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Patrick Cathcart is a partner with the firm of Adorno, Yoss, Alvarado & Smith in its Los Angeles office. For over 30 years, his practice has emphasized complex business trials and appeals, including multi-party insurance coverage litigation and professional liability matters. Mr. Cathcart was trial counsel for London market insurers in *Fuller-Austin v. Fireman's Fund Ins. Co., et al.* (2006) 135 Cal. App. 4th 958, and lead counsel for the prevailing party in *Certain Underwriters at Lloyd's, London v. Superior Court (Powerine I)* (2001) 24 Cal. 4th 945.

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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

USC 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

1 MB Practice Guide: Trial & Post-Trial Civil Proc Abbreviations

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

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 **California Jury Instructions**

CACI Judicial Council of California Civil Jury Instructions

(Matthew Bender) Cal. Forms Jury Inst. California Forms of Jury Instruction **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

1 MB Practice Guide: Trial & Post-Trial Civil Proc Abbreviations

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: Trial & Post-Trial Civil Proc Scope

Scope

HIGHLIGHTS

Release 9 October 2010

Burden of Proof

The California Supreme Court has held that the ordinary rules governing allocation of the burden of proof may be disregarded for policy reasons in exceptional circumstances. *See Ch. 9, Burden of Proof and Persuasion*.

Recovering Costs

The California Supreme Court has held that, in terms of cost recovery, a prevailing party does not include a plaintiff who proves a defendant's liability but who recovers nothing from the defendant. *See Ch. 24, Costs*.

Disqualification of Judge. In *People v. Freeman* (2010) 47 C4th 993, 103 CR3d 723, 222 P3d 177, the California Supreme Court held that to disqualify a judge under the Constitution's Due Process Clause, based on an objective assessment of the circumstances in the particular case, there must be the probability of actual bias on the part of the judge that is too high to be constitutionally tolerable. If only the appearance of bias is at issue, a litigant's recourse is to seek disqualification under state disqualification statutes. *See Ch. 4, Final Pretrial Conference, § 4.15[1]*.

Ordinary Burden of Proof May be Disregarded for Policy Reasons. In *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 C4th 12, the California Supreme Court held that the ordinary rules governing allocation of the burden of proof may be disregarded for policy reasons in exceptional circumstances. However, these exceptions are "few and narrow" and the reasons justifying a shift in the normal allocation of the burden of proof must be "compelling." *See Ch. 9, Burden of Proof and Persuasion, § 9.14[2]*.

Juror Analysis Outside Jury Room Within Scope and Purview of Evidence Acceptable. In *People v. Collins* (2010) 49 C4th 175, the California Supreme Court held that a juror's use of a home computer to make a diagram based on trial testimony was not prejudicial misconduct. *See Ch. 17, Dealing With the Jury, § 17.21[2]*.

Attorney Misconduct Justifies New Trial if Reasonably Probable Moving Party Would Have Obtained

More Favorable Result. In *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 CA4th 1108, 105 CR3d 485 , the court of appeal held that an attorney's comments regarding insurance coverage were not grounds for a new trial. See Ch. 21, *Motion for New Trial*, § 21.09[1].

Elements of Contempt Restated. In *Koehler v. Superior Court* (2010) 181 CA4th 1153, 104 CR3d 877 , the court of appeal held that the defendant's ability to pay is an element of proving contempt, not an affirmative defense. See Ch. 23, *Contempt*, § 23.20[3].

To Recover Costs, Prevailing Party Must Recover Damages From Defendant. In *Goodman v. Lozano* (2010) 47 C4th 1327, 104 CR3d 219, 223 P3d 77 , the California Supreme Court held that a prevailing party does not include a plaintiff who proves a defendant's liability but who recovers nothing from the defendant because the judgment is offset by settlements with codefendants before trial. See Ch. 24, *Costs*, § 24.07[2].

Effect of Withdrawal of CCP § 998 Offer. In *One Star, Inc. v. STAAR Surgical Co.* (2009) 179 CA4th 1082, 102 CR3d 195 , the court of appeal held that if a party withdraws a CCP § 998 offer before its statutory expiration, the withdrawing party's right to cost shifting under CCP § 998 is determined by the last rejected CCP § 998 offer. See Ch. 24, *Costs*, § 24.29[6].

Entire Judgment Must be Paid to Stop Accrual of Costs. In *Lucky United Properties Investment, Inc. v. Lee* (2010) 185 CA4th 125 , the court of appeal held that to stop the time within which the judgment creditor may seek costs under CCP § 685.080(a), the judgment debtor must pay the entire judgment including interest and attorney's fees. See Ch. 24, *Costs*, § 24.37.

Plaintiff Must Engage in Reasonable Attempt to Settle Dispute. In *Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc.* (2010) 180 CA4th 1542, 104 CR3d 78 , the court of appeal held that under the substantial benefit theory, to recover fees the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant before engaging in litigation. See Ch. 25A, *Recovering Attorney's Fees From Opposing Party*, § 25A.12[3].



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(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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Chapter 1 Preparing for Trial

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- 1.02 Objective and Strategy.
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- 1.04 Assessing Case Status.
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- 1.06 Determine Elements of Action and Defenses and Potential Damage Award.
- 1.07 Evaluate Burdens of Proof and Persuasion.
- 1.08 Make Choice Between Jury or Non-Jury Trial.
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1.16[6][c] Questions of Liability Must Be Tried by Separate Jury From That Which Tries Issues of Insurance Coverage Where Necessary to Avoid Prejudice.

1.16[7] Appealability of Judgment Resulting From Separate Issue Trial Depends on Basis for Order and Judgment.

1.16[7][a] Judgment From Separate Trial Under CCP § 597 or 597.5 Sustaining Affirmative Defense on All Claims May Be Appealed Immediately.

1.16[7][b] Judgment for Defendant From Separate Trial Under CCP § 598 on Sole Issue of Liability Before Trial of All Other Issues May Be Appealed Immediately.

1.16[7][c] Judgment From Separate Trial Under CCP § 1048 May Not Be Appealed Before All Issues Between the Parties Are Disposed.

1.16[7][d] Writ Review of Interlocutory Judgment on Separate Issue Trial May Be Sought.

1.16[8] If Court Shows Doubt, Ask for Denial Without Prejudice of Motion for Separate Trials.

1.17 Timing of Request for Separate Issues Trials.

1.17[1] Request for Separate Trial of Special Defenses or, in Action Against Medical Professional, Defense of Statute of Limitation May Be Made at Least Up to Call for Trial.

1.17[2] Separate Trial on Issue or Part of Issue Under CCP § 598.

1.17[2][a] Motion for Separate Trials Must Be Noticed in Time for Hearing and Decision Before Pretrial Conference or Else at Least 30 Days Before Trial.

1.17[2][b] Trial Court May Make Own Motion at Any Time.

1.17[3] Waiver of Separate Trial by Failure to Request It.

1.18 Grounds for Separate Trial.

1.18[1] Special Defenses May Be Tried Before Any Other Issue.

1.18[2] Defense on Statute of Limitation in Certain Causes of Action Against Medical Professional or Hospital Must Be Tried Before Any Other Issue.

1.18[3] Separate Trial of Issue or Part of Issue Is Allowed for Convenience of Witnesses, Ends of Justice, or Judicial Economy and Efficiency.

1.18[4] Separate Trial of Separate Issue Is Allowed for Convenience, Avoiding Prejudice, or Expedition and Economy.

1.18[5] Authority to Regulate Order of Proof Allows Court to Try Issues Separately.

1.18[6] In Punitive Damages Cases, Trial of Net Worth of Defendant Is Bifurcated.

1.19 Requesting Separate Issues Trials.

1.19[1] Motion of Party or Court May Be Required.

1.19[2] Party's Motion for Separate Trial of Issue for Convenience of Witnesses, Ends of Justice, or Judicial Economy and Efficiency Must Be Noticed.

1.20 Review of Orders on Separate Issues Trials.

1.21 CHECKLIST: Reviewing Evidentiary Issues and Marshalling Evidence and Witnesses for Trial.

1.22 Options and Strategies.

1.23 Determine Scope of Any Discovery Evidentiary Sanctions.

1.24 Review Any Evidentiary Rulings or Stipulations From Pretrial Motions.

1.25 Preparing Evidence and Evidentiary Foundations.

1.25[1] Locating and Organizing Evidence.

1.25[1][a] Monitoring Parties' and Attorneys' Status.

1.25[1][b] Finding Witness Information and Preparing Witness Files.

1.25[1][c] Organizing Documents and Physical Evidence.

1.25[1][d] Review Judicial Notice.

1.25[1][e] Review Stipulations.

1.25[2] Review Foundational Elements for Each Type of Evidence to Be Offered or Opposed.

1.26 Subpoenaing Witnesses and Documents for Trial.

1.27 Preparing Witnesses for Trial and Interpreters.

1.28 Preparing Exhibits and Demonstrative Evidence.

1.28[1] Preparing Exhibit Lists.

1.28[2] Preparing Demonstrative Evidence.

1.28[3] Preparing Photographic and Electronic Evidence.

1.29 Assess Evidence and Prepare for Pretrial Evidentiary Motions.

1.30 CHECKLIST: Preparing Trial Notebooks and Binders.

1.31 Options and Strategies.

1.32 Contents.

1.33 Use of Electronic Aids.

1.34 CHECKLIST: Preparing for Pretrial Conferences and Submission of Briefs.

1.35 Options and Strategies.

1.36 Prepare Checklist of Topics for Pretrial Conference.

1.37 Preparing Trial Briefs.

1.38 CHECKLIST: Preparing for Courtroom Presentation and Procedure.

1.39 Options and Strategies.

1.40 Preparing for Jury Selection.

1.41 Preparing for Opening Statement.

1.42 Preparing for Questioning of Witnesses.

1.43 Preparing for Continuances.

1.44 Preparing for Closing Argument.

1.45 Preparing for Instructions to Jury.

1.46 Preparing for Jury Deliberations.

1.47 Preparing for Jury Verdicts.

1.48 CHECKLIST: Preparing for Trial Motions.

1.49 Options and Strategies.



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Chapter 1 Preparing for Trial
I. STRATEGY

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1.01 Scope.

This chapter provides an outline of procedures that should be followed in when preparing for trial and for post-trial procedures up to the point of filing an appeal.

Trial preparation is organized in a series of checklists with cross referencing to the other chapters in this publication for in-depth analysis. Options and strategies follow each checklist, and when necessary additional analysis is provided. Topics covered are:

- Reviewing pretrial pleadings, motions, and discovery for case status [*see 1.03 et seq.*].
- Reviewing legal and procedural issues [*see 1.05 et seq.*].
- Planning and requesting a separate or phased trial [*see 1.15 et seq.*].
- Reviewing evidentiary issues and marshalling evidence and witnesses for trial [*see 1.21 et seq.*].
- Preparing trial binders and notebooks [*see 1.30 et seq.*].
- Preparing for pretrial conferences and submission on briefs [*see 1.34 et seq.*].
- Preparing for courtroom presentation and procedure [*see 1.38 et seq.*].
- Preparing for post-trial motions [*see 1.48 et seq.*].

Legal Topics:

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

Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil
ProcedureJudgmentsRelief From JudgmentGeneral Overview



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I. STRATEGY

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1.02 Objective and Strategy.

In preparation for and in conducting any trial, there are certain overarching objectives and strategies:

- **Anticipation and Preparation:** Everything about the case being tried that can possibly be anticipated, should be anticipated. Counsel should prepare diligently to meet those issues, facts, testimony and objections that might arise, even if careful consideration leads to the conclusion that the matter is unlikely to appear in the trial. Whether it is something that needs to be presented or prevented, *surprise* is the most dangerous obstacle in a trial. One of the best ways to start preparing for trial is to create a proof outline that breaks your case down into the elements for each cause of action, and then sets forth the evidence that supports your position with respect to each element, whether it be documents or testimony. This proof outline can serve as a reference tool throughout the trial.

- **Theme or Theory of the Case:** Counsel should, during preparation for trial, develop the trial theme and assure that the presentation of evidence is consistent with that theme. Evidence which is extraneous to the story counsel wishes to present should be carefully evaluated to determine whether, even if generally supportive of the party being represented, will distract from the overall theme.

- **Demeanor:** A jury will focus on everything in the courtroom, particularly in more complex lengthy trials. They will know the color of the attorneys' ties, style of suit, scarves, dresses, or other apparel. They will make judgments on the preparedness, thoroughness and care taken by attorneys based upon the case they present and also such other tangible observations as whether the desk in front of an attorney is organized, whether they fumble through yellow legal pads or appear completely at ease and knowledgeable about the case, whether the documents are organized and easily retrievable or difficult to find when used. They will take note of the ease with which audio-visual equipment, computers and graphic demonstrative evidence is used. Each and every second that counsel is in front of the jury in the courtroom, in the hallway outside the courtroom, or walking in and out of the courthouse is a moment that the jury will observe and, at least subliminally, will evaluate.

- **Presentation:** Each attorney has his or her own style, and it may be the result of an amalgam of other attorneys' styles acquired over the years, a composite of personal life experiences, or, in the rare case, innate personality and ability. Nevertheless, telling the story, use of chosen language, care in

presentation, and mindful of the need to "teach" the jury's counsel case should be the paramount objectives. All of the strategies employed should be directed at that goal.

 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 MattersGeneral OverviewCivil ProcedureTrialsGeneral Overview



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Chapter 1 Preparing for Trial
II. REVIEWING PRETRIAL PLEADINGS, MOTIONS, AND DISCOVERY FOR CASE STATUS

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1.03 CHECKLIST: Reviewing Pretrial Pleadings, Motions, and Discovery for Case Status.

☐ Review case file for all pleadings, motions, and discovery to date. This review should be conducted with a view toward identifying every aspect of pre-trial preparation and discovery connected to a carefully developed list of the issues identified--both favorable issues and those anticipated from the opponent's perspective.

☐ Prepare a summary of all pleadings and motions in attorney's file. Specifically check for, among others:

☐ Complaints.

☐ Service of summons.

☐ Motions to quash service.

☐ Motions to dismiss for lack of subject matter jurisdiction.

☐ Demurrers and motions for judgment on the pleadings.

☐ Motions to strike.

☐ Anti-SLAPP motions.

☐ Answers.

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- ☐ Motions to reclassify case.
- ☐ Cross-complaints.
- ☐ Motions to remove to federal courts.
- ☐ TROs and preliminary injunctions.
- ☐ Writs of attachment.
- ☐ Writs of possession (claim and delivery).
- ☐ Lis pendens.
- ☐ Motion to disqualify judge for cause.
- ☐ Peremptory disqualification of judge.
- ☐ Case management statement.
- ☐ Motions to amend case management statement and orders.
- ☐ Judicial arbitration motions and orders.
- ☐ Motions for reference.
- ☐ Stipulations.
- ☐ Motions to reconsider and renewed motions.
- ☐ Motions for continuance.
- ☐ Motion for intervention.
- ☐ Notices of related cases.
- ☐ Motions to consolidate.
- ☐ Motions for consolidation.

- ☐ Motions for separate trial.
- ☐ Motions for class action.
- ☐ Amended and supplemental pleadings.
- ☐ Motions for sanctions.
- ☐ Defaults and motions for relief from default.
- ☐ Motions for settlement and release.
- ☐ Motions for summary judgment and adjudication.
- ☐ Voluntary dismissals.
- ☐ Motions for dismissal for delay in bringing to trial.
- ☐ Any opposing documents to the pleadings and motions, above.
- ☐ All orders associated with pleadings and motions, above.

**Cross Reference:**

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

☐ Prepare a summary of all discovery documents in attorney's file. Specifically check for, among others:

- ☐ Oral depositions.
- ☐ Depositions on written questions.
- ☐ Notes on inspection of documents, tangible evidence, and land.
- ☐ Reports on physical and mental examinations.
- ☐ Requests for admissions.
- ☐ Exchange of expert witness information.

- ☐ Motions to preserve evidence.
- ☐ Protective orders.
- ☐ Discovery sanctions.
- ☐ Any opposing documents to the pleadings and motions, above.
- ☐ All orders associated with discovery topics, above.

**Cross Reference:**

See Matthew Bender[(R)] Practice Guide: California Civil Discovery.

- ☐ Have attorney's file summary compared to court file to assure neither file is missing important documents.
- ☐ Augment attorney's file if any missing documents and recheck office procedures for tracking documents.
- ☐ Notify court and opposing counsel of documents missing in court file.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureDiscoveryGeneral Overview



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1.04 Assessing Case Status.

A thorough review of the case and its file is the essential starting point for trial preparation. It is essential to "know where you've been" before deciding "where to go next." Litigation strategy starts long before the complaint is filed, and it is important that the attorney's and court's file reflects the record the party is trying to build. Be sure all necessary documents are in order. This review can prevent unwanted surprises at trial or identify a key weakness in your opponent's case. Again, this review must be against the background of identified trial issues, the pre-requisites of the applicable cause of action or affirmative defense, and the use of evidence for impeachment or related purposes.

Equally important, this review frames the options and strategies that may be employed during trial. One too many requests for a continuance during pretrial litigation may make a continuance request at trial more difficult to obtain. Imposition of sanctions during discovery may affect the court's determination when admitting other evidence. And certain motions, such as summary judgment, will define the issues in the case.

Review the status of the case using the checklists and determine what options are available, which have been used and are no longer available (e.g., peremptory challenge to judge), and which have been waived.

Legal Topics:

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

Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureTrialsGeneral Overview



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1.05 CHECKLIST: Reviewing Legal and Procedural Issues.

☐ Review elements of action and defenses and potential damage award.

☐ Use Judicial Council of California Civil Jury Instructions (CACI) for a list of elements.

☐ Research elements and actions not found in CACI.

Jury Instructions:

Discussion of selecting and submitting jury instructions, see Ch. 16, Jury Instructions.

Text of jury instructions, see Judicial Council of California Civil Jury Instructions.

☐ Research value of case and potential damage award using online resources.

☐ Evaluate burdens of proof and persuasion.

☐ Clarify terms during research.

☐ Burden of proof versus burden of persuasion.

☐ Distinguish between presumptions and inferences.

☐ Identify which party has burden of producing evidence.

☐ Identify which party has burden of persuasion.

☐ Establish standard for action.

☐ Preponderance of evidence.

☐ Clear and convincing evidence

► **Cross Reference:**

Discussion and strategy of burden of proof, see Ch. 9, Burden of Proof and Persuasion.

☐ Determine between choice of jury trial or non-jury trial.

☐ Establish if case is in equity or at law.

☐ Assess judge's knowledge of facts.

☐ Assess costs and fees.

☐ Determine if party has waive jury trial rights.

☐ Determine changes to courtroom procedure with no jury present.

☐ Assess whether to seek a statement of decision in a non-jury trial.

► **Cross Reference:**

Discussion and strategy of non-jury trials, see Ch. 5, Non-Jury Trials.

☐ Propose, draft, and prepare jury instructions.

☐ Determine if CACI instructions are on point.

☐ Assess use of special instructions.

☐ Conform format to Rules of Court.

☐ Submit proposed instructions to court.

☐ Submit objections to proposed jury instructions to court.

- ☐ Clarify record of which instructions are approved, denied, or modified at conference on instructions.

Jury Instructions:

Discussion and strategy of jury instructions, see Ch. 16, Jury Instructions.

Text of jury instructions, see Judicial Council of California Civil Jury Instructions.

- ☐ Prepare verdict forms.

- ☐ Determine whether to seek a general or special verdict.
- ☐ Determine whether to request special findings.
- ☐ Determine if CACI verdict forms are on point.
- ☐ Submit proposed verdict forms to court.
- ☐ Submit objections to verdict forms to court.
- ☐ Clarify record of which verdict forms are approved, denied, or modified at conference on instructions.

Jury Instructions:

Discussion and strategy of jury instructions, see Ch. 16, Jury Instructions.

Text of verdict forms, see Judicial Council of California Civil Jury Instructions.

- ☐ Determine if public access to trial and records should be restricted.

- ☐ Move to close trial proceedings if trade secrets, public safety, or protection of minors outweighs constitutional right to public trial.
- ☐ Move to seal records if overriding interest in protecting records.
 - ☐ Lodge records with court.
- ☐ Move for gag order if publicity concerns warrant motion.
- ☐ Review grounds for media access.

➡ Cross Reference:

Discussion and strategy for restricting public access, see Ch. 2, Public Access to Trials and Records.

- ☐ File notice of trial.

**Timing:**

At least 15 days' notice is required.

**Cross Reference:**

Filing and serving notice of trial, see Ch. 3, Notice of Trial.

- ☐ Determine whether to disqualify judge.



For cause.

**Timing:**

At the earliest practical opportunity after discovery of facts support disqualification for cause.



Peremptory challenge.

**Timing:**

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 5 days before that date. If the case is assigned to a judge for all purposes, the peremptory challenge must be made within 10 days after notice of the all-purpose assignment. In a court using a master calendar system, the challenge must be made no later than the time the case is assigned for trial [CCP § 170.6(a)(2)].

**Cross Reference:**

Disqualification of judge for cause or by peremptory challenge, including use of online resources for investigating judges, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 22, Disqualification of Judge.

- ☐ Determine whether to amend or supplement pleadings.



Amend to conform to proof.



Supplement pleadings if new facts developed.



Substitute parties.



Fictitiously name parties.



Party with disability.

- ☐ Deceased party.
- ☐ Interest in action transferred.
- ☐ Party has filed for bankruptcy.

**Cross Reference:**

Discussion and forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 34 Amended and Supplemental Pleadings.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Answers Civil Procedure Judicial Officers Judges Disqualifications & Recusals General Overview Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Remedies Damages General Overview Evidence Procedural Considerations Burdens of Proof General Overview



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1.06 Determine Elements of Action and Defenses and Potential Damage Award.

The review of pleadings and motions will determine which actions and defenses remain after pretrial proceedings. The nature and scope of the action can dramatically change between the first complaint and after a motion for summary judgment or adjudication. Once the actions and defenses are established, prepare a summary of the element for each action and defense.

Strategic Point:



Use the Judicial Council of California Civil Jury Instructions (CACI) for a list of elements. A party must eventually present evidence that supports the instructions, so it is best to start with what will be needed at the finish.



Cross References:

Discussion of selecting and submitting jury instructions, see Ch. 16, Jury Instructions.

Text of jury instructions, see Judicial Council of California Civil Jury Instructions.

Review the prayer for damages and amend to conform to proof if necessary. A review of current damage awards is helpful to assess the prayer for damages relative to the specific facts of the present case.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureSummary JudgmentGeneral Overview



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1.07 Evaluate Burdens of Proof and Persuasion.

Assess which party has the burden of proof on a claim or defense. Distinguish between the burden of producing evidence and burden of persuasion, and whether any presumptions and inferences affect the burdens. Factors to review are:

- Plaintiff's initial burden of producing evidence.
- Requirement of defense rebuttal evidence.
- Legislative presumptions altering production of evidence.
- Res ipsa loquitor.
- Preponderance of the evidence standard versus clear and convincing standard.



Cross Reference:

Discussion of burdens of proof and persuasion, see Ch. 9, Burden of Proof and Persuasion.

Legal Topics:

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

EvidenceInferences & PresumptionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of EvidenceTortsNegligenceProofRes Ipsa LoquitorEvidentiary Effect



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1.08 Make Choice Between Jury or Non-Jury Trial.

The choice between a jury or non-jury trial involves a careful assessment of the law and evidence, and whether a jury is more likely to favor one side over the other, as well as cost considerations.



Timing:

Usually, the demand for a jury trial will be made early in litigation and will be included in the case management statement, but if not requested in statement, demand must be filed at time case is set for trial, or within five days if case was set without notice or stipulation [CCP § 631(d)(4)].



Strategic Point:

It is easier to demand a jury trial and later waive it than to waive the jury and later seek to revoke the waiver. If discovery or other events militate for a non-jury trial, consider waiving the jury trial before trial.



Cross Reference:

Options and strategies for selecting jury versus non-jury trial, see *Ch. 5, Non-Jury Trials, 5.03* et seq.

Waiver of jury trial rights, see *Ch. 5, Non-Jury Trials, 5.12* et seq.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral Overview



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1.09 Prepare Jury Instructions.

Proposing and drafting jury instructions most focus on the issues of the case. A party has a right to instructions on the law applicable to its theories of the case, but not to the use of any particular language.

The Judicial Council of California Civil Jury Instructions (CACI) are the official instructions for use in California [*Cal Rules Ct, Rule 2.1050(a)*]. These instruction are referred to as "approved jury instructions" [*Cal Rules Ct, Rule 2.1055(a)(1)(A)*]. The California Rules of Court strongly encourage use of CACI jury instructions and verdict forms [*Cal Rules Ct, Rule 2.1050(e)*].

Special jury instructions may be proposed and submitted if no CACI instruction exists for those circumstances [*Cal Rules Ct, Rule 2.1050(e)*]. Counsel should take care to draft special instructions carefully. If verbatim CACI are not used, the possibility of drafting an inaccurate or incomplete instruction increases [*see, e.g., Chapman v. Enos (2004) 116 CA4th 920, 927-931, 10 CR3d 852 (modified BAJI impaired party's rights, resulting in instructional error)*].



Timing:

Jury instructions must be submitted to the court and served on the other parties before the first witness is sworn [*CCP § 607a*]; however, local court rules may advance the submission and service date before trial [*e.g., Los Angeles County may advance the date as early as five days before the final status conference for submitting instructions [Los Angeles Super Ct Rules, Rules 7.9(h), 8.24]*].



Cross Reference:

Preparation, drafting, and submission of jury instructions, see Ch. 16, Jury Instructions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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1.10 Prepare Verdict Forms.

Determine whether to seek a general verdict or special verdict and whether special findings will be required. The California Rules of Court strongly encourage use of CACI verdict forms [*see Cal Rules Ct, Rule 2.1050(e)*].



Strategic Point:

A general verdict has the advantage of being upheld when one or more counts is supported by substantial evidence, but has the disadvantage of not identifying specific issues on appeal. A special verdict has the advantage of identifying issues on appeal, but has the disadvantage of creating a defective or incomplete verdict.



Timing:

Local rules govern the submission of verdict forms, but ingeneral, counsel should submit the proposed general verdict form with the jury instructions.



Cross Reference:

Preparation, drafting, and submission of verdict forms, see Ch. 18, Jury Verdicts.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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1.11 Determine Whether to Restrict Public Access to Trial, If Sealed Documents Are Needed, or Restrictions on Media Coverage.

A party seeking to close public access to a civil trial proceeding must initially establish that the interest it seeks to protect overrides the constitutional presumption that the proceeding should be open to the public [*see CCP § 124*]. A party seeking to have records sealed must overcome the presumption that all court records and proceedings are open to the public [*see Cal Rules Ct, Rule 2.550(d)(1)*; *Mary R. v. B. & R. Corp. (1983) 149 CA3d 308, 317, 196 CR 871*]. Other related issues are:

- Obtaining a gag order.
- Obtaining an order to allow media to photograph, record, and/or broadcast trial court proceedings.

Evaluate the nature of the case that may override these presumptions, such as trade secrets, public safety, protection of minors, or other similar issues.



Cross Reference:

Closed proceedings, sealed records, gag orders, and media access, see Ch. 2, Public Access to Trials and Records.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Criminal Law & Procedure Pretrial Motions & Procedures Gag Orders Governments Courts Court Records Trade Secrets Law Civil Actions Sealed Records



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1.12 Prepare Notice of Trial.

Notice of trial is a mandatory, and a judgment entered following a trial conducted in violation of the requirement is void [CCP § 594(a)].



Timing:

At least 15 days' notice is required, and the court may not shorten the 15-day time for notice; however, the period may be shortened by waiver or consent of the parties [*Au-Yang v. Barton* (1999) 21 C4th 958, 963, 90 CR2d 227, 987 P2d 697] .



Cross Reference:

Preparing and serving notice of trial, see Ch. 3, Notice of Trial.

Legal Topics:

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



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1.13 Determine Whether to Disqualify Judge for Trial.

Disqualification of a judge may be made for cause [CCP § 170.1] or by peremptory challenge [CCP § 170.6].



Timing--For Cause:

At the earliest practical opportunity after discovery of facts support disqualification for cause [CCP § 170.1].



Timing--Peremptory Challenge:

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)]. If the case is assigned to a judge for all purposes, the peremptory challenge must be made within 10 days after notice of the all-purpose assignment [CCP § 170.6(a)(2)]. In a court using a master calendar system, the challenge must be made no later than the time the case is assigned for trial [CCP § 170.6(a)(2)]. A peremptory challenge must be denied if the judge presided at an earlier hearing that involved a determination of contested factual issues relating to the merits [*Swift v. Superior Court* (2009) 172 CA4th 878, 883-885, 91 CR3d 504] .

The local court system will be a determining factor for the exercise of a peremptory challenge. Review local court rules to review court assignments.



Cross Reference:

Disqualification of judge for cause or by peremptory challenge, including use of online resources for investigating judges, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 22, Disqualification of Judge.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral Overview



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Cathcart Durie McGee Prather

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Chapter 1 Preparing for Trial
III. REVIEWING LEGAL AND PROCEDURAL ISSUES

1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.14

1.14 Determine Whether to Amend or Supplement Pleadings.

As new facts are discovered during litigation, new causes or action or defenses may be plead based on those new facts. Counsel before trial should review discovery and determine whether to:

- Amend complaint.
- Amend answer.
- Move to strike.
- Supplement pleadings based on new facts.
- Substitute parties.
- Substitute fictitiously named parties.
- Oppose amendment or supplementation.



Cross References:

Amending and supplemental pleadings, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 34.03 *et seq.*

Substituting parties, including substitution of fictitious party on learning true name, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 34.31 *et seq.*

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings



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Chapter 1 Preparing for Trial
IV. REQUESTING SEPARATE TRIAL OF ISSUES AND PHASED TRIALS

1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.15

1.15 CHECKLIST: Requesting Separate Trial of Issues and Phased Trials.

☐ Determine whether each issue should be tried separately or not, based on factors including, but not limited to:

- ☐ Whether setting separate trial on the issue is mandatory or discretionary.
- ☐ Who has the burden of proof in the separate trial.
- ☐ Whether separation of issues based on trial by judge versus trial by jury is more advantageous.
- ☐ Whether separate trials would allow separate judges or juries to hear each issue.
- ☐ Whether a judgment arising from a separate trial is appealable before trial of other issues in the case.

Discussion:

See 1.16

Authority:

CCP §§ 597, 597.5, 598, 1048

☐ Determine which statutory authorization for separate trials applies to each issue considered for separate trial.

- ☐ Separate trials of issues under various statutes may be obtained for the following categories of issues or grounds for separate trials:

☐ Special defenses.

☐ Defense on statute of limitation in certain causes of action against medical professional or hospital.

☐ Convenience of witnesses, ends of justice, or judicial economy and efficiency.

☐ Convenience, avoiding prejudice, or expedition and economy.

☐ Proper regulation of the order of proof.

☐ Punitive damages.

Discussion:

See 1.18

Authority:

CC § 3295; CCP §§ 597, 597.5, 598, 1048; Evid Code § 320

☐ Determine whether the timing restricts availability of separate trial on issues statutory authorization for separate trials applies to each issue considered for separate trial.

☐ Request for separate trial of special defenses or, in action against medical professional, defense of statute of limitation may be made at least up to call for trial.

☐ Party's motion for separate trials must be noticed in time for hearing and decision before pretrial conference or else at least 30 days before trial.

Discussion:

See 1.17

Authority:

CCP §§ 597, 597.5, 598

☐ Request desired separate trials of issues, by motion, if required, which is noticed, if required.

Discussion:

See 1.19

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Supplemental Pleadings Evidence Procedural Considerations Burdens of Proof General Overview



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Chapter 1 Preparing for Trial
IV. REQUESTING SEPARATE TRIAL OF ISSUES AND PHASED TRIALS

1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.16

1.16 Options and Strategies.

1.16[1] Multiple Overlapping Statutes Allow Separate Trial of Issues. Most broadly, *CCP § 1048* allows the separate trial of any separate issue or issues on three different grounds. On a pretrial motion, *CCP § 598* allows separate trial on specified grounds of any issue or part of an issue before the trial of other issues in a case. *CCP § 597* even more narrowly allows an initial trial phase for consideration of special defenses. Separate trials under those statutes are at the discretion of the trial court.



Strategic Point:

Even the legislature recognized that these statutes overlap in various ways. Legislative committee comments to the 1971 amendment of *CCP § 1048* go so far as to suggest that *CCP §§ 597, 598* may only add procedural details [*see CCP § 1048, Leg Comm'n Cmt*]. However, the courts have continued to find viability in the substantive aspects of the statutes, if appellate court rulings are any indication of that fact [*see 1.18[1], [2]*].

Consider:

One way that the language of *CCP § 598* may offer something that *CCP § 1048* does not is in its specification that "a part" of an issue may be scheduled for initial separate trial [*see CCP § 598*]. *CCP § 1048*, by contrast, only refers to separate trial of "any separate issue or ... issues." However, the lack of a statutory definition of an "issue" and the difficulty of defining a "separate issue" leave the question open.

The clearest difference between the statutes is in provisions concerning the appealability of the judgment or ruling arising from initial separate issues trials. *CCP §§ 597, 597.5, 598* all provide for appealability of dispositive judgments resulting from separate issues trials conducted under their authority, while *CCP § 1048* has no such provision.

Consider:

While appellate courts may not yet have made the comparison, the appeal provisions of *CCP §§ 597, 597.5, 598* [*see 1.16[7][a], [b]*] may be indistinguishable from the final judgment rule applicable to rulings arising from separate issues trials under *CCP § 1048* [*see 1.16[7][c]*].

Distinguish:

In contrast to severance of issues or causes concerning different parties under *CCP* § 597.5, establishing separate trials on different issues does not sever the issues from the cause of action [*Morehart v. County of Santa Barbara* (1994) 7 C4th 725, 737 n3, 29 CR2d 804, 872 P2d 143 (*CCP* § 1048(b) "no longer authorizes severance of a civil action")]. On the other hand, setting a separate trial of an issue in a phased trial is not merely a reordering of the order of proof within a trial under *Evid Code* § 320.

**Cross Reference:**

Severance of actions, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 32.23 *et seq.*

Most narrowly of all, *CCP* § 597.5 requires an initial separate trial of a defense on statute of limitations in certain actions against specified medical professionals and hospitals.

**Strategic Points:**

- While *CCP* § 1048 does not mention the issue of order of various separate trials, *CCP* § 598 specifically provides for the trial of issues earlier than the trial of remaining issues, except that issues that the court orders to be tried separately under *CCP* § 597 or 597.5 are to be tried before issues tried earlier under *CCP* § 598 [*CCP* § 598].

- Adverse rulings on issues raised by pretrial motion do not preclude separate trial on the same issues [*Finley v. Superior Court* (2000) 80 CA4th 1152, 1162, 96 CR2d 128 (separate trial on affirmative defense permissible under *CCP* § 1048(b) even though motion for summary judgment on that defense was denied)].

- Counsel must decide whether to seek separate trials on issues and on what statutory basis to seek them.

1.16[2] "Severance" Is Outdated Term for Separate Issues Trials. The California Supreme Court has noted that the ordering of separate issues trials does not "sever" the issues or claims. This is true despite any contrary labels given in statutory headings [see *Morehart v. County of Santa Barbara* (1994) 7 C4th 725, 737 n3, 29 CR2d 804, 872 P2d 143 (*CCP* § 1048(b) "no longer authorizes severance of a civil action")]. The courts nonetheless continue to use the term "sever" [see, e.g., *Edwards v. Arthur Andersen LLP* (2006) 142 CA4th 603, 611, 47 CR3d 788] when discussing separate issue trials. The principal distinction relates not to the use of the proper term (i.e., "separate trial" versus "severed trial"), but rather to whether the procedure used results in an independent judgment that is appealable or whether review must be by writ or other attack.

1.16[3] Trial Court Has Discretion to Allow Separate Trials, Except in Certain Actions Against Specified Medical Professionals. Generally, a trial court has discretion to allow a separate trial on separate issues [*Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 911, 93 CR2d 364] . Specifically, the trial court has discretion to allow an initial separate trial for any issue or part of an issue under *CCP* § 598 [*Grappo v. Coventry Fin. Corp.* (1991) 235 CA3d 496, 504, 286 CR 714] , and separate trials for any issues under *CCP* § 1048 [*Regents of Univ. of Cal. v. Sheily* (2004) 122 CA4th 824, 833, 19 CR3d 84] .

Consider:

There is doubt whether a trial court in its exercise of discretion under *CCP* § 1048(b) must consider the viability of a party's contention on a particular issue in deciding whether to grant separate trial on that

issue [see *Finley v. Superior Court* (2000) 80 CA4th 1152, 1158 n6, 96 CR2d 128] .

Examples:

Examples of the trial court's proper exercise of discretion to set separate issue trials include:

- When the legal requirements for separate trials are met, the trial court properly provided for separate trials before separate juries of claims concerning environmental contamination at 57 physical sites divided up into eight groups, each group being heard by a different jury that rendered special verdicts concerning the sites within its separate trial [*FMC Corp. v. Plaisted & Cos.* (1998) 61 CA4th 1132, 1143-1144, 72 CR2d 467] .
- It was not abuse of discretion under CCP § 1048(b) to order separate trial on the separate litigation committee defense in a shareholder derivative action [*Finley v. Superior Court* (2000) 80 CA4th 1152, 1162, 96 CR2d 128] .
- It was not abuse of discretion to proceed with hearing in mandamus to compel production of corporation books for inspection before disposing of defendant's plea in abatement, based on another action pending to remove plaintiff as director of corporation, where defendants had refused court's offer to send matter to trial department for full hearing in event that they had any evidence adverse to plaintiff's right to inspect [*Healy v. Stationers Corp.* (1964) 228 CA2d 601, 603, 39 CR 679] .

A party who cannot demonstrate any harm resulting from the denial of separate trials and not benefit from having separate trials fails to demonstrate an abuse of discretion by the trial court [*Padilla v. McClellan* (2001) 93 CA4th 1100, 1106-1107, 113 CR2d 680 (hearing on attorney fees was sufficient)].

However, the trial court must grant a motion for separate initial trial of certain actions against specified medical professionals under CCP § 597.5 [*Kelemen v. Superior Court* (1982) 136 CA3d 861, 864, 186 CR 566 ; *County of Kern v. Superior Court of Kern County* (1978) 82 CA3d 396, 399-400, 147 CR 248 (denial of motion was error)].

1.16[4] Order of Proceedings in Each Separate Issue Trial Depends on Burden of Proof. The trial court has discretion in regulating the order of proof at trial [*Evid Code* § 320]. However, in doing so in a civil action in accordance with CCP § 607, the court is to apply the labels of "plaintiff" and "defendant" in that statute on the basis of burden of proof on the overall substance of the trial. Thus, where a separate trial is on an issue on which the burden of proof is reversed, the defendant in the case acts in the order given to the "plaintiff" under the statute, and vice versa [see *Orient Handel v. U.S. Fid. & Guar. Co.* (1987) 192 CA3d 684, 701, 237 CR 667] .

Example:

The party on whom the burden of proof rests has the right to open and close the argument subject to a reasonable discretion on the part of the court to regulate the time and manner of presenting the arguments. Thus, the defendant, having the burden of proof on a claim of fraud in a cross-complaint, had the right to start opening and closing arguments in a separate trial on only the fraud claim [*Orient Handel v. U.S. Fid. & Guar. Co.* (1987) 192 CA3d 684, 701, 237 CR 667 (applying CCP § 607(7))].

1.16[5] Separate Trials on Issues for Trial by Judge and Issues for Trial by Jury.

1.16[5][a] Separate Trials on Issues of Law by Judge Before Trial on Issues of Fact Are Tried by Jury in Actions for Property, for Money Due on or for Breach of Contract, or for Injuries Is Mandatory. Issues of fact in certain actions for property, money due on or for breach of contract, or for injuries must be tried first by the judge, after which the jury tries the issues of fact [CCP § 592]. This rule applies to actions for [CCP § 592]:

- Recovery of specific real or personal property, with or without damages.
- Money claimed due upon contract.
- Money claimed as damages for breach of contract.
- Injuries.

Exception:

The court need not try issue of law first if a jury trial is waived or the court orders reference of the case [CCP § 592].

1.16[5][b] Separate Trial of Equitable Issues by Judge Before Trial of Issues at Law by Jury Allowed Only for Mutually Exclusive Remedies, Unless Defendant Waives Jury Trial. Phrasing of a trial under CCP § 598 and CCP § 1048 may be used to try equitable claims for which no constitutional right to trial by jury applies first, before claims at law, where inconsistent or mutually exclusive remedies are pled, and if the trial of equitable issues disposes of the legal issues, no further trial is called for [*American Motorists Ins. Co. v. Superior Court* (1998) 68 CA4th 864, 871-872, 80 CR2d 621 ; *Walton v. Walton* (1995) 31 CA4th 277, 282-283, 36 CR2d 901] . However, at some point, the plaintiff will have to choose his or her remedy by seeking trial first on one of the pleaded remedies [*Walton v. Walton* (1995) 31 CA4th 277, 292-293, 36 CR2d 901] .

Prerequisite:

Of course, the availability of an equitable remedy may depend on a showing that the legal remedy is inadequate [*Walton v. Walton* (1995) 31 CA4th 277, 294-295, 36 CR2d 901 (legal remedy was inadequate)].

Example:

Claim of quasi-specific performance, an equitable claim, was properly tried first before judge, to be followed by trial of contract claims at law, i.e., breach of contract, restitution, and money had and received, before the jury if the trial of the equitable claims did not dispose of the issues on the claims at law. Ultimately, the trial of the equitable claim did dispose of the issues, so the plaintiff was allowed to dismiss the claims at law. The defendant thus did not receive a trial by jury on any issue [*Walton v. Walton* (1995) 31 CA4th 277, 282-283, 36 CR2d 901] .

**Warning:**

The court of appeals in *Walton* specifically did not rule on whether the plaintiff was required to dismiss the claims at law before trial of the equitable claim, given that the defendant failed to object to this fact [*Walton v. Walton* (1995) 31 CA4th 277, 293, 36 CR2d 901] .

**Strategic Point:**

The court is not required to hear equitable issues before legal ones, and in fact may hear issues in the opposite order [*Bate v. Marsteller* (1965) 232 CA2d 605, 617, 43 CR 149] .

1.16[5][c] Trial Court Has Discretion to Permit Separate Trial of Issues for Court and Issues for Jury Under CCP § 1048(b). The trial court has discretion to allow separate trials of issues for determination by the court and issues for determination by jury if proper under the criteria for separate trials under CCP § 1048(b) [see *Regents of Univ. of Cal. v. Sheily* (2004) 122 CA4th 824, 833, 19 CR3d 84] .

Example:

Allowing separate trials in a condemnation action on the issues of goodwill compensation, an issue to be decided by the jury, and entitlement, an issue to be decided by the court, is "a paradigm example of the propriety of" doing so because the second issue is dependent upon the first, and it is likely to be confusing to the jury and inefficient to everyone if both are tried at the same time [*Regents of Univ. of Cal. v. Sheily* (2004) 122 CA4th 824, 833, 19 CR3d 84] .

 Cross Reference:

Requesting separate trials under *CCP* § 1048(b), see 1.18[4].

1.16[5][d] Questions of Law May Be Tried by Court Before Trial of Issues for Jury Under *CCP* § 597.5 or 598. Questions of law concerning the applicable statute of limitations are proper subjects of initial separate trial under *CCP* § 597.5 [*Kelemen v. Superior Court* (1982) 136 CA3d 861, 864, 186 CR 566] or *CCP* § 598 [see *Equitable Life Assurance Soc'y v. Berry* (1989) 212 CA3d 832, 836, 260 CR 819] .



Strategic Point:

The separate trial of issues of law from issues of fact under *CCP* § 597.5 does not otherwise diminish a party's right to a trial by jury [*Jefferson v. County of Kern* (2002) 98 CA4th 606, 616-619, 120 CR2d 1 (separate trial under *CCP* § 597.5 is not a special proceeding within exception to right to trial by jury)]. A separate trial on equitable claims that fully disposes of the issues may negate the need for a later jury trial [see, e.g., *Walton v. Walton* (1995) 31 CA4th 277, 282-283, 36 CR2d 901] .

 Cross Reference:

Requesting separate trials under *CCP* § 597.5, see 1.18[2].

Example:

Contract interpretation (e.g., insurance policy) is an issue of law determined outside of the jury's presence; the jury is involved only if the court determines that the wording of the instrument is reasonably susceptible of the interpretation contended for by the proponent, the extrinsic evidence presented is relevant to prove the proposed meaning, and the credibility of the proponent's parol evidence is disputed [*Equitable Life Assurance Soc'y v. Berry* (1989) 212 CA3d 832, 836, 260 CR 819] .

A court of appeal has upheld jury instructions, and therefore presentation of contract interpretation of an ambiguous term to the jury, when extrinsic evidence was required to interpret a contract term ("gross receipts") that was determined to be ambiguous [*Wolf v. Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1112-1113]. However, the court allowed the interpretation of another term ("purchaser") to go to the jury when (1) the extrinsic evidence proffered was undisputed, and (2) a close reading of the contract demonstrated that there was only one meaning to which the term was reasonably susceptible and therefore was not ambiguous. Therefore, it is proper to submit to the jury the question of what an ambiguous term means in a contract, with special interrogatories. The trial in *Wolf* was bifurcated, but the issues tried were liability in the first phase and damages in the second. The trial was not bifurcated into legal issues tried first to the court and factual issues tried second to the jury separately [*Wolf v. Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1116]

1.16[5][e] Court May Defer Ruling on Issues Presented in Earlier Separate Issues Trials. Even if the court grants separate issues trials, it may defer its ruling on a particular issue after separate trial of that issue until after any or all subsequent issues trials [*Bate v. Marsteller* (1965) 232 CA2d 605, 617, 43 CR 149] .



Strategic Point:

If counsel senses that the court's ruling on an issue may be adverse, counsel may still suggest to court that it defer its ruling, and seek to shore up in subsequent issues trials weak evidence or credibility on the prior issue.

1.16[5][f] Jury Instructions on Outcome of Trial by Court Must Be Requested. A party who fails to request jury instructions during the jury trial phase concerning the issues determined in a separate trial of issues by the court waives the res judicata effect of those court rulings [*Ocean Servs. Corp. v. Ventura Port Dist.* (1993) 15 CA4th 1762, 1778, 19 CR2d 750] .



Strategic Point:

Counsel must remember to have the issues tried by the jury properly limited in light of the court's rulings on equitable issues and request appropriate jury instructions reflecting the rulings.

1.16[6] Separate Trials to Have Different Judges or Juries Hear Different Issues.

1.16[6][a] Separate Issue Trials May Be Heard by Different Judges or Juries. Each separate trial ordered under CCP § 598 may be heard by the same or a different jury, as ordered by the trial judge [CCP § 598; *Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 CA4th 318, 323, 29 CR2d 330 (court left open possibility that trial court could have ordered separate jury in separate trial under CCP § 1048)]. In a case in which separate juries are ordered, the new jury is to be selected from a new and different array of potential jurors [*Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 CA4th 318, 323-324, 29 CR2d 330 (party's request to continue voir dire on jury that heard and decided preliminary evidence was properly denied as irregular)].



Warning:

The appellate court's discussion of severance and bifurcation of issues for trial in *Bly-Magee* does not appear reconcilable with the Supreme Court's ruling in *Morehart*, as discussed in 1.16[1], [7].

Distinguish:

Having separate trials on separate issues heard by different judges does not mean that a judge different than the one who hears the separate issue trial may decide the issue. That would be barred by CCP § 635. Only a statement of decision by the judge who heard the separate trial may be the basis for judgment [see *Armstrong v. Picquelle* (1984) 157 CA3d 122, 126-128, 203 CR 552 (not involving separate trials)].

1.16[6][b] Right to Different Jury As Ordered by Court May Be Waived. The failure to object to the failure of the court to select a new jury for a new phase of trial, when the court had previously ordered separate issue trials with separate juries, until after an adverse verdict by the same jury waives the right to the separate jury in the later trial [*Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 CA4th 318, 325, 29 CR2d 330] .



Strategic Point:

The party wanting trial court to select the new jury based on a prior order to that effect should request a sidebar or otherwise bring up the court's failure to select a new jury at the first recess before swearing in the same jury from the prior phase of trial [*Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 CA4th 318, 324, 29 CR2d 330] .

1.16[6][c] Questions of Liability Must Be Tried by Separate Jury From That Which Tries Issues of Insurance Coverage Where Necessary to Avoid Prejudice. *Evid Code* § 1155 precludes the use of evidence of the tortfeasor's insurance in a negligence action, which therefore gives a tortfeasor the right to have separate trials on the

issues of liability and insurance coverage [*Omaha Indem. Co. v. Superior Court* (1989) 209 CA3d 1266, 1274-1275, 258 CR 66] . A separate trial of those issues by separate juries is required where it is necessary to prevent prejudice from the evidence. Whether this rule applies must be determined on a case-by-case basis [*Shade Foods, Inc. v. Innovative Prods. Sales & Mktg.* (2000) 78 CA4th 847, 912, 93 CR2d 364] .

1.16[7] Appealability of Judgment Resulting From Separate Issue Trial Depends on Basis for Order and Judgment.

1.16[7][a] Judgment From Separate Trial Under CCP § 597 or 597.5 Sustaining Affirmative Defense on All Claims May Be Appealed Immediately. A judgment from a separate trial under CCP § 597 or 597.5 sustaining an affirmative defense bars further trial in the case and may be appealed immediately [CCP §§ 597, 597.5].

Exception:

When the defense of another action pending or a demurrer based upon CCP § 430.10(c) is sustained (and no other special defense is sustained) in a separate issue trial under CCP § 597, an interlocutory judgment is to be entered in favor of the defendant pleading for it. This judgment has the effect that no trial of other issues may be had until the final determination of the other action [CCP § 597]. A trial court has no discretion to allow the second action to proceed if it finds the first involves substantially the same controversy between the same parties [*Lawyers Title Ins. Corp. v. Superior Court* (1984) 151 CA3d 455, 460, 199 CR 1] . The plaintiff may appeal from the interlocutory judgment in the same manner and within the same time as is now or may be hereafter provided by law for appeals from judgments [CCP § 597].

Distinguish:

An interlocutory judgment abating an inverse condemnation action on the ground of a prior pending condemnation action is not appealable where no special trial was held on the issue. The provisions of CCP § 597 allowing that when a trial is held relative to special issues and defenses, an interlocutory judgment sustaining the defense of another action pending is then appealable, is thus not applicable [*Zisk v. City of Roseville* (1976) 56 CA3d 41, 47-48, 127 CR 896] .

1.16[7][b] Judgment for Defendant From Separate Trial Under CCP § 598 on Sole Issue of Liability Before Trial of All Other Issues May Be Appealed Immediately. If a separate trial, before the trial of any other issues, on the sole issue of liability is ordered under CCP § 598, and the judgment is favorable to the defendant, no other issues may be tried in the case, and the judgment may be appealed [CCP § 598].

Distinguish:

A positive verdict of liability in a bifurcated trial merely has the same status as a partial verdict or finding. Consequently, when the trial is bifurcated and the issue of damages remains to be tried, appeal from the interlocutory judgment of liability is premature. After the trial of the remaining issues, judgment must be entered in the same manner and with the same effect as if all the issues in the case had been tried at one time [*Plaza Tulare v. Tradewell Stores, Inc.* (1989) 207 CA3d 522, 524, 254 CR 792 ; see CCP § 598].

1.16[7][c] Judgment From Separate Trial Under CCP § 1048 May Not Be Appealed Before All Issues Between the Parties Are Disposed. CCP § 904.1 provides that there may be an appeal only after final judgment on all issues between the parties. Therefore, a partial or interlocutory judgment after a separate trial under CCP § 1048 of less than all issues between the parties may not be appealed, until the remaining issues are reduced to judgment [*Morehart v. County of Santa Barbara* (1994) 7 C4th 725, 740-741, 743, 29 CR2d 804, 872 P2d 143 ; *Armstrong Petroleum Corp. v. Superior Court* (1981) 114 CA3d 732, 737, 170 CR 767] .

Distinguish:

A judgment, such as that resulting from a separate issues trial, that disposes of fewer than all of the causes of action framed by the pleadings is necessarily "interlocutory" and not yet final as to parties between whom another cause of action remains pending. Only judgments that leave nothing to be decided between one or more parties and their adversaries, or that can be amended to encompass all controverted issues, are final [see *Morehart v. County of Santa Barbara* (1994) 7 C4th 725, 741, 29 CR2d 804, 872 P2d 143 ; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 CA4th 1810, 1830, 54 CR2d 176] .

Examples:

Examples of appealable final judgments resulting from separate issues trials include:

- When the dismissal of an action operates to remove a defendant from the case and to leave no issue remaining between the plaintiff and the defendant, the order is appealable as a final judgment [*Will v. Engebretson & Co* (1989) 213 CA3d 1033, 1039, 261 CR 868] .
- A judgment is dispositive with respect to a particular defendant if it disposes of all issues with respect to that defendant, even if other issues remain to be tried in claims against one or more other defendants [*Hazel v. Hewlett* (1988) 201 CA3d 1458, 1463 n3, 247 CR 723 ; see CCP § 579].

Exception:

A party may be able to avoid the dismissal of an appeal if the appellate court can and does consolidate appeals from multiple interlocutory judgments that collectively dispose of all issues between the parties [*FMC Corp. v. Plaisted & Cos.* (1998) 61 CA4th 1132, 1143-1144, 72 CR2d 467 (appeal heard consolidating appeal of eight separate "judgments" on trials on groups of contamination sites involving the same parties)].



Strategic Point:

The appellate court may also consider an erroneously filed appeal as a petition for writ review [*Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 CA4th 1810, 1831, 54 CR2d 176 ; see 1.16[7][d]].

Distinguish:

A "severance" order rendered at the same time as a judgment on less than all causes of action for the express purpose of permitting an immediate appeal is not authorized by CCP § 1048 [*California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 CA3d 49, 59, 271 CR 410 (appeal invalid); *Armstrong Petroleum Corp. v. Superior Court* (1981) 114 CA3d 732, 737, 170 CR 767 (order invalid)].

Example:

When the result of the initial phase of trial does not dispose of the entire cause of action, the ruling on the issue tried in the initial phase is nonappealable and is properly appealed with the appeal of the final judgment in the case [*Gavin W. v. YMCA of Metro. Los Angeles* (2003) 106 CA4th 662, 668-669, 131 CR2d 168 (appeal with final judgment preserved appeal of nondispositive interlocutory judgment on issue tried in initial phase)].



Strategic Point:

Subsequent action on remaining causes of action between the parties at a later separate trial may validate an improperly filed notice of appeal, if the subsequent action occurs in time for consideration by the appellate court [see *Amigos de Bolsa Chica, Inc. v. Signal Props., Inc.* (1983) 142 CA3d 166, 190 CR 798, 806 (unpublished decision)].

Example:

Dismissal of the remaining counts included in a subsequent amended complaint by the time the court of appeals heard the appeal cured the defect of a notice of appeal of the dismissal of several other counts in a prior complaint [*Amigos de Bolsa Chica, Inc. v. Signal Props., Inc.* (1983) 142 CA3d 166, 190 CR 798, 806 (unpublished decision)].

1.16[7][d] Writ Review of Interlocutory Judgment on Separate Issue Trial May Be Sought. Although a judgment on the basis of a separate trial of an issue may not be appealed [see 1.16[7][b]], a party with proper grounds may seek writ review of such a ruling [*Morehart v. County of Santa Barbara* (1994) 7 C4th 725, 743, 29 CR2d 804, 872 P2d 143] .



Strategic Point:

The appellate court has discretion to consider an erroneously filed appeal as a petition for writ review [*Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 CA4th 1810, 1831, 54 CR2d 176 (review granted); see 1.16[7][d]].



Cross Reference:

Seeking writ review, see California Forms of Pleading and Practice, Ch. 492, Review (Certiorari), Writ of (Matthew Bender).

1.16[8] If Court Shows Doubt, Ask for Denial Without Prejudice of Motion for Separate Trials. The court may deny without prejudice a motion for separate trial on an issue [see, e.g., *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 910, 93 CR2d 364] .



Warning:

After denial without prejudice, the failure to make the motion again later, and on any conditions specified by the trial court, waives the right to separate trial [*Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 911, 93 CR2d 364] .

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewEvidenceProcedural ConsiderationsBurden of ProofGeneral Overview



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1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.17

1.17 Timing of Request for Separate Issues Trials.

1.17[1] Request for Separate Trial of Special Defenses or, in Action Against Medical Professional, Defense of Statute of Limitation May Be Made at Least Up to Call for Trial. A motion for trying special defenses before other issues in a case may be made at least as late as the call for trial [see, e.g., *Cornette v. Dep't of Transp.* (2001) 26 C4th 63, 67, 109 CR2d 1, 26 P3d 332 (decided under CCP § 597); see also, e.g., *Fuller v. Tucker* (2000) 84 CA4th 1163, 1167, 101 CR2d 776 (motion under CCP § 597.5 made after other defendants dismissed from action)].

1.17[2] Separate Trial on Issue or Part of Issue Under CCP § 598.

1.17[2][a] Motion for Separate Trials Must Be Noticed in Time for Hearing and Decision Before Pretrial Conference or Else at Least 30 Days Before Trial. A party's motion for bifurcation of trial on issues must be noticed for either [CCP § 598]:

- In time for hearing and decision before the pretrial conference, if one is held in the case.
- In other cases, at least 30 days before trial.

1.17[2][b] Trial Court May Make Own Motion at Any Time. The trial court may order a separate trial on specified issues at any time [CCP § 598; *Grappo v. Coventry Fin. Corp.* (1991) 235 CA3d 496, 503-504, 286 CR 714]. The trial court may even interrupt an ongoing phase of trial to order that a specific issue be tried [see, e.g., *Buran Equip. Co. v. H & C Inv. Co., Inc.* (1983) 142 CA3d 338, 343, 190 CR 878 (trial court properly interrupted presentation of case in chief to order trial on issue that could have been dispositive)].

1.17[3] Waiver of Separate Trial by Failure to Request It. The failure to make a motion under CCP § 598 at least 30 days from the date of trial waives the phasing of trial under that statute [*Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 911, 93 CR2d 364 (initial denial of motion for separate trial without prejudice put burden on party to move again for bifurcation)].

Legal Topics:

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

Civil Procedure
Pretrial Matters
Separate Trials
Governments
Legislation
Statutes of Limitations
General
Overview
Torts
Malpractice & Professional Liability
Healthcare Providers



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1.18 Grounds for Separate Trial.

1.18[1] Special Defenses May Be Tried Before Any Other Issue. The trial court may order that a special defense be tried before all other issues in a given case [CCP § 597].

Prerequisite:

Consideration of a special defense at trial, including in an initial phase of trial, requires that the affirmative defense was raised in responsive pleadings, as amended, to the complaint or cross-complaint [CCP § 597].

 Cross References:

Discussion of pleading affirmative defense in answer, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 14.18 *et seq.*

Discussion of amending pleadings, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 34.03 *et seq.*

Table of affirmative defense forms, see *California Forms of Pleading and Practice*, Ch. 26, Answers, App. VI (Matthew Bender).



Strategic Point:

A trial court also has discretion under CCP § 1048(b) to order a separate trial on an affirmative defense [*Finley v. Superior Court* (2000) 80 CA4th 1152, 1162, 96 CR2d 128 ; see 1.18[4]].

Special defenses include those claiming [CCP § 597]:

- The action is barred by a statute of limitations [see CCP § 597].

Distinguish:

Obtaining an initial phase of trial for consideration of an affirmative defense of bar by statute of limitations is predicated on the choice not to have raised the bar in a demurrer [see CCP § 430.10(c)] or motion for summary judgment [see CCP § 437c].

Cross References:

Discussion of raising statute of limitations as bar to cause of action, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 4.38 et seq.

Discussion of filing demurrer on the basis that statute of limitation bars the cause of action, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 11.08[4][e].

Discussion of filing motion for summary judgment based on affirmative defense, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 38.05.

- The action is barred by a prior judgment [see CCP §§ 430.10(e), 430.30(b), 431.30(b)(2)].

Distinguish:

Obtaining an initial phase of trial for consideration of an affirmative defense of bar by prior judgment is predicated on the choice not to have raised the bar in a demurrer [see CCP § 430.10(c)], judicial notice [see CCP §§ 430.30(a), 430.70], or motion for summary judgment [see CCP § 437c].

Cross References:

Discussion of filing demurrer on the basis that res judicata bars the cause of action, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 8.39[2][d], 11.08[4][e].

Discussion of filing motion for summary judgment based on affirmative defense, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 38.05.

- Another action is pending on the same cause of action [see CCP §§ 430.10(c), 430.30(b), 431.30(b)(2)].

Distinguish:

Obtaining an initial phase of trial for consideration of an affirmative defense that another action is pending on the same cause of action is predicated on the choice not to have raised the bar in a demurrer [see CCP § 430.10(c)] or by judicial notice of the pending action [see CCP §§ 430.30(a), 430.70].



Strategic Point:

The claim of abatement of an action due to the effect of another pending action should be pleaded in a responsive pleading when factual issues must be resolved for the resolution of the abatement claim [see *Leadford v. Leadford* (1992) 6 CA4th 571, 574, 8 CR2d 9] .

Cross Reference:

Discussion of filing demurrer on the basis that another action is pending on the same cause of action, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil*

Procedure, 8.39[2][c], 11.09[1].



Strategic Point:

A defendant does not waive a plea in abatement by not seeking to have it tried separately and before issues on merits [*Kubon v. Kubon (1958) 51 Cal 2d 229, 232-233, 331 P2d 636*] .



Cross Reference:

Discussion of pleas in abatement, see California Forms of Pleading and Practice, Ch. 3, Abatement of Actions (Matthew Bender).

- Any other grounds not going to the merits of the plaintiff's cause but that would constitute a bar or abatement of the cause.

Examples:

A separate trial of the following issues has been permitted under this provision of CCP § 597:

- Whether two professors claiming marital discrimination come within the ministerial exception under federal civil rights law. If they do, clearly the causes of action based on marital status discrimination must fail [*Hope Int'l Univ. v. Superior Court (2004) 119 CA4th 719, 741, 14 CR3d 643*] .

- What effect a release has on the cause of action and whether it is enforceable and not void as against public policy [*Gavin W. v. YMCA of Metro. Los Angeles (2003) 106 CA4th 662, 667-669, 131 CR2d 168*] .

Distinguish:

In an action to recover for defendant's loss of plaintiff's property where defendant pleaded that plaintiff had been reimbursed for loss by insurance company that had no greater equity than defendant who was without fault or neglect, and the suit was actually subrogation claim asserted by plaintiff's insurer, determination of plaintiff's right to pursue action involved merits of action, and it was therefore improper for court to order special trial under CCP § 597 [*Meyer Koulisch Co., Inc. v. Cannon (1963) 213 CA2d 419, 430-431, 28 CR 757*] .

1.18[2] Defense on Statute of Limitation in Certain Causes of Action Against Medical Professional or Hospital Must Be Tried Before Any Other Issue. The trial court may order that a defense on the statute of limitations in an action for specified causes of action against specified medical professionals or a hospital be tried before all other issues in the case [CCP § 597.5].

Prerequisite:

Consideration of a defense on statute of limitations at trial, including in an initial phase of trial, requires that the affirmative defense was raised in responsive pleadings, as amended, to the complaint or cross-complaint [CCP § 597.5].



Cross References:

Discussion of pleading affirmative defense in answer, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 14.18 et seq.*

Discussion of amending pleadings, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 34.03 et seq.*

Table of affirmative defense forms, see *California Forms of Pleading and Practice, Ch. 26, Answers*, (Matthew Bender).

Distinguish:

The phasing of trial under *CCP § 597.5* is available only for a defense on the statute of limitations and is inapplicable to the defense of alleged failure to file a timely claim under the Tort Claims Act contained in *Gov Code § 911.2*. The time limitations for filing a claim under the Act are similar in purpose to statutes of limitations, but are not statutes of limitations. A statute of limitations bars stale claims in judicial actions, while a claims limitation encourages speedy resolution of disputes against the government that may impede its operation [*County of Kern v. Superior Court of Kern County (1978) 82 CA3d 396, 400-401, 147 CR 248*] .

Exception:

If a defense on statute of limitations qualifies for an initial phase of trial, the court may also try any other issue arising out of the same factual question [*County of Kern v. Superior Court of Kern County (1978) 82 CA3d 396, 401, 147 CR 248*] .

Example:

A defense that the plaintiff failed to file a timely claim under *Gov Code § 911.2* was also properly triable during the first phase of the trial set to hear a defense on statute of limitations. Although the claims defense and the statute of limitations defense were different, they both arose out of a common factual question: when did the plaintiff discover, or in the exercise of due diligence should have discovered, the malpractice [*County of Kern v. Superior Court of Kern County (1978) 82 CA3d 396, 401, 147 CR 248*] .



Strategic Point:

The language of *CCP § 597.5* to the effect that the court "must" hold an initial phase to hear the defense of statute of limitations in the enumerated cases is mandatory [*Kelemen v. Superior Court (1982) 136 CA3d 861, 864, 186 CR 566* ; *County of Kern v. Superior Court of Kern County (1978) 82 CA3d 396, 399-400, 147 CR 248* (denial of motion was error)], unlike in other instances of authorized phasing of trials.

This method of phasing trial must be ordered in actions against a [*CCP § 597.5*]:

- Physician or surgeon.
- Dentist.
- Registered nurse.
- Optometrist or dispensing optician.
- Registered physical therapist.

- Podiatrist.
- Licensed psychologist.
- Osteopathic physician and surgeon.
- Chiropractor.
- Clinical laboratory bioanalyst or technologist.
- Veterinarian.
- Licensed hospital employing one of the above persons.

The action must be based on the medical professional's alleged [CCP § 597.5]:

- Professional negligence.
- Rendering of professional services without consent.
- Error or omission in his or her practice.



Strategic Point:

A trial court also has discretion under *CCP § 1048(b)* to order a separate trial on an affirmative defense [*Finley v. Superior Court* (2000) 80 CA4th 1152, 1162, 96 CR2d 128 ; see 1.18[4]].

1.18[3] Separate Trial of Issue or Part of Issue Is Allowed for Convenience of Witnesses, Ends of Justice, or Judicial Economy and Efficiency. When appropriate grounds exist, the trial court may try any issue or part of an issue before other issues in the action [CCP § 598].



Warning:

Counsel must be careful in analyzing case precedents involving the pre-1977 version of *CCP § 598*, which allowed bifurcation only of liability and damage issues in their entirety.

Exception:

The trial of an issue under *CCP § 598* before the trial of other issues still occurs after the trial of special defenses under *CCP § 597* [see 1.18[1]] or *CCP § 597.5* [see 1.18[2]].

The court may only do so on the grounds that one of the following would be promoted thereby [CCP § 598]:

- The convenience of witnesses.
- The ends of justice.
- The economy and efficiency of handling litigation.

Example:

The trial court properly interrupted the presentation of the case in chief to order trial, on grounds of promoting economy and efficiency of handling litigation, of the issue of whether as a matter of law, on stipulated facts, repossession must occur before the giving of notice for a deficiency judgment to be available, because if it were required, then trial of the other issues would not have been required [*Buran Equip. Co. v. H & C Inv. Co., Inc.* (1983) 142 CA3d 338, 343-344, 190 CR 878] .

1.18[4] Separate Trial of Separate Issue Is Allowed for Convenience, Avoiding Prejudice, or Expedition and Economy. The court may order separate trial of any separate cause or issue on the grounds that one of the following would be promoted thereby [CCP § 1048(b)]:

- The convenience.
- The avoidance of prejudice.
- The expedition and economy.

Example:

Allowing separate trials in a condemnation action on the issues of goodwill compensation and entitlement is "a paradigm example of the propriety of" doing so because the second issue is dependent upon the first, and it is likely to be confusing to the jury and inefficient to everyone if both are tried at the same time [*Regents of Univ. of Cal. v. Sheily* (2004) 122 CA4th 824, 833, 19 CR3d 84] .

A trial court has discretion under CCP § 1048(b) to order a separate trial on an affirmative defense [*Finley v. Superior Court* (2000) 80 CA4th 1152, 1162, 96 CR2d 128 (special litigation committee defense)].

This statutory provision expressly applies to causes in a cross-complaint [CCP § 1048(b)].

1.18[5] Authority to Regulate Order of Proof Allows Court to Try Issues Separately. A trial courts authority to regulate the order of proof under *Evid Code* § 320 enables the court to set separate trial of particular issues [*Finley v. Superior Court* (2000) 80 CA4th 1152, 1162, 96 CR2d 128 (separate trial of affirmative defense)].

Example:

In a libel action, the trial court did not err in making a determination of the public official/public figure privilege issue before commencement of the jury trial. The procedure was consistent with the procedure generally followed for the determination of privilege, and, in any event, *Evid Code* § 320 leaves the order of proof to the discretion of the trial court except as otherwise provided by law [*Weingarten v. Block* (1980) 102 CA3d 129, 134-135, 162 CR 701] .

1.18[6] In Punitive Damages Cases, Trial of Net Worth of Defendant Is Bifurcated. On application of a defendant, a trial court must bifurcate the trial so that the issue of liability, plaintiff's actual damages, and whether the defendant acted with oppression, malice, or fraud is tried first [CC § 3295(d)]. If the jury finds for the plaintiff and finds by clear and convincing evidence the defendant acted with oppression, malice, or fraud, a separate trial is held with the same jury and hears evidence of the profit and financial condition of the defendant for purposes of awarding punitive damages first [CC § 3295(d); see *Westrec Marina Mgmt. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 CA4th 1042, 1049, 102 CR2d 673] .

The separate trial for punitive damages must be heard by the same jury [CC § 3295(d)], unless the defendant agrees otherwise [see *El Monte v. Superior Court* (1994) 29 CA4th 272, 276, 34 CR2d 490] . However, CC § 3295(d) does not prevent a trial court from ordering a retrial of the issues of malice and, if necessary, punitive damages, before a different jury [*Barmas, Inc. v. Superior Court* (2001) 92 CA4th 372, 377, 112 CR2d 71] .

Legal Topics:

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

Civil ProcedurePretrial MattersSeparate TrialsTortsDamagesPunitive DamagesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsProcedureStatutes of LimitationsGeneral Overview



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1.19 Requesting Separate Issues Trials.

1.19[1] Motion of Party or Court May Be Required. A separate trial of special defenses or the defense of statute of limitations in an action against a medical professional may be ordered upon the motion of a party or the court under *CCP* §§ 597, 597.5, 598.



Strategic Point:

Before making a motion to that effect, counsel might consider suggesting to the court that the court bifurcate the trial of issues in the desired way. That way, if the court does so on its own motion, the necessity for counsel to prepare and file the motion is avoided. If the court does so, of course, counsel should make sure that the court clearly states the scope of the issues to be tried first and that the court is doing so on its own motion [*see Grappo v. Coventry Fin. Corp. (1991) 235 CA3d 496, 503-504, 286 CR 714* (court properly ordered separate trials on stated terms of own motion after suggestion by party, to which other party responded)].

On the other hand, *CCP* § 1048 does not expressly require a motion, and the court's authority under that statute may allow the court to order separate trials so long as grounds for the separation exist [*see Grappo v. Coventry Fin. Corp. (1991) 235 CA3d 496, 504, 286 CR 714*].

Example:

Motion in limine including brief request for separate trials, combined with suggestion in court was sufficient to constitute request for separate trial and avoid waiver of the right to request it [*Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc. (2000) 78 CA4th 847, 910-911, 93 CR2d 364*].



Strategic Point:

Local court practice may determine whether the judge will require a motion under *CCP* § 1048 in situations where *CCP* §§ 597, 597.5, 598 do not apply. In any event, determine if the separate trial on a

defense is mandatory or discretionary. If mandatory (such as in punitive damages), an oral motion should suffice. If discretionary, it is better practice to file a written motion.

1.19[2] Party's Motion for Separate Trial of Issue for Convenience of Witnesses, Ends of Justice, or Judicial Economy and Efficiency Must Be Noticed. The motion for an issue for the convenience of witnesses, the ends of justice, or judicial economy and efficiency must be a noticed motion [*CCP* § 598].



Cross Reference:

Discussion of making noticed motions, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.39 *et seq.*

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice General Overview Civil Procedure Pretrial Matters Separate Trials Governments Legislation Statutes of Limitations General Overview



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1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.20

1.20 Review of Orders on Separate Issues Trials.

A trial court's exercise of its discretion under *CCP* § 1048(b) is subject to review on appeal for 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] .



Strategic Point:

Failure to raise an issue concerning separate trial of issues generally waives the right to review on that issue, although the reviewing court has the discretion to consider it anyway [*Finley v. Superior Court* (2000) 80 CA4th 1152, 1158, 96 CR2d 128 (waived issue considered because issue was likely to arise in lower court); see 1.18[4]].



Cross Reference:

Appeals generally, see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview (Matthew Bender).

Even if abuse of discretion is shown, relief by writ is not a foregone conclusion [*Omaha Indem. Co. v. Superior Court* (1989) 209 CA3d 1266, 1271, 258 CR 66] . The general criteria for determining the propriety of an extraordinary writ include whether: (1) the issue tendered in the writ petition is of widespread interest or presents a significant and novel constitutional issue; (2) the trial court's order deprived petitioner of an opportunity to present a substantial portion of his cause of action; (3) conflicting trial court interpretations of the law require a resolution of the conflict; (4) the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case; (5) the party seeking the writ lacks an adequate means, such as a direct appeal, by which to attain relief; and (6) the petitioner will suffer harm or prejudice in a manner that cannot be corrected on appeal. The extent to which these criteria apply depends on the facts and circumstances of the case [*Omaha Indem. Co. v. Superior Court* (1989) 209 CA3d 1266, 1273-1274, 258 CR 66 (writ granted)].



Cross Reference:

Seeking writ review, see California Forms of Pleading and Practice, Ch. 492, Review (Certiorari), Writ of (Matthew Bender).

Legal Topics:

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

Civil ProcedurePretrial MattersSeparate TrialsCivil ProcedureRemediesWritsCommon Law WritsGeneral
OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil
ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewAbuse of
Discretion



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1.21 CHECKLIST: Reviewing Evidentiary Issues and Marshalling Evidence and Witnesses for Trial.

- ☐ Review limits to evidence during pretrial proceedings.
 - ☐ Discovery evidentiary sanctions.
 - ☐ Evidentiary rulings and stipulations.
- ☐ Find and organize evidence.
 - ☐ Monitor attorney and party status using online resources.
 - ☐ Find witness information and prepare witness files.
 - ☐ Organize documents and physical evidence.
 - ☐ Review judicial notice.
 - ☐ Review stipulations to date.
- ☐ Prepare evidentiary foundations for each piece of evidence to be admitted.
- ☐ Subpoena witnesses and documents for trial.

- ☐ Prepare witnesses for trial.
 - ☐ Review procedures and testimony.
 - ☐ Secure interpreter, if needed.
- ☐ Prepare exhibits and demonstrative evidence.
 - ☐ Compile exhibit list.
 - ☐ Design demonstrative evidence.
 - ☐ Prepare electronic exhibits.
 - ☐ Determine if use if as substantive evidence or as demonstrative evidence.
- ☐ Assess evidence and prepare for objections.
- ☐ Compile evidence to be used for impeachment.

Discussion:

See 1.23 -1.29

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedurePretrial MattersSubpoenasEvidenceTestimonyCredibilityImpeachmentGeneral Overview



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1.22 Options and Strategies.

Trial counsel should not wait until trial to resolve issues appropriately addressed during pre-trial discovery. Doing so will invite a response from the trial judge, and trial is not the time to raise such issues which are, by that point, waived. Similarly, counsel should assure that written orders are on file regarding issues resolved by pre-trial discovery motions and other motions which may impact on what evidence may be admissible at trial. Counsel should bear in mind most judges do not like trials to be delayed by raising issues regarding the admissibility of evidence which can be addressed during pretrial proceedings. To the extent such issues can be resolved without jeopardizing the disclosure of trial strategies or other work product, trial counsel is well advised to do so.

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview



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1.23 Determine Scope of Any Discovery Evidentiary Sanctions.

Imposition of issue or evidence sanctions may severely inhibit the ability to present a case at trial. The court may impose an issue sanction that designated facts be taken as established by the aggrieved party, or prohibit an offending party from supporting or opposing designated claims or defenses [see *CCP* § 2023.030(b)]. The court may also impose an evidence sanction prohibiting the offending party from introducing designated matters into evidence [see *CCP* § 2023.030(c)]. Review all discovery documents for any issue or evidentiary sanctions and note the scope of the sanctions in the trial binder or notebook. Consider what evidence may be substituted to maintain the party's case.

Legal Topics:

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

Criminal Law & Procedure
Discovery & Inspection
Discovery Misconduct
General Overview



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1.24 Review Any Evidentiary Rulings or Stipulations From Pretrial Motions.

Throughout the course of pretrial procedure, the court may make several evidentiary rulings for purposes of pretrial motions. For example, the court may determine whether judicial notice may be taken of certain documents when ruling on a demurrer, or a deposition may be found inadmissible for purposes of a summary judgment motion. And stipulations to evidence may frequently occur throughout the pretrial time frame.

Counsel should prepare a list of evidentiary rulings to determine what evidence the court has already admitted or excluded, and any stipulations to evidence. The reasons for excluding prior evidence may highlight how to cure the evidentiary issue at trial. Counsel can also use the list to highlight to the court during trial when an opponent suddenly changes its position on admitting or excluding evidence that is the opposite of what the opponent claimed during pretrial proceedings.

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewEvidenceGeneral Overview



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1.25 Preparing Evidence and Evidentiary Foundations.

1.25[1] Locating and Organizing Evidence.

1.25[1][a] Monitoring Parties' and Attorneys' Status. Pre-complaint investigation and due diligence should identify the parties and their affiliates, and the discovery process will aid identification of any additional parties to be added to the pleadings. However, party status can change during the course of litigation, particularly when representing an entity such as a corporation. The attorney status may change, as well, such as when law firms merge or reorganize.

Parties may file other actions during the course of litigation that may not require a notice of related cases, but the other action may include relevant evidence for the current action.

Counsel should continually monitor the parties' and attorneys' status, and schedule a complete recheck before trial. This not only helps prevent surprises at trial and incomplete judgments, it aids counsel's continuing duty to monitor for conflicts of interest and notify the client and court of the situation.

1.25[1][b] Finding Witness Information and Preparing Witness Files. Witnesses for trial and the subject of their testimony are generally identified through pretrial discovery. Generate a witness contact list and instruct witnesses to inform counsel of any change in contact information.

Witness background information is also useful for identifying conflicts of interest, bias, and facts for impeachment. Use public records to augment your understanding of each witness for trial.

Compile witness information in the trial notebook or binder and note the evidentiary purpose for each witness, the discovery relating to that witness, and the subject matter of questioning at trial. Witness files may include:

- Witness contact information and description sheet.
- Witness subpoena and proof of service.
- Transcripts of depositions.

- Answers to interrogatories.
- Declarations, affidavits, letters, and all other witness statements.
- Copies of documents to show witness at trial.
- Subject matter list of questions for trial, including scripts of questions if necessary.

1.25[1][c] Organizing Documents and Physical Evidence. Review and organize originals and copies of the following documents:

- Documents that are the basis of a claim or defense, such as contracts, deeds, insurance policies, judgments, settlements, etc.
- Witness documents such as declarations, affidavits, and letters.
- Depositions.
- Interrogatories and responses.
- Requests for production of documents and produced documents.
- Requests for admission and responses.
- Expert witness reports.

Review and organize physical evidence other than documents. Consider whether certain types of evidence will be difficult to bring to the courtroom or create a potential hazard (e.g., a demolished car that is central to the case, or blood samples) and how the local rules or the judge's preferences may affect how the evidence is admissible. Consider alternatives to the actual evidence, such as photographs or reports.

If a view of a property or scene is anticipated, review the necessary evidentiary foundations.

 Cross Reference:

Admitting view of scene, see *11.110*.

1.25[1][d] Review Judicial Notice. Judicial notice may have already been made on several issues during pretrial proceedings. Make a list of judicially noticed evidence, and augment with evidence that will require judicial notice at trial.

 Cross Reference:

Evidence that may be judicially noticed and procedure, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.17.

1.25[1][e] Review Stipulations. Stipulations may have already been made on several issues during pretrial proceedings. Make a list of stipulations and determine their scope for trial.

 Cross Reference:

Making and enforcing stipulations, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil*

Procedure, Ch. 28, Stipulations.

1.25[2] Review Foundational Elements for Each Type of Evidence to Be Offered or Opposed. A fundamental requirement for a successful trial is an understanding what evidence may be admitted, which requires a review of all foundational elements for each piece of evidence offered. The proponent of evidence has the burden of meeting these elements, and opposing counsel will be ready with the standard objection, "Objection, your honor, lack of foundation," for evidence that fails to meet the statutory requirements.

Laying a foundation for evidence primarily occurs on direct examination, though a cross-examiner may introduce evidence on cross-examination from time to time. Regardless whether during direct or cross-examination, the proponent must lay the foundation "brick by brick."

Counsel should prepare a list of each element for each type of evidence to be introduced, and include that list under the witness in the trial notebook or binder. Counsel should also consider the evidence the opposing party will introduce and include the list of foundational elements in the opposition portion of the trial notebook or binder. Missing elements may be readily apparent before trial, and counsel should be ready to object with a well-researched response when the proponent attempts an offer of proof.

Cross References:

List of foundational elements and sample scripts of how to introduce and respond to objections, see Imwinkelried, et al., *California Evidentiary Foundations* (Matthew Bender).

Admitting and objecting to relevant evidence, see *11.80* et seq.

Admitting and objecting to opinion evidence, see *11.86* et seq.

Admitting and objecting to hearsay evidence, see *11.94* et seq.

Admitting and objecting to writings and secondary evidence, see *11.98* et seq.

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview



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1.26 Subpoenaing Witnesses and Documents for Trial.

Witnesses and their documents must be subpoenaed for trial and counsel must review the following issues:

- Service of subpoena.
- Witness fees.
- Agreement to appear in lieu of subpoena.
- Challenging witness attendance and motion to quash subpoena.



Timing:

A reasonable time for witness to prepare and travel, but at 10 days before trial, or 20 days before trial if requesting books, documents, or other things.



Cross Reference:

Compelling witness attendance, see Ch. 7, Compelling Witness Attendance and Witness Preparation.

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersSubpoenas



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1.27 Preparing Witnesses for Trial and Interpreters.

Every witness for the proponent should be evaluated and prepared before trial. Issues to address are:

- Familiarizing the witness with trial requirements.
- Explaining where to report for trial and when.
- Dress.
- How to answer questions.
- Whether an interpreter will be needed.



Cross References:

Preparing witnesses for trial and examination, see *Ch. 7, Compelling Witness Attendance and Witness Preparation*, 7.21 et seq.

Assessing need for interpreter, obtaining interpreter, and examination issues, see *Ch. 8, Interpreters*.

Legal Topics:

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



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1.28 Preparing Exhibits and Demonstrative Evidence.

1.28[1] Preparing Exhibit Lists. Although not required by statute, many local rules require counsel to prepare a list of exhibits to be introduced at trial.

Example--Los Angeles County:

At least five days before the final status conference, the parties must exchange and file lists of pre-marked exhibits [Los Angeles Super Ct Rules, Rules 7.9(h), (i)(6), 8.60]. All exhibits must be prenumbered before counsel or a witness makes any reference to them [Los Angeles Super Ct Rules, Rule 8.60].

The list should briefly describe each exhibit. Premarking and numbering usually occurs during the final pretrial conference. Prepare substitutes for bulky or dangerous exhibits, such as photographs and technical reports.

Cross Reference:

Local rules governing exhibit lists, mechanics, redaction, and bulky exhibits, see *Ch. 4, Final Pretrial Conference*, 4.16[3].

1.28[2] Preparing Demonstrative Evidence. Demonstrative evidence is evidence that helps a witness demonstrate or illustrate oral testimony. Examples of demonstrative evidence include:

- Diagrams and charts.
- Maps
- Models.
- Items replicating actual evidence (e.g., toy gun for real gun).
- Computer simulations.

➤ **Cross References:**

Using and objecting to demonstrative evidence, see *11.102* et seq.

Verification of diagrams, marking of diagrams, and models, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 4, § K (Matthew Bender).

1.28[3] Preparing Photographic and Electronic Evidence. Photographs and electronic evidence (tape recordings, email, videos, and computer animations or simulations) may be substantive evidence that the party intends to introduce at trial, or may be demonstrative evidence to help illustrate oral testimony. Identify the purpose of the photographs and electronic evidence, and prepare to authenticate them at trial if moving into evidence; otherwise, be prepared to meet the standards for demonstrative evidence. List the witnesses required to authenticate the evidence if seeking admission and prepare foundational questions.

➤ **Cross References:**

Foundations for authenticating tape recordings, email, photographs, videos, and computer animations or simulations, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 4 §§ I, J, M, O (Matthew Bender).

Using and objecting to demonstrative evidence, see *11.102* et seq.

Legal Topics:

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

EvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceDemonstrative
EvidencePhotographsEvidenceDocumentary EvidenceWritingsGeneral Overview



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1.29 Assess Evidence and Prepare for Pretrial Evidentiary Motions.

After compiling the evidence for trial, perform a complete review of each piece of evidence for the following primary factors:

- Relevance.
- Conditional relevance.
- Probative versus prejudicial value.
- Exclusion under extrinsic policies.
 - ☐ Privileges.
 - ☐ Character, habit, custom.
 - ☐ Mediation.
 - ☐ Subsequent remedial measures.
 - ☐ Settlement negotiations/offers to compromise.
- Scientific evidence not generally accepted.
- Limits on opinion testimony.
- Hearsay and exceptions.
- Secondary evidence.

Proponents of evidence should take the exhibit list as well as the oral evidence sought and prepare notations for any factors that may be raised in opposition to admission. Opponents of evidence should take the exhibit list and oral evidence and prepare the list of objections for trial. A useful method is to then copy and divide up the analysis sheet and have the appropriate portion included on each witness sheet in the trial notebook so the material is readily handy when the witness is on the stand.

 Cross Reference:

Discussion of evidence, see Ch. 11, Questioning Witnesses and Objections.

If counsel concludes the evidence is inadmissible and prejudicial, consider filing a motion in limine to prevent the jury from hearing the evidence at trial. Schedule the motion in accordance with local rules.

 Cross Reference:

Motions in limine, see Ch. 4, *Final Pretrial Conference*, 4.20 et seq.

Legal Topics:

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

EvidenceHearsayGeneral OverviewEvidencePrivilegesGeneral OverviewEvidenceRelevanceCompromise & Settlement NegotiationsEvidenceTestimonyExpertsAdmissibilityEvidenceTestimonyLay WitnessesOpinion TestimonyGeneral Overview



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VI. PREPARING TRIAL NOTEBOOKS AND BINDERS

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1.30 CHECKLIST: Preparing Trial Notebooks and Binders.

- ☐ Prepare organization and contents.
 - ☐ Choose between temporal or topical approach.
 - ☐ Review list of common trial topics.
- ☐ Assess use of electronic aids.

Discussion:

See 1.31 -1.33

Legal Topics:

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



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1.31 Options and Strategies.

The choice of how to prepare a trial binder or notebook is greatly impacted by the type and complexity of the case at hand. For a simple, straightforward case, the notebook may be structured witness by witness, with each segment representing the steps of a trial. For complex cases, particularly ones that involve separate trials or phases, a topical approach may be more useful since the chronological structure of a standard trial may be quite varied.

In any event, the binder or notebook must be easy to read, have tabs or a system for easy access in court, and be guarded with the proper security due all work product.

Legal Topics:

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



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1.32 Contents.

A trial binder or notebook should cover the following topics:

- Attorneys' and parties' contact information.
- Pleadings.
- Case analysis.
- Legal research.
- Briefs.
- Timelines and important dates.
- Pretrial conference checklist.
- Jury instructions.
- Verdict forms.
- Stipulations and orders.
- Jury preparation.

☐ Jury questionnaires.

☐ Juror information sheet.

☐ Voir dire questions.

- Exhibits.
- Opening Statement outline.
- Direct examination witness plans.
 - ☐ Witness list.
 - ☐ Examination questions.
 - ☐ Evidence and exhibits to introduce.
 - ☐ Responses for anticipated objections.
- Cross-examination witness plans.
 - ☐ Witness list.
 - ☐ Cross-examination questions.
 - ☐ Evidence and exhibits to introduce.
 - ☐ Responses for anticipated objections
- Pre-verdict motions.
 - ☐ Motion for judgment on the pleadings.
 - ☐ Motion for nonsuit.
 - ☐ Motion for directed verdict.
 - ☐ Motion for judgment.
 - ☐ Motion in limine.
 - ☐ Motion to exclude witnesses.
 - ☐ Motion to amend pleadings to conform to proof.
 - ☐ Motion for continuance.

- ☐ Motion for separate trials.
- ☐ Motion to recall witness.
- ☐ Motion to reopen case.
- ☐ Motion for mistrial.
- Closing argument outline.
- Jury instruction modifications.
- Post-verdict motions
 - ☐ Motion for judgment notwithstanding the verdict.
 - ☐ Motion for new trial.
 - ☐ Motion to tax costs.
 - ☐ Motion to strike costs.
 - ☐ Motion to determine prevailing party and attorney's fees.
- Entry of judgment.

Legal Topics:

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



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1.33 Use of Electronic Aids.

Laptops and other electronic notebooks are a frequent sight in courtrooms and are proving a convenient resource for trial attorneys. With almost unlimited storage capacity, these devices eliminate bulky trial binders from the counsel table and permit easy access to research, checklists, and prepared motions. Wi-Fi connections permit instantaneous research while in court and connection to the office. And with a portable printer, counsel is ready to edit and submit prepared motions on the spot.

Electronic aids also facilitate multiple representation. Using a shared server, several attorneys representing a party may create and download the latest version of the trial plan on a daily basis.



Warnings:

- Backup data regularly in a secured environment. Be careful of system failures in the courtroom. If a crucial trial segment is to occur, consider bringing a printout as a backup.
- Laptop theft is increasing by the year and is one of the leading causes of identity theft. Counsel should consider several of the security devices available, such as password protection, portable locking cables that attach to any desk, and electronic monitors that can be used to find stolen laptops.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1.34 CHECKLIST: Preparing for Pretrial Conferences and Submission of Briefs.

- ☐ Review local rules for timing and restrictions on topics that may be addressed during pretrial conferences.
- ☐ Review checklist of pretrial conference topics:
 - ☐ Resolve judge, parties, and issues for trial.
 - ☐ Seek disqualification of judge if appropriate.
 - ☐ Ascertain identity of identifiable fictitious parties.
- ☐ Determine scope of issues to be tried.
 - ☐ Reduce issues at pretrial conference.
 - ☐ Reduce issues by stipulation.
 - ☐ Reduce issues by severance.
 - ☐ Expand issues by consolidation.
- ☐ Organize documentary and demonstrative evidence for trial.

- ☐ Make requests for judicial notice.
- ☐ Determine objection to deposition use at trial.
- ☐ Resolve issues concerning exhibits.
- ☐ Request viewing of scene, property, or demonstration.
- ☐ Organize testimonial evidence for trial.
 - ☐ File list of witnesses.
 - ☐ Finalize matters concerning expert witnesses.
 - ☐ Set order of examination and cross-examination of witnesses in multiple-party cases.
 - ☐ Request limits on examination.
 - ☐ File motion to exclude witnesses from courtroom.
 - ☐ Consider motions in limine.
- ☐ Organize jury selection.
- ☐ Organize trial mechanics.
 - ☐ Resolve courtroom access, technology, and communications issues.
 - ☐ File motion for closure of trial proceedings to public.
 - ☐ Review media access and courtroom security.
 - ☐ Arrange facilities for disabled participants.
 - ☐ Request use of technology at trial.
 - ☐ Resolve mandatory and permissive use of interpreters and translators.
 - ☐ File motion for gag order.

- ☐ Determine rules for sidebar conferences.
- ☐ Resolve court records issues.
 - ☐ Request availability and access to daily transcripts.
 - ☐ File motion to seal court records.
- ☐ Determine whether to file motion to bifurcate.
- ☐ Resolve jury handling issues in jury trial.
- ☐ Finalize timing of trial and its parts.
 - ☐ Resolve remaining motions for continuance.
 - ☐ Set time limits.
 - ☐ Set daily schedule of trial sessions.
 - ☐ Schedule arguments on legal issues.
 - ☐ Request order of arguments in multiple-party cases.

**Cross Reference:**

Discussion and strategies for pretrial conferences, see Ch. 4, Final Pretrial Conference.

- ☐ Prepare trial briefs.

Discussion:

See 1.37

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedureTrialsGeneral Overview



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1.35 Options and Strategies.

Many attorneys find it a good practice in any significant case to prepare a trial statement and/or trial brief to present to the judge, along with a copy to the adverse party. The purpose of the statement or brief is to familiarize the court with the client's legal and factual claims. Since the effect of the brief on the judge may depend on when it is submitted, counsel should consider delivering the brief as soon as permitted by local rule.

Local rules may limit when trial statements or briefs are permitted and when and how the brief is to be filed and served. Check local rules and ask the judge at the first available hearing on the case what the practice is for trial briefs in the county.

Example--Santa Cruz County:

Trial briefs are optional unless ordered by the court, but when so ordered, they must be submitted to the court and opposing counsel no later than the court day preceding the date set for trial, unless the court orders submission at an earlier date. Trial briefs must set forth the issues to be tried and any significant evidentiary problems which are likely to be presented, and must a list all witnesses the counsel preparing the brief intends to call at the trial [Santa Cruz Super Ct Rules, Rule 2.2.06].

Legal Topics:

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



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1.36 Prepare Checklist of Topics for Pretrial Conference.

The scheduling and content of pretrial conferences varies widely from county to county. Various time restrictions are applicable, such as limits for bringing a motion in limine. Regardless of the local rules, there are a distinct set of issues to be raised at the final pretrial conference or trial readiness conference. Prepare a checklist of items to be addressed at the final pretrial conference and cross off the items as the court visits and each matter.

Cross References:

Timing and limitations of final pretrial conferences, see *Ch. 4, Final Pretrial Conference, 4.03 et seq.*

Items to be covered at final pretrial conferences, see *Ch. 4, Final Pretrial Conference, 4.13 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial Conferences



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1.37 Preparing Trial Briefs.

A trial brief should contain the following elements:

- Summary of the case.
- Outline of facts counsel expects to prove.
- Statement and rebuttal of the adverse party's factual contentions.
- Legal arguments with proper citations to appropriate authorities.

Strategic Point--Issues:



Counsel should also anticipate motions based upon issues, and prepare a trial brief on those issues. A non-jury trial will involve a more traditional "pretrial brief," but a jury trial also merits an additional submission to the court outlining the issues, but much more briefly, so that the court will be aware of the particular issues in connection with efforts to admit evidence and objections to evidence.

Strategic Point--Preparation:



A good starting point for preparing trial briefs is earlier filed motions for summary judgment or, when earlier exchanged with opposing counsel, mediation statements. By the same token, counsel should bear in mind such documents are a starting point only, and must be revised to take into account matters which will educate the trial judge as to the overall trial themes of the submitting attorney, and otherwise address issues required by local rules.

Legal Topics:

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



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VIII. PREPARING FOR COURTROOM PRESENTATION AND PROCEDURE

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1.38 CHECKLIST: Preparing for Courtroom Presentation and Procedure.

- ☐ Prepare for jury selection.
 - ☐ Topics for pre-voir dire conference with judge:
 - ☐ Number of jurors and alternates.
 - ☐ Method for selecting prospective jurors for voir dire.
 - ☐ Motions in limine to limit questioning.
- ☐ Prepare juror questionnaires.
- ☐ Identify if panel challenge is needed.
- ☐ Review grounds for excusing for cause.
- ☐ Determine number of peremptory challenges.

➡ **Cross Reference:**

Discussion and forms for jury selection, see Ch. 6, Jury Selection.

- ☐ Prepare opening statement.
 - ☐ Identify themes.

- ☐ Address burden of proof.
- ☐ Prepare simple visual aids.
- ☐ Request mini-openings, if appropriate.
- ☐ Choose format for opening:
 - ☐ Chronological or witness-by-witness presentation.
- ☐ Identify key events and persons.
- ☐ Describe key documents.
- ☐ Address damages.
- ☐ Use judicial tutorial, if appropriate.

► **Cross References:**

Discussion and strategy for opening statement, see Ch. 10, Opening Statement.

Discussion of judicial tutorials, see *Ch. 4, Final Pretrial Conference, 4.19A*.

- ☐ Prepare for continuance.
 - ☐ Determine if good cause exists for continuance.
 - ☐ File and serve motion with court.
 - ☐ Seek stipulation for continuance from opposing party.

► **Cross References:**

Moving for continuance, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 30, Continuances.

- ☐ Prepare for questioning of witnesses.
 - ☐ Review witnesses to be excluded from courtroom.
 - ☐ Determine if witness is competent to testify.

- ☐ Determine order of proof and examination.
- ☐ Prepare questions for direct examination.
- ☐ Evaluate if court or jury may need to examine witnesses:
- ☐ Determine which witness will lay foundation for entry of exhibits.
- ☐ Evaluate deposition testimony and other discovery documents:
 - ☐ Interrogatories.
 - ☐ Requests for admissions.
- ☐ Determine grounds for impeaching opponent's witnesses:
 - ☐ Bias.
 - ☐ Prior inconsistent statements.
 - ☐ Character.
- ☐ Determine grounds for rehabilitating witness.
- ☐ Prepare objections and responses to objections.
- ☐ Evaluate relevance of evidence and possible limits:
 - ☐ Conditional relevance.
 - ☐ Prejudice outweighs probative value.
 - ☐ Extrinsic policies to exclude:
 - ☐ Privileges.
 - ☐ Character, habit, or custom.
 - ☐ Mediation.

- ☐ Subsequent remedial measures.
- ☐ Settlement negotiations/offers to compromise.
- ☐ Liability insurance.
- ☐ Scientific evidence not readily accepted.

☐ Evaluate lay and expert opinion evidence.

☐ Evaluate secondary evidence.

☐ Evaluate evidence not requiring a witness:

☐ Stipulations.

☐ Judicial notice.

☐ View of scene.

 Cross Reference:

Discussion and strategy for questioning witnesses, see Ch. 11, Questioning Witnesses and Objections.

☐ Prepare closing argument.

☐ Identify themes.

☐ Address burden of proof.

☐ Prepare simple visual aids.

☐ Choose format for argument:

☐ Chronological.

☐ Element-by element.

☐ Issue-by-issue.

☐ Witness-by-witness.

☐ Narrative.

☐ Identify key events and persons.

☐ Describe key documents.

☐ Address damages.

➡ **Cross Reference:**

Discussion and strategy for closing argument, see Ch. 15, Closing Argument.

☐ Prepare for instructions to jury.

☐ Determine if court instructs before or after argument.

➡ **Cross Reference:**

Discussion and strategy for giving jury instructions, see *Ch. 17, Dealing With the Jury*, 17.26 et seq.

☐ Prepare for jury deliberation.

☐ Review rules for jury questions.

☐ Determine if sufficient alternates are available given length of trial.

☐ Review grounds for juror misconduct:

➡ **Cross Reference:**

Discussion of jury deliberations, see *Ch. 17, Dealing With the Jury*, 17.31 et seq.

☐ Prepare for verdict.

☐ Determine whether to use general versus special verdict form.

☐ Determine if special findings are needed.

➡ **Cross Reference:**

Discussion and strategy for jury verdicts, see Ch. 18, Jury Verdicts.

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral Overview



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1.39 Options and Strategies.

Courtroom presentations are as varied as the attorneys who make them. Becoming comfortable in the courtroom takes time and experience, but certain traits can aid the process and reduce the stress associated with trial work:

- Be prepared. One of the greatest creators of stress is not doing the work that you know should be done. And one of the greatest dangers in any trial is surprise.
- Be punctual and inform the court of any delays.
- Treat the court and its staff with respect.
- Be organized and ready to proceed before the judge enters the courtroom. Keep a clean desk, with materials in order. Personnel helping counsel should also watch their conduct, every move, and appearance as well.
- Have exhibits and other evidence at the ready. Demonstrate familiarity and control over the case by the ease with which exhibits and evidence are marshaled.
- Practice opening statement and closing argument before the trial starts.
- Be prepared for changes in plan.
- Expect that opposing counsel is going to try to upset your rhythm, and learn coping techniques.
- Remember that the jury is watching you and your client at all times, especially for reactions when you are not talking.
- Keep the presentation as simple, succinct, and clear as possible.
- Be yourself.

Legal Topics:

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



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VIII. PREPARING FOR COURTROOM PRESENTATION AND PROCEDURE

1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.40

1.40 Preparing for Jury Selection.

Jury selection is the first opportunity to present yourself to the jury, and the only real opportunity to hold a two-way conversation with a prospective juror. After the jury is sworn in, no communication may be made with a juror without court supervision. Use this stage of trial to build a rapport with the jury.



Cross Reference:

Discussion and forms for jury selection, see Ch. 6, Jury Selection.

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral Overview



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1.41 Preparing for Opening Statement.

The opening statement is counsel's first opportunity to tell the client's story directly to the fact finder. Review the list of issues in the checklist and determine how to present a credible, lively, and entertaining presentation. Be sure to practice the opening statement before trial.



Cross Reference:

Discussion and strategy for opening statement, see Ch. 10, Opening Statement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsOpening StatementsGeneral Overview



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1.42 Preparing for Questioning of Witnesses.

Use the analysis of how to review evidentiary issues and marshalling of evidence [*see 1.21 et seq.*] and compare to the issues listed in the checklist. Command of the laws of evidence is essential to witness questioning, and failure to understand them can result in losing the best of cases because the fact finder is prevented from hearing relevant, admissible evidence.



Cross Reference:

Discussion and strategy for questioning witnesses, see Ch. 10, Opening Statement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceTestimonyGeneral Overview



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1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.43

1.43 Preparing for Continuances.

The development of fast track courts and case management guidelines have brought continuances into disfavor. An affirmative showing of good cause is necessary for a continuance [*Cal Rules Ct, Rule 3.1332(c)*; see e.g., *Forrest v. Department of Corporations (2007) 150 CA4th 183, 199-202, 58 CR3d 466*]. Review the grounds for a trial continuance in the checklist and assess the possible impact on calendaring, witness convenience, and whether stipulating to a continuance may result in the favor being returned.

Cross References:

Moving for continuance, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 30, Continuances.

Legal Topics:

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



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1.44 Preparing for Closing Argument.

The closing argument is counsel's last opportunity to persuade the fact finder in his or her client's favor. Review the list of issues in the checklist and determine how to present a credible, lively, and persuasive presentation. Be sure to practice the closing argument before trial.



Cross Reference:

Discussion and strategy for closing argument, see Ch. 15, Closing Argument.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral Overview



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1.45 Preparing for Instructions to Jury.

The objective of jury instructions is to instruct the jury with regard to applicable questions of law raised in the pleadings and during trial, in a thorough, accurate, and unbiased manner, with respect to all theories of each party's case. Review the list of issues in the checklist and determine how court charges jury and whether it is done before or after closing argument.



Cross Reference:

Discussion and strategy for giving jury instructions, see *Ch. 17, Dealing With the Jury*, 17.26 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.46

1.46 Preparing for Jury Deliberations.

Counsel will be involved in the decision-making process if the jurors have questions or request more information during deliberations. Be aware of the possibility of juror misconduct. Review the list of issues in the checklist and be prepared for answering juror questions.



Cross Reference:

Discussion and strategy for jury deliberations and misconduct, see Ch. 17, Dealing With the Jury.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJury Deliberations



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1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.47

1.47 Preparing for Jury Verdicts.

In most uncomplicated cases a general verdict will suit counsel's needs. Counsel should analyze the case at the outset to determine whether it is complex, whether a special verdict is required, or whether CACI special verdicts are available for the circumstances of the case. Review the list of issues in the checklist and be prepared and draft appropriate verdict forms.



Cross Reference:

Discussion and strategy for jury verdicts, see Ch. 18, Jury Verdicts.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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Chapter 1 Preparing for Trial
IX. PREPARING FOR TRIAL MOTIONS

1-1 MB Practice Guide: Trial & Post-Trial Civil Proc 1.48

1.48 CHECKLIST: Preparing for Trial Motions.

☐ Review motion for nonsuit.



Timing:

After plaintiff's opening statement or presentation of evidence.



Brought by defendant.



Defendant challenges legal sufficiency of plaintiff's claims without waiving the right to present defense if motion denied.



Usually a written motion.



Issue is decided as a matter of law.



Cross Reference:

Discussion, strategy, and forms, see *Ch. 12, Motion for Nonsuit and Other Motions During Trial*, 12.03 et seq.



Review motion for judgment.



Timing:

After opponent completes presentation of evidence.

- ☐ Brought by either side.
- ☐ Usually a written motion.
- ☐ Same standards as motion for nonsuit, but for a non-jury trial.

➡ **Cross Reference:**

Discussion, strategy, and forms, see Ch. 13, Motion for Judgment.

- ☐ Review motion to amend pleadings to conform to proof.



Timing:

Any time before judgment is entered.

- ☐ Brought by either side.
- ☐ Court to consider effect of delay, prejudice, and extent issues have already been tried.
- ☐ Usually a written motion.

➡ **Cross Reference:**

Discussion, strategy, and forms, see *Ch. 12, Motion for Nonsuit and Other Motions During Trial*, 12.22 et seq.

- ☐ Review motion to voluntarily dismiss.



Timing:

Any time before judgment is entered.

- ☐ Brought by plaintiff, or defendant if a cross-complaint.
- ☐ Usually a written motion.
- ☐ Dismissal at trial is with prejudice.
- ☐ Dismissal affects pending motions.
- ☐ Dismissal cannot stop sanctions.

- ☐ Dismissal affect attorney's fees.

**Cross Reference:**

Discussion, strategy, and forms, see *Ch. 12, Motion for Nonsuit and Other Motions During Trial*, 12.27 et seq.

- ☐ Review motion to reopen case.

**Timing:**

Any time before judgment is entered.

- ☐ Brought by either side.
- ☐ Usually an oral motion.
- ☐ Consider as response to motion for nonsuit or directed verdict.
- ☐ Include offer of proof.

**Cross Reference:**

Discussion, strategy, and forms, see *Ch. 12, Motion for Nonsuit and Other Motions During Trial*, 12.35 et seq.

- ☐ Review motion for directed verdict.

**Timing:**

After all parties have presented evidence, but plaintiff may make motion after opening statement if defendant's case is without merit, or motion may be made after jury is discharged without reaching a verdict.

- ☐ Brought by either side.
- ☐ Usually a written motion.
- ☐ Issue is decided as a matter of law that reasonable jury could only find for one side.
- ☐ Partial verdict may be granted.
- ☐ Include offer of proof.

 Cross Reference:

Discussion, strategy, and forms, see Ch. 14, Motion for Directed Verdict.

- ☐ Review motion for judgment notwithstanding the verdict.

**Timing:**

After valid jury verdict.

- ☐ Brought by either side.
- ☐ Usually a written motion.
- ☐ Issue is decided as a matter of law that no substantial evidence supports verdict.

 Cross Reference:

Discussion, strategy, and forms, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

- ☐ Review motion for mistrial.

**Timing:**

Any time during trial, but motion must be made promptly once error is discovered.

- ☐ Brought by either side.
- ☐ Usually an oral motion.
- ☐ Grounds: Misconduct of judge, jury, party, witness, and/or counsel.

 Cross Reference:

Discussion, strategy, and forms, see Ch. 22, Mistrial.

- ☐ Review motion for new trial

**Timing:**

May be made before entry of judgment, filed and served within 15 days of date of mailing notice of entry of judgment, or 180 days after entry of judgment.

- ☐ Brought by either party.

☐ Made to trial judge.

☐ Grounds:

☐ Irregularity in proceedings.

☐ Juror misconduct.

☐ Accident or surprise.

☐ New discovered evidence.

☐ Excessive or inadequate damages.

☐ Insufficiency of evidence.

☐ Lack of trial phonographic report.

☐ Loss or destruction of bill of exceptions or statement of case.

☐ Affidavits or declarations required.

 Cross Reference:

Discussion, strategy, and forms, see Ch. 21, Motion for New Trial.

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil
ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureTrialsJudgment as Matter of
LawDirected VerdictsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil
ProcedureTrialsMotions for Mistrial



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1.49 Options and Strategies.

Some of the trial motions listed in the checklist can be well-planned in advance given the state of the evidence and the obvious defects in the opponent's case, such as a motion for directed verdict. These motions should be drafted in advance of trial and amended as events unfold at trial. Having the motion prepared in advance with supporting memorandum helps focus the argument and is a more professional way of interacting with the court and preserving the record.

Other motions, such a motion for mistrial, can be precipitated by sudden and unforeseen events. Even though these motions are predominantly oral, it is important to support the oral motion with a written motion at the earliest opportunity (often the next day). This assures that counsel's motion is more clearly entered into the record and acts as a backup in case there is a dispute about the transcript. The written motion generally will be better organized and focused, and the accompanying points and authorities may improve the party's chances when the motion was taken under advisement or prompt the court to reconsider a prior ruling.

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil
ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureTrialsJudgment as Matter of
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Chapter 2 Public Access to Trials and Records

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.syn

§ 2.syn Synopsis to Chapter 2: Public Access to Trials and Records

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2.07[3] Local Court Rules May Provide Notice and Hearing Requirements for Motion to Close Proceedings.

2.07[4] Trial Court Must Provide Notice to Public of Planned Closure.

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2.07[6] Moving Party Must Overcome Presumption That Civil Trials Are Open to Public.

2.07[6][a] Moving Party Must Assert Overriding Interest That Overcomes Presumption.

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2.08 Party May Base Opposition to Motion to Close Civil Proceedings on Less Restrictive Means to Protect Stated Interest.

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2.13 Court Records Are Presumed Open to Public.

2.14 Only Certain Records May Be Sealed.

2.14[1] Materials Used at Trial May Be Sealed.

2.14[2] Sealing Procedure Does Not Apply to Records Kept Confidential by Law or Certain Discovery Materials.

2.14[3] "Record" Includes Paper and Other Things Filed or Lodged With Court.

2.14[4] "Sealed" Record Is Not Open to Inspection Pursuant to Court Order.

2.14[5] "Lodged" Record Is Temporarily Placed With Court but Not Filed.

2.15 Court Must Order That Records Be Sealed.

2.16 Court May Seal Records on Its Own Motion.

2.17 Bringing Motion or Application for Order Sealing Record.

2.17[1] Moving Party Must File Motion or Application With Points and Authorities and Declaration.

2.17[2] Party Must Serve Motion or Application and Copy of Records to Be Sealed.

2.17[3] San Francisco Court Rules Cover Motion to Seal Records.

2.17[3][a] Noticed Motion Is Required.

2.17[3][b] Motion Must Specify Grounds and Supporting Law.

2.17[4] Local Court Rules or Trial Court Procedure May Require That Motion Be Made to Certain Judge.

2.17[5] Lodging Records With Court.

2.17[5][a] Party Must Generally Lodge Records to Be Sealed With Court.

2.17[5][b] Lodged Record Is Conditionally Under Seal.

2.17[5][c] Papers Must Be Filed in Public Redacted Version and Lodged in Complete Version.

2.17[5][d] San Francisco Court Rules Require Filing Party to File Unredacted Copy and Lodge Complete Copy of Papers, With 15-Day Notice to File Motion to Seal.

2.17[5][e] Party Must Comply With Specific Lodging Procedures, Including Proper Labeling of Documents.

2.17[5][f] Clerk Must Retain but Not File Lodged Record Without Court Order.

2.17[5][g] If Motion to Seal Is Denied, Lodged Records Are Not Filed Unless Moving Party Notifies Clerk Otherwise Within 10 Days.

2.17[6] Moving Party Must Overcome Presumption That Court Records Are Open to Public.

2.17[7] Moving Party Has Burden to Show Why Records Should Be Sealed.

2.18 Court Records May Be Sealed Only If Court Makes Findings.

2.18[1] Court Must Find Specific Facts Consisting of Sufficient Overriding Interest.

2.18[2] Trade Secrets, Statutory Privileges, and Protection From Threatened Harm May Warrant Sealing of Records.

2.18[3] Party Asserting Statutory Privilege Must Waive Privilege If Information Is Essential to Claim.

2.19 Opposing Motion or Application to Seal Record.

2.19[1] Opposing Party May Assert That Insufficient Grounds Exist to Grant Motion.

2.19[2] Opposing Party May Assert That Less Restrictive Methods Are Appropriate.

2.19[3] Opposing Party Must File Papers in Redacted Version and Lodged in Complete Version If Necessary to Prevent Disclosure.

2.19[4] Local Rules Disfavor Sealing of Court Records.

2.19[4][a] San Diego Rules Require Genuine Trade Secret or Privilege, and Particularized Showing Supporting Secrecy.

2.19[4][b] San Francisco Rules Require Showing of Privilege or Protected Interest and Facts Justifying Sealing.

2.20 Order Sealing Records Must Contain Findings and Specificity.

2.20[1] Order Must Set Forth Supporting Facts and Direct Sealing of Specific Records.

2.20[2] Court May Appoint Referee for Voluminous Records.

2.20[3] Order Must State Whether Additional Records Are Sealed.

2.20[4] Order Must State Whether Other Persons May Inspect Sealed Record.

2.20[5] San Francisco Rule Requires That Order Comply With State Rules.

2.20[6] San Francisco Rule Limits Order to Confidential Material and Requires Public File to Designate Location of Sealed Material.

2.21 Prohibition Against Disclosure of Sealed Information.

2.21[1] Publicly Filed Records May Not Reveal Material in Sealed or Potentially Sealed Record.

2.21[2] Parties May Not Disclose Contents of Sealed Records.

2.21[3] San Diego Rule Restricts Viewing of Sealed Records to Parties and Attorneys.

2.22 Custody of Sealed Records.

2.22[1] Clerk Relabels Record As Sealed by Court Order.

2.22[2] Court Must Keep Sealed Records Separate and Secure.

2.22[3] Public Agency May Maintain Its Voluminous Original Records.

2.23 Sealing Order Is Subject to Modification on Changed Circumstances.

2.24 Unsealing Records.

2.24[1] Unsealing of Records Requires Court Order.

2.24[2] Party or Public May Bring Motion, Application, or Petition to Unseal Record.

2.24[3] Unsealing of Records on Court's Own Motion.

2.24[3][a] Court May Unseal Record on Its Own Motion.

2.24[3][b] Court Must Provide Notice to Parties, Who May File Opposition and Response.

2.24[4] Bringing Motion, Application, or Petition to Unseal Record.

2.24[4][a] Person Bringing Motion, Application, or Petition Must File and Serve Notice.

2.24[4][b] File Papers in Public Redacted Version and Sealed in Complete Version.

2.24[5] Court Must Consider Matters Relevant to Sealing of Records.

2.24[6] First Amendment Rights Support Unsealing of Records.

2.25 Order Unsealing Records.

2.25[1] Order Unsealing Records Must State Certain Information, Including Extent to Which Record Is Unsealed.

2.25[2] Order Unsealing Records May Set Conditions.

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2.26 Special Procedure for Discovery Documents Subject to Confidentiality Agreement or Protective Order.

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2.28 Records in Confidential In Camera Proceedings Are Sealed.

2.29 Standard of Review for Orders Sealing or Unsealing Records.

2.29[1] Order Sealing Records Is Reviewed for Abuse of Discretion.

2.29[2] Order Unsealing Records Is Reviewed for Abuse of Discretion.

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2.31 Options and Strategies for Obtaining and Opposing Gag Order.

2.32 Court Can Control Persons Connected With Judicial Proceedings.

2.33 Gag Order Prevents Trial Participants From Discussing Case.

2.34 Attorneys Are Subject to Rules of Professional Conduct Concerning Inappropriate Trial Publicity.

2.35 Seeking Gag Order.

2.35[1] Party May Move for Gag Order.

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2.35[3] Moving Party Must Meet Procedural Conditions.

2.35[4] Moving Party Must Bring Motion in Timely Manner to Prevent Projected Harm.

2.36 Opposing Gag Order.

2.36[1] Grounds for Opposing Gag Order Include First Amendment Rights.

2.36[2] Federal and California Constitutions Protect Free Speech and Freedom of Press.

2.36[3] Prior Restraint Is Disfavored.

2.36[4] Gag Order Is Unconstitutional Unless Constitutional Safeguards Exist.

2.36[5] Opposing Party May Assert That Proposed Order Is Too Broad.

2.36[6] Opposing Party May Propose Less Restrictive Means to Achieve Moving Party's Purpose.

2.36[7] Gag Order Is Not Appropriate to Protect Confidential Information From Disclosure.

2.37 Gag Order Must Include Specific Findings.

2.38 Stipulated Gag Order Is Likely Against Public Policy.

2.39 Reviewing Court Examines Entire Record to Determine Constitutionality of Gag Order.

2.40 CHECKLISTS: Obtaining or Opposing Order to Allow Media to Photograph, Record, and/or Broadcast Trial Court's Proceedings.

2.40[1] Obtaining Order to Allow Media to Photograph, Record, and/or Broadcast Trial Court's Proceedings.

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2.41 Options and Strategies for Obtaining and Opposing Order to Allow Media to Photograph, Record, and/or Broadcast Trial Court's Proceedings.

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2.43 Person May Inconspicuously Record Proceedings for Own Use With Court's Permission.

2.44 Request by Media to Cover Court Proceedings.

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2.44[2] Definitions.

2.44[3] Media May File Judicial Council Form With Proposed Order.

2.44[4] Media Must File Form at Least Five Court Days Before Proceeding.

2.44[5] Judge Assigned to Proceeding or Supervising Calendar Judge Must Rule on Request; Clerk Notifies Parties.

2.44[6] Judge May Hold Hearing on Request.

2.44[7] Court Must Consider Specified Factors.

2.44[8] No Presumption Regarding Media Coverage.

2.45 Local Court Rules May Determine Procedure for Requesting Coverage, and Terms of Coverage.

2.45[1] Local Court Rules or Trial Court Procedure May Apply.

2.45[2] Los Angeles County Court Rules.

2.45[2][a] Submit Request on Judicial Council Form.

2.45[2][b] Submit Special Requests to Film Jury Rooms or Employee Work Areas on Judicial Council Form Five Days Before Filming.

2.45[2][c] Location and Manner of Coverage Are Subject to Limitations.

2.45[2][d] Media Personnel Must Comply With State and Local Rules.

2.45[3] Orange County Court Rules.

2.45[3][a] Filming, Photography, Electronic Recording Prohibited Unless Permitted by Rules.

2.45[3][b] Violator of Rules Is Subject to Sanctions, Including Contempt.

2.45[3][c] Submit Request for Coverage on Judicial Council Form.

2.45[3][d] Location and Manner of Coverage Are Subject to Limitations.

2.45[3][e] Coverage Prohibited in Certain Circumstances.

2.45[3][f] Permission May Be Revoked If Media Vehicle Is Illegally Parked.

2.45[3][g] Media Activities Are Limited to Certain Court Facilities.

2.45[3][h] Make Special Requests for Filming in Writing to Public Information Office.

2.45[4] Santa Barbara Court Rules.

2.45[4][a] Judicial Officers Have Power to Limit Media Occupancy.

2.45[4][b] Court Must Give Media Notice and Opportunity to Be Heard.

2.45[4][c] Aggrieved Party May Seek Modification or Exemption by Written Request.

2.45[4][d] Film or Electronic Coverage Allowed Only on Written Court Order After Request.

2.45[5] Santa Clara Court Rules.

2.45[5][a] Media Must Use Judicial Council Form to Request Coverage.

2.45[5][b] File Forms With Proposed Order at Least Five Court Days Before Proceeding; Clerk Notifies Parties.

2.45[5][c] Judge May Control Location of Media and Equipment.

2.45[5][d] Media May Not Film Jurors; Filming of Other Areas of Courthouse by Permission.

2.45[5][e] Turn Equipment Off During Transportation.

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- 2.46 Media Coverage Not Permitted Under Certain Circumstances, Such As Jury Selection.
- 2.47 Party Opposing Request for Media Coverage May Raise Pertinent Statutory Factors.
- 2.48 Order Granting or Denying Request for Media Coverage.
- 2.48[1] No Findings and Statement of Decision Is Required.
- 2.48[2] Order May Incorporate Local Rule or Presiding Judge's Order.
- 2.48[3] Media Agency Is Responsible for Compliance With Order.
- 2.49 Court May Impose Conditions on Grant of Coverage.
- 2.49[1] Court May Condition Coverage on Media's Payment of Increased Costs.
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- 2.49[3] Court May Require Media to Demonstrate Compliance.
- 2.49[4] Restrictions on Quantity and Placement of Equipment Apply Absent Other Order.
- 2.50 Multiple Media Agencies Must Pool Coverage.
- 2.51 Court That Permits Recording May Not Later Limit Broadcast.
- 2.52 Modifying Order Permitting Media Coverage.
- 2.52[1] Court May Modify Order on Own Motion or on Application.
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- 2.53 Sanctions and Contempt for Violation of Media Coverage Rule or Order.
- 2.54 Notice of Motion and Motion for Order to Close Proceedings.
- 2.55 Order Closing Proceedings.
- 2.56 Notice of Motion and Motion for Order to Seal Records.
- 2.57 Order Sealing Records.
- 2.58 Notice of Motion and Motion for Gag Order.
- 2.59 Gag Order.
- 2.60 Judicial Council Form MC-500--Media Request to Photograph, Record, or Broadcast.
- 2.61 Judicial Council Form MC-510--Order on Media Request to Permit Coverage.



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Chapter 2 Public Access to Trials and Records
I. STRATEGY

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.01

2.01 Scope.

This chapter covers:

- Seeking and opposing an order to close civil court proceedings [*see* 2.03 -2.10].
- Seeking and opposing an order sealing court records [*see* 2.11 -2.29; Forms: *see* 2.56, 2.57].
- Seeking and opposing a gag order [*see* 2.30 -2.39].
- Seeking and opposing an order permitting media taping and broadcasting of trial proceedings [*see* 2.40 -2.53].

Core Statutes:

Cal Rules Ct, Rules 1.150, 2.550, 2.551

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior RestraintGovernmentsCourtsCourt Records



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Cathcart Durie McGee Prather

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Chapter 2 Public Access to Trials and Records
I. STRATEGY

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.02

2.02 Objective and Strategy.

A party seeking or opposing an order that renders court proceedings or records closed or sealed must familiarize itself with the constitutional protections that militate against those orders. The burden is on the party seeking to keep the proceedings or records secret, even temporarily. Media seeking permission to tape or broadcast live court proceedings must familiarize itself with the relevant state and local rules, and be prepared to cooperate with other members of the media seeking the same access.

Particular courts, or even individual judges, may have forms (model forms, approved forms, or the like) that may facilitate the adoption of an order closing or sealing records. Most courts seek to avoid "litigating in secret." However, if both parties stipulate to such orders, and the particular court or judge uses a "form," then adoption of such a practice is easier to achieve.

Note that the court cannot simply adopt a stipulation sealing records [see 2.15, 2.16]. In practice, it is possible to file specific transcripts, portions of transcripts, or certain court documents under seal without an order that affects the complete action. Most courts will agree more readily to specific requests.



Warning:

A party seeking to seal any court records or proceedings, or parts of a proceeding, should note that such protection is not easy to maintain. In a situation in which only certain documents, transcripts, and the like are sealed, a party can still attach a sealed document to an appendix on appeal, refer to a sealed document in court, mark a sealed document as an exhibit, or read from a sealed transcript to impeach a witness. Such acts may open the sealed document to the public.



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 Trials General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free

PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior
Restraint



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Chapter 2 Public Access to Trials and Records
II. OBTAINING OR OPPOSING ORDER TO CLOSE CIVIL TRIAL PROCEEDINGS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.03

2.03 CHECKLISTS: Obtaining or Opposing Order to Close Civil Trial Proceedings.

2.03[1] Obtaining Closure of Civil Trial Proceedings.

- ☐ Move to close proceedings by oral motion when appropriate.

Authority:

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 C4th 1178, 1182, 1217,
86 CR2d 778, 980 P2d 337

Discussion:

See 2.07[2]

- ☐ Bring written motion to close proceedings when appropriate.

- ☐ Draft written motion if time permits, and if appropriate under circumstances.

Authority:

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 C4th 1178, 1182, 1217,
86 CR2d 778, 980 P2d 337

Discussion:

See 2.07[2]

Form:

See 2.54

- ☐ Draft supporting memorandum.

Authority:*Cal Rules Ct, Rule 3.1113(a)***Discussion:***See 2.07[3]*

- ☐ Include grounds for closure in the motion.

Discussion:*See 2.07[6]*

- ☐ Include declarations containing facts sufficient to justify order.

Discussion:*See 2.07[6]*

- ☐ Include the following in support of the motion:

☐ There exists an overriding interest supporting closure and/or sealing.

☐ There is a substantial probability that the interest will be prejudiced absent closure and/or sealing.

☐ The proposed closure and/or sealing is narrowly tailored to serve the overriding interest.

☐ There is no less restrictive means of achieving the overriding interest.

Authority:*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 C4th 1178, 1217-1218, 86 CR2d 778, 980 P2d 337***Discussion:***See 2.07[5]*

- ☐ File motion and notice of motion according to local court rule or trial court preference, e.g., at least two court days before hearing in Santa Barbara County.

Authority:*Santa Barbara Super Ct Rules, Rule 604***Discussion:***See 2.07[3]*

- ☐ Prepare and submit proposed order.

Form:

See 2.55

2.03[2] Opposing Closure of Civil Trial Proceedings.

- ☐ Consult local court rules regarding motion to close proceedings.
 - ☐ If moving party filed formal motion, determine compliance with any applicable local court rules.
 - ☐ Raise procedural defects if applicable.

Authority:

See, e.g., Santa Barbara Super Ct Rules, Rule 604

Discussion:

See 2.07[3]

- ☐ In response to motion to close proceedings, raise following grounds when appropriate:
 - ☐ Moving party failed to overcome presumption that civil trials are open to public.

Authority:

CCP § 124

Discussion:

See 2.05, 2.07[5], [6]

- ☐ No overriding interest supports closure.
- ☐ No substantial probability exists that asserted interest will be prejudiced absent closure.
- ☐ Proposed closure is not narrowly tailored to serve asserted overriding interest.

Authority:

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 C4th 1178, 1217-1218, 86 CR2d 778, 980 P2d 337

Discussion:

See 2.07[5]

- ☐ Less restrictive means exist to protect asserted overriding interest.
 - ☐ Describe less restrictive means short of closure, e.g., use of jury instructions.

Authority:

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 C4th 1178, 1217-1218, 86 CR2d 778, 980 P2d 337

Discussion:

See 2.07[5], 2.08

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree
PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior
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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.04

2.04 Options and Strategies.

A party seeking to close public access to a civil trial proceeding must initially establish that the interest it seeks to protect overrides the constitutional presumption that the proceeding should be open to the public [see CCP § 124]. If a specific statute does not provide for the closure, the party must assert an interest inherent in the case, such as the party's right to a fair trial under the given circumstances, and must ascertain that other factors established by case law favor closure [see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217-1218, 86 CR2d 778, 980 P2d 337] .

Counsel should consult local court rules and trial court preferences regarding the bringing of a motion for closure [see, e.g., Santa Barbara Super Ct Rules, Rule 604]. Counsel should also prepare for a hearing on the motion, which is required [see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217-1218, 86 CR2d 778, 980 P2d 337] .

Cross Reference:

Discussion of bringing motion and preparing for hearing, see 2.07[3], [5], [6].

A party opposing a motion for closure has in its favor the presumption that civil trials are open to the public [see CCP § 124]. Therefore, the opposing party may assert that the moving party has failed to overcome that presumption, and/or failed to make a showing of additional required factors justifying closure [see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217-1218, 86 CR2d 778, 980 P2d 337] .



Strategic Point:

A party opposing a motion for closure may also assert that the information or matters involved are not covered by any applicable privilege or are already in the public domain, either because they were the subject of press reports or otherwise.

Cross Reference:

Discussion of hearing and opposing motion, see 2.07[5], [6], 2.08.

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree
PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior
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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.05

2.05 Civil Trials Are Presumed Open to Public.

Except as provided in *Fam Code* § 214 (private trial in interests of justice and persons involved) or any other provision of law, the sittings of every court must be public [*CCP* § 124; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1192, 86 CR2d 778, 980 P2d 337] . Thus, absent some other provision of law, the public nature of trials is supported by strong public policy [see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217, 86 CR2d 778, 980 P2d 337] .

► Cross Reference:

Discussion of open trials, see *California Forms of Pleading and Practice*, § 551.171 (Matthew Bender).

Example:

CCP § 124 precludes a trial court from excluding the public from the parts of a civil trial that are held outside a jury's presence, even when the court reasonably believes there is a strong likelihood that the proceedings will be widely publicized and might come to the attention of the jurors and jeopardize the litigants' right to a fair trial [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1196-1212, 86 CR2d 778, 980 P2d 337] .

Exception:

In a criminal proceeding, one court of appeals held that *CCP* § 124 is subordinate to the higher right and duty of the court to see to it that a defendant receives a fair trial and has a fair opportunity to present a defense [*Kirstowsky v. Superior Court* (1956) 143 CA2d 745, 753, 300 P2d 163] . It also noted that the press has no greater right to be present than other members of the public.

The First Amendment [US Const, amend I] generally precludes closure of substantive courtroom proceedings in criminal cases unless a trial court provides notice to the public on the question of closure and after a hearing makes specific findings [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1209-1212, 86 CR2d 778, 980 P2d 337 ; see *Press-Enter. Co. v. Superior Court of Cal.* (1984) 464 US 501, 510, 104 S Ct 819, 78 L Ed2d 629] .

► Cross Reference:

Discussion of required findings to overcome presumption, see 2.07[5].

California's "open court" statute [CCP § 124] is consistent with these constitutional requirements, which apply in California to ordinary civil proceedings [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1181, 86 CR2d 778, 980 P2d 337] .



Cross Reference:

Discussion of "open court" statute, see *California Trial Guide*, § 4.10[1] (Matthew Bender).



Warning:

Shifting parts of the proceedings to a bench conference or an in camera proceeding to avoid the right to open trial goes beyond the historically accepted uses of these proceedings, and is unconstitutional [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1216, 86 CR2d 778, 980 P2d 337] .

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior RestraintEvidenceInferences & PresumptionsPresumptions



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.06

2.06 Courts May Allow Closure of Proceedings.

As the Santa Barbara Court Rules provide, proceedings of the superior courts are generally public, but certain exceptions are provided by California statutes and court rules, and may be further specified by order of court. Juvenile and certain other proceedings are closed to the public, and the court may specify closed proceedings and limitations on attendance of witnesses and others, as permitted by law [Santa Barbara Super Ct Rules, Rule 604].

Examples:

A civil proceeding can be closed to conduct a hardship examination of a juror on sensitive issues, to protect trade secrets, minors, or victims of sexual abuse, or to prevent undue embarrassment of a witness.

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior Restraint



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.07

2.07 Seeking Order to Close Civil Trial Proceedings.

2.07[1] Court May Close Proceedings on Its Own Motion or on Motion of Party. A party may move to close proceedings, or the trial court may close proceedings on its own motion [see, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1182, 1217, 86 CR2d 778, 980 P2d 337] .

2.07[2] Motion for Closure May Be Oral or Written. A party may move for closure of trial proceedings by oral or written motion [see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217, 86 CR2d 778, 980 P2d 337] .

Consider:

It is important to include declarations that specify the nature of the interest to be protected and why the party will be injured if the information becomes publicly known.



Trap--Potential Release of Protected Information:

A party moving for closure of trial proceedings should be careful in any written motion, especially in declarations or exhibits, not to include information that is to be protected. Filing the motion puts the paper being filed into the public domain unless there is a prior effort to seal the moving and opposing papers. Seek an ex parte hearing under the applicable court's rules to permit the filing of the motion and all related papers to be made under seal.



Cross Reference:

Discussion of motion to close proceedings, see *California Trial Guide*, § 4.11 (Matthew Bender).



Strategic Point--Moving Party:

The moving party should narrow the request for closure to shield only the proceedings necessary to protect the request's stated purpose. Further, to the extent possible, the moving party should narrow the request to specific information or documents, rather than the entire proceeding.

2.07[3] Local Court Rules May Provide Notice and Hearing Requirements for Motion to Close Proceedings.

Counsel should consult local court rules and trial court preferences to determine the requirements for notice of a motion to close court proceedings [see, e.g., Santa Barbara Super Ct Rules, Rule 604; see also *Cal Rules Ct, Rule 3.1113(a)* (supporting memorandum)].

In Santa Barbara County, when an order of the court is sought for closure of an open proceeding or for opening of a closed proceeding, the party seeking the order must file written notice of motion for opening or closure of the proceeding at least two court days before the subject hearing. The motion will be scheduled to be heard at least one day before the subject hearing. Motions for closure of hearings calendared on short notice, such as arraignments or OR/BR proceedings, may be heard on shorter notice at the discretion of the court [Santa Barbara Super Ct Rules, Rule 604].

2.07[4] Trial Court Must Provide Notice to Public of Planned Closure. To overcome the presumption of open proceedings, a trial court must provide notice to the public of the contemplated closure. When a motion to close a proceeding is made in open court (or at a closed bench conference held during open court proceedings), adequate notice of the contemplated closure is provided if the trial judge thereafter announces in open court that he or she plans to hold (or to consider holding) that proceeding in closed session. When a motion seeking closure is made in a written filing, adequate notice is provided by publicly docketing the motion reasonably in advance of a determination on it. In either circumstance, the notice requirement should not impose an onerous or undue burden on trial courts [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217, 86 CR2d 778, 980 P2d 337] .

➡ **Cross References:**

Discussion of notice of closure, see *California Forms of Pleading and Practice*, § 551.172 (Matthew Bender). *California Trial Guide*, § 4.10[2] (Matthew Bender).

2.07[5] Court Must Hold Hearing and Make Specific Findings. Before substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find all of the following [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217-1218, 86 CR2d 778, 980 P2d 337] :

- There is an overriding interest supporting closure and/or sealing.
- There is a substantial probability that the interest will be prejudiced absent closure and/or sealing.
- The proposed closure and/or sealing is narrowly tailored to serve the overriding interest.
- There is no less restrictive means of achieving the overriding interest.

➡ **Cross Reference:**

Discussion of overriding interest, see 2.07[6][a].

2.07[6] Moving Party Must Overcome Presumption That Civil Trials Are Open to Public.

2.07[6][a] Moving Party Must Assert Overriding Interest That Overcomes Presumption. Substantive courtroom proceedings in ordinary civil cases are presumptively open [CCP § 124; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217, 86 CR2d 778, 980 P2d 337] . A party can overcome the presumption of openness only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest must be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered [*Press-Enter. Co. v. Superior Court of Cal.* (1984) 464 US 501, 510, 104 S Ct 819, 78 L Ed2d 629 ; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1204, 86 CR2d 778, 980 P2d 337] .

► Cross References:

Discussion of presumption, see 2.05.

Discussion of overcoming presumption, see *California Trial Guide*, § 4.11[3] (Matthew Bender).

2.07[6][b] Overriding Interests That Can Overcome Presumption. Overriding interests that can overcome the presumption of open court proceedings include the following:

- The need for a fair trial [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1223, 86 CR2d 778, 980 P2d 337] .
- The interests of public safety and decorum [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1222, 86 CR2d 778, 980 P2d 337] .
- The need to protect trade secrets [see *Evid Code* § 1062; *Publicker Indus., Inc., v. Cohen* (3d Cir 1984) 733 F2d 1059, 1073 (cited by NBC court)].
- The need to protect the privacy of minors and jurors [*Globe Newspaper Co. v. Superior Court* (1982) 457 US 596, 607, 102 S Ct 2613, 73 L Ed2d 248 ; *Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 372, 74 CR2d 69] .

The moving party should include declarations containing facts sufficient to justify the order along with the motion [see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1218, 86 CR2d 778, 980 P2d 337] .

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureTrialsGeneral
OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic
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2.08 Party May Base Opposition to Motion to Close Civil Proceedings on Less Restrictive Means to Protect Stated Interest.

The media such as a newspaper organization, seeking open access to court proceedings, commonly brings opposition to a motion to close proceedings. In any case, a person opposing closure of a civil proceeding may assert that there are less restrictive means, short of closure, of achieving the overriding interest [see, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1181, 86 CR2d 778, 980 P2d 337] .

Example:

In a high-profile case against a movie star, rather than closing all proceedings outside the jury's presence to assure the parties' right to a fair trial (i.e., ensuring that the jury would not be exposed to inadmissible evidence), the court could have (1) allowed instructions to the jury to disregard press accounts or (2) sequestered the jury [see *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1223, 86 CR2d 778, 980 P2d 337] .



Cross Reference:

Discussion of less restrictive means, see *California Trial Guide*, § 4.11 (Matthew Bender).

Legal Topics:

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

Civil Procedure Trials General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.09

2.09 Santa Barbara Court Rules Provide for Sign Posted on Courtroom Door Indicating Closure.

Closed court proceedings will, ordinarily, be noticed in the form of a "Courtroom Closed" or other appropriate sign posted on the door of the courtroom where the closed proceedings are heard [Santa Barbara Super Ct Rules, Rule 604].



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.10

2.10 Obtain Review of Order to Close Civil Proceedings by Writ of Mandate or Writ of Prohibition.

If a judge orders civil proceedings closed, an interested person may seek to open the proceedings pursuant to a writ of mandate or writ of prohibition [see, e.g., *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1181, 1186, 86 CR2d 778, 980 P2d 337] .



Cross Reference:

Discussion of review of closure order, see *California Trial Guide*, § 4.10[3] (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil
ProcedureRemediesWritsCommon Law WritsProhibitionConstitutional LawBill of RightsFundamental
FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial &
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III. OBTAINING OR OPPOSING ORDER TO SEAL RECORDS AND UNSEAL RECORDS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.11

2.11 CHECKLISTS: Obtaining or Opposing Order to Seal Records and Unseal Records.

2.11[1] Bringing Motion to Seal Records.

☐ Determine whether grounds exist to overcome presumption that records are open to public:

- ☐ Overriding interest overcomes right of public access to record.
- ☐ Overriding interest supports sealing record.
- ☐ There is substantial probability that overriding interest will be prejudiced if record is not sealed.
- ☐ Proposed sealing is narrowly tailored.
- ☐ No less restrictive means exist to achieve overriding interest.

Authority:

Cal Rules Ct, Rule 2.550(d)

Discussion:

See 2.17[6]

☐ Draft notice of motion and motion for order sealing records.

Authority:

Cal Rules Ct, Rule 2.551(b)

Discussion:

See 2. 17

Form:

See 2.56

- ☐ Draft supporting memorandum.

Authority:*Cal Rules Ct, Rules 2.551(b)(1), 3.1113(a)***Discussion:**

See 2.17[1]

- ☐ Draft supporting affidavit or declaration.

- ☐ Raise the following points:

- ☐ Overriding interest overcomes right of public access to record.

- ☐ Substantial probability exists that interest will be prejudiced if records are not sealed.

- ☐ Proposed sealing is narrowly tailored.

- ☐ No less restrictive means will protect overriding interest.

Authority:*CCP § 2015.5; Cal Rules Ct, Rules 2.550(d), 2.551(b)(1)***Discussion:**

See 2.17[1]

- ☐ If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal.

Authority:*Cal Rules Ct, Rule 2.551(b)(5)***Discussion:**

See 2.17[5]

- ☐ If another party to the action already possesses copies of the records to be placed under seal, prepare redacted version for service on that party.

Authority:

Cal Rules Ct, Rule 2.551(b)(2)

Discussion:

See 2.17[2]

- ☐ Prepare envelope or container for records so they can be lodged with the court pending outcome of motion.

Authority:

Cal Rules Ct, Rule 2.551(d)

Discussion:

See 2.17[5]

- ☐ Prepare proposed order sealing records.

Authority:

Cal Rules Ct, Rules 2.550(d), (e), 2.551(e)

Discussion:

See 2.20

Form:

See 2.57

2.11[2] Opposing Motion to Seal Records.

- ☐ Determine sufficiency of motion papers.
- ☐ Determine whether moving party filed and served sufficient noticed motion, including required supporting memorandum and declaration.
- ☐ Determine whether moving party specified grounds for motion and legal authority authorizing confidentiality of each record sought to be sealed.
- ☐ Raise procedural defects if applicable.

Authority:

Cal Rules Ct, Rule 2.551(b)

Discussion:

See 2.17

- ☐ Determine whether moving party complied with any applicable local court rules pertaining to motion to seal records.

Authority:

See, e.g., San Francisco Super Ct Rules, Rule 10.5.D

Discussion:

See 2.17[3], [4]

☐ In response to motion to seal records, raise following grounds when appropriate:

☐ Particular records described in motion are not allowed to be sealed.

☐ Records are required by law to be kept confidential.

☐ Records are discovery materials not subject to sealing procedure.

Authority:

See *Cal Rules Ct, Rule 2.550(a)*

Discussion:

See 2.14

☐ Raise any grounds in opposition based on any applicable local court rules disfavoring sealing.

Authority:

See, e.g., San Diego Super Ct Rules, Rule 2.48

Discussion:

See 2.19[4]

☐ Moving party failed to overcome presumption that court records are open to public.

Authority:

Cal Rules Ct, Rule 2.550(c)

Discussion:

See 2.13, 2.17[6]

☐ No overriding interest overcomes right of public access to record.

☐ No overriding interest supports sealing record.



Strategic Point:

The Los Angeles County Superior Court is now enforcing *Cal Rules Ct, Rule 2.551(b)(3)*, requiring a motion to seal files. If no motion is made, the clerk will remove the the subject documents from the sealed envelope in which they were lodged and place them in the public file. A party seeking to maintain the sealed status of any documents lodged with the court must make a motion therefor under *Cal Rules Ct, Rule 2.551(b)* [see 2.26].

☐ No substantial probability that asserted overriding interest will be prejudiced if record is not sealed.

- ☐ Proposed sealing is too broad.
- ☐ Less restrictive means exist to achieve asserted overriding interest.

Authority:

Cal Rules Ct, Rule 2.550(d)

Discussion:

See 2.18, 2.19

- ☐ File opposition papers in public redacted version, and lodge complete version conditionally under seal if necessary to prevent disclosure.

Authority:

Cal Rules Ct, Rule 2.551(b)(5)

Discussion:

See 2.19[3]

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice General Overview Governments Courts Court Records



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III. OBTAINING OR OPPOSING ORDER TO SEAL RECORDS AND UNSEAL RECORDS

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2.12 Options and Strategies.

A party seeking to have records sealed must overcome the presumption that all court records and proceedings are open to the public [see *Cal Rules Ct, Rule 2.550(d)(1)*; *Mary R. v. B. & R. Corp. (1983) 149 CA3d 308, 317, 196 CR 871*]. The court must limit its denial of access to records by narrow and well-defined orders. Thus, the party seeking to have records sealed must demonstrate a compelling reason why and to what extent the records should be made private [*H.B. Fuller Company v. Doe (2007) 151 CA4th 879, 886, 60 CR3d 501*].



Strategic Point:

A party seeking to seal records faces a strong presumption against sealing. One court of appeals has pointed out that only under "extremely limited circumstances, a party to a civil action may file documents sealed from public view" [*Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 CA4th 294, 316, 106 CR2d 906*].

Before moving for an order to seal records, counsel working to obtain the sealing must do the following:

1. Consider the elements that must be established [*Cal Rules Ct, Rule 2.550(d)*].
2. Ascertain that privacy or confidentiality has been preserved in all dealings with the information sought to be sealed [see *In re Providian Credit Card Cases (2002) 96 CA4th 292, 303-310, 116 CR2d 833* (information had not been treated with safeguards normally accorded trade secrets, thus court found it was not trade secret and would not seal records)].
3. Ascertain that the right to confidentiality has not been waived in another context [see *Universal City Studios, Inc. v. Superior Court (2003) 110 CA4th 1273, 1286, 2 CR3d 484* (showing of financial and competitive harm would have been sufficient to seal records if proponent had not voluntarily disclosed them in another proceeding)].
4. Ensure that no less restrictive means would suffice to protect the client's interest [see, e.g., *Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1242-1245, 101 CR2d 558* (redacting names and assigning each patient a number would be sufficient to protect patient privacy, support denial of gag order, and allow remainder

of declarations regarding physician's conduct with respect to patients to remain accessible)].

5. Ascertain whether the information or records are subject to the California constitutional right to privacy attaching to financial information, and whether *Gov Code § 7470 et seq.* provides a basis to seek to restrict dissemination of the information sought.

The party opposing sealing will want to argue that the above procedures and requirement have already been compromised, and thus that the material does not qualify for sealing.



Cross Reference:

See 2.18.

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Evidence Inferences & Presumptions Presumptions Governments Courts Court Records



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2.13 Court Records Are Presumed Open to Public.

Unless confidentiality is required by law, court records are presumed to be open to the public [*Cal Rules Ct, Rule 2.550(c)*; see *H.B. Fuller Company v. Doe (2007) 151 CA4th 879, 886, 60 CR3d 501*].

Judge's Perspective:

There is a trend in the law disfavoring the sealing of records. Many judges will resist sealing of records, especially in cases involving product liability when there is a strong public safety interest in full disclosure.

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Evidence Inferences & Presumptions Presumptions Governments Courts Court Records Torts Products Liability Privacy



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2.14 Only Certain Records May Be Sealed.

2.14[1] Materials Used at Trial May Be Sealed. The rules for sealing records [*see Cal Rules Ct, Rule 2.550 et seq.*] apply to records sealed or proposed to be sealed by court order [*Cal Rules Ct, Rule 2.550(a)*]. They apply to both civil and criminal cases [*see Advisory Committee Comment to Cal Rules Ct, Rule 2.550*].

The rules apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings [*Cal Rules Ct, Rule 2.550(a)*].

Distinguish:

The sealing of records on appeal is a separate matter, and is determined under Cal Rules Ct, Rule 2.160.



Cross References:

Discussion of what may be sealed, see *California Forms of Pleading and Practice*, § 190.37 (Matthew Bender). *California Trial Guide*, § 4.01[3] (Matthew Bender).

2.14[2] Sealing Procedure Does Not Apply to Records Kept Confidential by Law or Certain Discovery Materials. The rules for sealing records [*see Cal Rules Ct, Rule 2.550 et seq.*] do not apply to records that are required to be kept confidential by law, nor do they apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings [*Cal Rules Ct, Rule 2.550(a)*].

Examples:

Examples of confidential records to which public access is restricted by law are records of the family conciliation court [*see Fam Code § 1818(b)*], and in fee waiver applications [*Cal Rules Ct, Rule 3.54; see Advisory Committee Comment to Cal Rules Ct, Rule 2.550*].

Distinguish:

The mere presence of claimed trade secrets does not carry a mandatory confidentiality requirement. That requirement is imposed only in actions initiated pursuant to the Uniform Trade Secrets Act [*see CC § 3426 et seq.*] for misappropriation of trade secrets [*see CC § 3426.5; In re Providian Credit Card Cases (2002) 96 CA4th 292, 298-299, 116 CR2d 833*].

► Cross References:

Discussion of records kept confidential by law, see *California Forms of Pleading and Practice*, § 190.37 (Matthew Bender).

California Trial Guide, § 4.01[1] (Matthew Bender).

San Francisco Super Ct Rules, Rule 10.5.D and 10.5.E do not apply to records that are required to be kept confidential by law, nor to discovery motions and records filed or lodged in connection with discovery motions. A party seeking to file under seal records that are required to be kept confidential by law may do so only on an order issued by the presiding judge or the designee of the presiding judge, or by the judge assigned to hear the matter to which the records relate. A party seeking to file under seal records in connection with a discovery motion may do so only under the following conditions [San Francisco Super Ct Rules, Rule 10.5.H]:

- If the motion is to be heard in a Discovery Department and is identified as required by San Francisco Super Ct Rules, Rule 8.14(G); or
- If the motion is to be heard in another department, on an order issued by the presiding judge or the designee of the presiding judge, or by the judge assigned to hear the matter to which the records relate.

► Cross Reference:

See 2.17[3].



Strategic Point:

In San Francisco, an order authorizing the filing of records under seal pursuant to San Francisco Super Ct Rules, Rule 10.5.H may be requested by an ex parte application [San Francisco Super Ct Rules, Rule 10.5.H].

A record filed under seal on the ground that it relates to a discovery motion, and without the court having made the findings specified in *Cal Rules Ct, Rule 2.550(d)*, may not be considered for any other purpose unless the record is unsealed or the court enters an order in conformity with *Cal Rules Ct, Rules 2.550(d), (e)* and *2.551(e)* [San Francisco Super Ct Rules, Rule 10.5.H].

2.14[3] "Record" Includes Paper and Other Things Filed or Lodged With Court. Unless the context indicates otherwise, "record" as used in *Cal Rules Ct, Rule 2.550* means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court [*Cal Rules Ct, Rule 2.550(b)(1)*].

2.14[4] "Sealed" Record Is Not Open to Inspection Pursuant to Court Order. A "sealed" record is a record that by court order is not open to inspection by the public [*Cal Rules Ct, Rule 2.550(b)(2)*].

2.14[5] "Lodged" Record Is Temporarily Placed With Court but Not Filed. A "lodged" record is a record that is temporarily placed or deposited with the court but not filed [*Cal Rules Ct, Rule 2.550(b)(3)*].

🔪 Judge's Perspective:

A "filed" record is placed in the court file and remains there in the same manner as any other pleading. "Lodged" documents usually consist of exhibits used in conjunction with motion pleadings and are listed on a notice of lodgment. On completion of the motion, lodged documents are returned to the custody of the party that submitted them for consideration and do not remain in the court file. Only the notice of lodgment listing the documents remains in the file. In this way the court file is not needlessly cluttered

with documents that are often voluminous and are used to support legal arguments and that provide the court with convenient access for the purpose of a given motion. Lodged documents might even include documents such as the complaint, answer, or cross complaint that are contained elsewhere in the court file. Lodged documents also could include declarations, photographs, or reports of experts.

Examples--Filed and Lodged Documents:

An exhibit used by the court or jury in a case would be filed. When a witness is cross-examined and a transcript of the deposition is used as a prior inconsistent statement, the transcript is lodged with the court and not filed. The statement read into the record is part of the record, but the transcript, containing testimony and material not admitted, is used by the court only during the impeachment and then returned, after use or at the end of trial.

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public
Access Governments Courts Court Records Trade Secrets Law Protection of Secrecy General Overview



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2.15 Court Must Order That Records Be Sealed.

A record must not be filed under seal without a court order [*Cal Rules Ct, Rule 2.551(a)*]. The court may not permit a record to be filed under seal based solely on the agreement or stipulation of the parties [*Cal Rules Ct, Rule 2.551(a)*].

Cross Reference:

Discussion of requirement for order, see *California Trial Guide*, § 4.01[1] (Matthew Bender).

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public
Access Governments Courts Court Records



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2.16 Court May Seal Records on Its Own Motion.

The court may seal records on its own motion [*see, e.g., Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 372, 74 CR2d 69 (decision to seal settlement terms in civil case involving minor was "a matter of this court's independent obligation to the minor to do what's fair to the minor")].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesGeneral OverviewConstitutional LawBill of RightsFundamental
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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.17

2.17 Bringing Motion or Application for Order Sealing Record.

2.17[1] Moving Party Must File Motion or Application With Points and Authorities and Declaration. A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing [*Cal Rules Ct, Rule 2.551(b)(1)*].



Cross Reference:

Form of noticed motion to seal records, see 2.56.



Strategic Point:

If the case involves a request for injunctive relief related to the motion to seal records, the trial court should decide both procedures consistently, i.e., if the court allows the injunctive relief, it should also seal the related records [*see Gilbert v. National Enquirer, Inc. (1996) 43 CA4th 1135, 1149, 51 CR2d 91* (trial court improperly issued preliminary injunction concerning defamation claim, but denied motion to seal related records; because preliminary-injunction order was reversed on appeal, party could not then assert that motion to seal was improperly denied)].

2.17[2] Party Must Serve Motion or Application and Copy of Records to Be Sealed. A copy of the motion or application must be served on all parties who have appeared in the case. Unless the court orders otherwise, any party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers as well as a redacted version [*Cal Rules Ct, Rule 2.551(b)(2)*].

Consider:

A redacted version of a paper has the confidential or sensitive information omitted or defaced so as to prevent reading. An unredacted version is a complete version [*see Bellas v. Superior Court (2000) 85 CA4th 636, 649, 102 CR2d 380*].

2.17[3] San Francisco Court Rules Cover Motion to Seal Records.

2.17[3][a] Noticed Motion Is Required. Except as stated in San Francisco Super Ct Rules, Rule 10.5.H, a party requesting that a record be filed under seal must file a noticed motion for an order sealing the specific record in compliance with *Cal Rules Ct, Rule 2.551(b)* [San Francisco Super Ct Rules, Rule 10.5.D].



Strategic Point:

Any provision in a protective order that authorizes the filing of records under seal without having to obtain an order pursuant to a motion filed in compliance with San Francisco Super Ct Rules, Rule 10.5 and based on the findings specified in *Cal Rules Ct, Rule 2.550(d)* is not sufficient to authorize the filing of any record under seal except as permitted in San Francisco Super Ct Rules, Rule 10.5.H. However, any record that was filed under seal before July 1, 2001, must remain under seal unless an order specifically unsealing that record is entered [San Francisco Super Ct Rules, Rule 10.5.D].



Cross References:

Ex parte request under San Francisco Super Ct Rules, Rule 10.5.H, see 2.14[2].

Motion to seal records, see *California Trial Guide*, §§ 4.01[2], 4.02 (Matthew Bender).

2.17[3][b] Motion Must Specify Grounds and Supporting Law. A motion for an order sealing a record must specify the grounds and provision of law authorizing confidentiality of each record sought to be placed under seal [San Francisco Super Ct Rules, Rule 10.5.F]. An order sealing a record must comply with *Cal Rules Ct, Rules 2.550(d), (e)* and 2.551(e) [San Francisco Super Ct Rules, Rule 10.5.F].

2.17[4] Local Court Rules or Trial Court Procedure May Require That Motion Be Made to Certain Judge. Counsel should consult local court rules and trial court preferences to determine the judge to whom the motion for an order sealing court records should be made.

In Los Angeles County, motions for sealing orders or approval of confidentiality agreements are to be made to the presiding judge or supervising judge, not to the temporary judge or referee [Los Angeles Super Ct Rules, Rule 12.20].

In San Francisco County, a motion filed pursuant to San Francisco Super Ct Rules, Rule 10.5.D and 10.5.E must be noticed for hearing in the department in which the matter to which the records relate will be heard. If this department cannot be ascertained when the motion is filed, the motion must be noticed for hearing before the presiding judge or before any judge designated by the presiding judge to hear the motion [San Francisco Super Ct Rules, Rule 10.5.G].

2.17[5] Lodging Records With Court.

2.17[5][a] Party Must Generally Lodge Records to Be Sealed With Court. The party requesting that a record be filed under seal must lodge the record with the court under *Cal Rules Ct, Rule 2.551(d)* when the motion or application is made, unless good cause exists for not lodging it, or unless the record has previously been lodged with respect to discovery records subject to a confidentiality agreement or protective order [*Cal Rules Ct, Rule 2.551(b)(4)*]; see *Cal Rules Ct, Rule 2.551(b)(3)(A)(i)*].



Trap--Potential Release of Confidential Information:

When material is lodged in support of the motion, there is a risk that the information will be released if the motion fails or if the information is referred to or disclosed in other court documents or in the proceedings that are not themselves sealed.



Cross References:

Proper labeling and packaging of records conditionally under seal, see 2.17[5][e].

Lodging records, see *California Trial Guide*, § 4.01[2] (Matthew Bender).

2.17[5][b] Lodged Record Is Conditionally Under Seal. Pending the determination of the motion or application, the lodged record is conditionally under seal [*Cal Rules Ct, Rule 2.551(b)(4)*].



Trap--Potential Release of Confidential Information:

Material conditionally under seal becomes part of the public record if the motion or application is denied. Counsel should try to obtain from the court the right to withdraw material if the motion fails, as during an ex parte hearing on whether the motion itself can be filed under seal. Although the clerk must keep and not file such material, counsel should remember to ask for the material and to take steps to make sure the material is not inadvertently filed. Counsel must also continually monitor filings by an adversary that may contain his/her confidential information, and move to have those filings sealed as appropriate.



Cross Reference:

Discussion of lodging records with the court, see 2.17[5][e], [f].



Strategic Point:

In appropriate circumstances, the moving party can ask for in camera review of sensitive documents [see *General Dynamics Corp. v. Superior Court* (1994) 7 C4th 1164, 1191, 32 CR2d 1, 876 P2d 487].



Cross Reference:

Discussion of in camera proceedings, see 2.28.

2.17[5][c] Papers Must Be Filed in Public Redacted Version and Lodged in Complete Version. If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal [*Cal Rules Ct, Rule 2.551(b)(5)*].

Examples:

Filing in a redacted version and lodging in a complete version is often required when referring to or quoting materials in documents produced pursuant to a protective order requiring that the documents and information from the documents be filed under seal.

Also, in an action for an accounting between two partners, parts of a financial statement unrelated to the issue in dispute may be subject to sealing. If the part relates to costs of research and development of highly sensitive, commercially valuable products the disclosure of which would aid competitors, but the amount of which is not disputed in the accounting, that information could be redacted from the exhibits attached to declarations or filed. Although the information contained in the financial statements not pertinent to the matter might be redacted, the complete financial statements must be lodged.

2.17[5][d] San Francisco Court Rules Require Filing Party to File Unredacted Copy and Lodge Complete Copy of Papers, With 15-Day Notice to File Motion to Seal. If a pleading, memorandum of points and authorities, or affidavit or declaration contains or discloses the content of records designated as confidential pursuant to a protective order, the filing party must concurrently file redacted copies, lodge unredacted originals as specified in *Cal Rules Ct, Rule 2.551(d)*. If the record was designated confidential by another party, the filing party must also give written notice to the party that designated the records confidential that the records will be placed in the public file unless within 15 days of the notice that party files a motion for a sealing order in compliance with *Cal Rules Ct, Rule 2.551(b)* and the

local rule [San Francisco Super Ct Rules, Rule 10.5.E].

 Cross Reference:

Discussion of protective orders, see *California Forms of Pleading and Practice*, § 190.30 *et seq.* (Matthew Bender).

A motion filed pursuant to San Francisco Super Ct Rules, Rule 10.5.D and 10.5.E must be noticed for hearing in the department in which the matter to which the records relate will be heard. If this department cannot be ascertained when the motion is filed, the motion must be noticed for hearing before the presiding judge or before any judge designated by the presiding judge to hear the motion [San Francisco Super Ct Rules, Rule 10.5.G].

If the party that designated the records confidential fails to file the motion within 15 days (unless extended by the court for good cause), that party is deemed to have consented to the public filing of the record and the clerk must remove the originals from the envelope labeled "CONDITIONALLY UNDER SEAL" and file the complete pleading, supporting memorandum, or affidavit or declaration in the public file. If the party that designated the records confidential does file the motion within 15 days (or within any extension ordered by the court), the originals must remain conditionally under seal until the court rules on the motion, and thereafter must be filed in the manner directed by the court [San Francisco Super Ct Rules, Rule 10.5.E].

2.17[5][e] Party Must Comply With Specific Lodging Procedures, Including Proper Labeling of Documents.

To lodge a record with the court, the record is put in an envelope or other appropriate container, sealed in the envelope or container, and lodged with the court [*Cal Rules Ct, Rule 2.551(d)(1)*]. That envelope or container must be labeled "CONDITIONALLY UNDER SEAL" [*Cal Rules Ct, Rule 2.551(d)(2)*].

The party submitting the lodged record must affix to the envelope or container a cover sheet that contains all the information required on a caption page under *Cal Rules Ct, Rule 2.111*; and states that the enclosed record is subject to a motion or an application to file the record under seal [*Cal Rules Ct, Rule 2.551(d)(3)*].

 Warning:

An error in the process of lodging or filing a document for sealing by the court could result in a significant release of confidential information. Counsel should be extremely careful in the process. Particularly in the case of information that has a high economic value (a trade secret, for example) that would result in serious damages if the information is made public, counsel should personally handle the placement of a cover sheet, securing the envelope, and filing the material. This task should not be left to a non-attorney, and certainly not to a messenger service.

2.17[5][f] Clerk Must Retain but Not File Lodged Record Without Court Order. On receipt of a record lodged under *Cal Rules Ct, Rule 2.551*, the clerk must endorse the affixed cover sheet with the date of its receipt and must retain but not file the record unless the court orders it filed [*Cal Rules Ct, Rule 2.551(d)(4)*].

2.17[5][g] If Motion to Seal Is Denied, Lodged Records Are Not Filed Unless Moving Party Notifies Clerk Otherwise Within 10 Days. If the court denies the motion or application to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed [*Cal Rules Ct, Rule 2.551(b)(6)*].

2.17[6] Moving Party Must Overcome Presumption That Court Records Are Open to Public. To obtain the sealing of court records, the moving party must overcome the presumption that the records are open to the public [see *Cal Rules Ct, Rules 2.550(c)*].

 Cross References:

Discussion of presumption of openness, see 2.13.

Overcoming presumption, see *California Trial Guide*, § 4.02[3] (Matthew Bender).

2.17[7] Moving Party Has Burden to Show Why Records Should Be Sealed. The party seeking to deny public access to court records has the burden to establish compelling reasons why and to what extent the records should be sealed [*Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 374, 74 CR2d 69] .



Strategic Point:

It is not clear what standard of proof the moving party must meet [see *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 CA4th 294, 315-317, 106 CR2d 906] . In view of the extremely discretionary power of the court to determine whether to seal the information, the movant's burden is probably high; thus, a declaration should set forth the general nature of the information and why it meets the appropriate standard. The moving party should not withhold any effort, information, or argument if sealing the record is truly critical.



Cross Reference:

Discussion of burden, see *California Trial Guide*, § 4.02[4] (Matthew Bender).

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice Supporting Memoranda Civil Procedure Remedies Injunctions General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Governments Courts Court Records Trade Secrets Law General Overview



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2.18 Court Records May Be Sealed Only If Court Makes Findings.

2.18[1] Court Must Find Specific Facts Consisting of Sufficient Overriding Interest. The court may order that a record be filed under seal only if it expressly finds facts that establish all of the following [*Cal Rules Ct, Rule 2.550(d)*]:

- There is an overriding interest that overcomes the right of public access to the record.
- The overriding interest supports sealing the record.
- A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed.
- The proposed sealing is narrowly tailored.
- No less restrictive means exist to achieve the overriding interest.

➡ Cross Reference:

Discussion of findings, see *California Forms of Pleading and Practice*, § 551.173[4].

California Trial Guide, § 4.02[3].

Policy reasons to restrict access to public records are "anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel has a tendency to be injurious to the public or the public good" [*Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 373, 74 CR2d 69] .

2.18[2] Trade Secrets, Statutory Privileges, and Protection From Threatened Harm May Warrant Sealing of Records. The California Rules of Court do not define what constitutes an overriding interest, leaving this determination to the courts. Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and

privacy interests, when properly asserted and not waived, may constitute overriding interests [see Advisory Committee Comment to *Cal Rules Ct, Rule 2.550*; see also *General Dynamics Corp. v. Superior Court* (1994) 7 C4th 1164, 1191, 32 CR2d 1, 876 P2d 487 (trial court should use sealing, protective orders, and other procedures to protect attorney-client privilege when attorney is plaintiff)]. Records may also be sealed based on the fear that public disclosure would cause persons physical harm [see *Estate of Hearst* (1977) 67 CA3d 777, 781-785, 136 CR 821] .

A party may assert an overriding interest in favor of sealing court records based on a binding contractual agreement not to disclose certain information [see *Universal City Studios, Inc. v. Superior Court* (2003) 110 CA4th 1273, 1283, 2 CR3d 484 (agreement lodged with court was redacted to extent that negated overriding interest in nondisclosure)]. A settlement agreement containing a confidentiality provision cannot be sealed, however, unless there is a showing of serious injury that would result from public disclosure [*Huffy Corp. v. Superior Court* (2003) 112 CA4th 97, 106, 4 CR3d 823] .

Examples--Overriding Interests:

Successful overriding interests may include:

- Trade secrets [see *In re Providian Credit Card Cases* (2002) 96 CA4th 292, 303-310, 116 CR2d 833] .
- Threats to person and property [see *Estate of Hearst* (1977) 67 CA3d 777, 781-785, 136 CR 821 (sealing testamentary trust documents to protect identities of lesser known beneficiaries of famous testator was warranted if limited in scope and purpose was to prevent harm to life or property of members of wealthy family whose heiress had been kidnaped in highly publicized criminal case)].

Examples--Insufficient Interests:

Interests insufficient to override the presumption of open records include:

- The assertion of an interest in a fair trial, absent a supporting proposition that prejudice to that interest was substantially probable absent closure and temporary sealing [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1222, 86 CR2d 778, 980 P2d 337] .
- The assertion of a minor's privacy interest in probate proceedings for the minor's compromise of a negligence claim against a school district, when the identities and circumstances of the violent crime against the minor had already been disclosed, and no privacy interest remained to prevent the unsealing of a court record that contained merely settlement terms [*Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 375-376, 74 CR2d 69] .
- The assertion of a purported trade secret that did not qualify as such either because of the subject matter, because it had already been disclosed, or because the party did not take reasonable efforts to protect it [see *In re Providian Credit Card Cases* (2002) 96 CA4th 292, 304-305, 116 CR2d 833 ("trade secrets" used by telemarketers were actually sales pitches); see also CC § 3426.1(d) (definition)].

2.18[3] Party Asserting Statutory Privilege Must Waive Privilege If Information Is Essential to Claim.

Although an overriding interest may consist of a statutory privilege, when a party asserting a claim invokes a privilege to withhold crucial evidence, the policy favoring full disclosure of relevant evidence conflicts with the policy underlying the privilege. Courts have resolved this conflict by holding that the proponent of the claim must give up the privilege in order to pursue the claim. When privileged information goes to the heart of the claim, fundamental fairness requires that it be disclosed for the litigation to proceed [*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 CA4th

294, 316, 106 CR2d 906 (supporting documents in support of motion going to merits of action could not be sealed from opposing party's view)].

Legal Topics:

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

Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessConstitutional
LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior RestraintEvidencePrivilegesGeneral
OverviewEvidencePrivilegesTrade SecretsWaiverGovernmentsCourtsCourt Records



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2.19 Opposing Motion or Application to Seal Record.

2.19[1] Opposing Party May Assert That Insufficient Grounds Exist to Grant Motion. In opposition to a motion to seal records, the opposing party may refute that the moving party has overcome the presumption of open records, and/or that the proposed sealing order is too broad or restrictive [*see Cal Rules Ct, Rule 2.550(d)*].



Strategic Point--Opposing Party:

The burden is the party seeking to deny public access to court records to establish compelling reasons why and to what extent the records should be made private [*Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 374, 74 CR2d 69] .



Cross References:

Overcoming burden, see 2.17[7].

Discussion of burden, see *California Trial Guide*, § 4.02[4] (Matthew Bender).

2.19[2] Opposing Party May Assert That Less Restrictive Methods Are Appropriate. A party opposing the sealing of court records may assert that less restrictive means than sealing the records will address the moving party's concerns [*see Universal City Studios, Inc. v. Superior Court* (2003) 110 CA4th 1273, 1283, 2 CR3d 484] .

Example:

Instead of sealing the records, the court may order that the documents in question be redacted to accomplish the purpose asserted by the moving party. If the documents are already redacted to that extent, the motion may be denied on that ground [*see Universal City Studios, Inc. v. Superior Court* (2003) 110 CA4th 1273, 1283, 2 CR3d 484] .

2.19[3] Opposing Party Must File Papers in Redacted Version and Lodged in Complete Version If Necessary to Prevent Disclosure. If necessary to prevent disclosure, the opposing party must file the opposition papers in a public redacted version and lodged in a complete version conditionally under seal [*Cal Rules Ct, Rule 2.551(b)(5)*].

 Cross Reference:

Discussion of lodging papers, see *California Trial Guide*, § 4.01[2] (Matthew Bender).

2.19[4] Local Rules Disfavor Sealing of Court Records.

2.19[4][a] San Diego Rules Require Genuine Trade Secret or Privilege, and Particularized Showing Supporting Secrecy. Under the San Diego local rules, confidentiality agreements and protective orders are disfavored and should be recognized and approved by the court only when there is a genuine trade secret or privilege to be protected [San Diego Super Ct Rules, Rule 2.48].

Confidentiality agreements will not be recognized or approved by the court without a particularized showing (document-by-document) that secrecy is in the public interest, the proponent has a cognizable interest in the material (e.g., the material contains trade secrets, privileged information, or is otherwise protected by law from disclosure), and that disclosure would cause serious harm [San Diego Super Ct Rules, Rule 2.48].

2.19[4][b] San Francisco Rules Require Showing of Privilege or Protected Interest and Facts Justifying Sealing. San Francisco court rules provide that orders sealing any record [see *Cal Rules Ct, Rule 2.550(b)(1)*] filed or lodged in a proceeding, and orders directing that parties or others comply with agreements to maintain the confidentiality of documents relating to a proceeding, are disfavored and should be entered only on a showing that [San Francisco Super Ct Rules, Rule 10.5.A]:

- The subject matter of such record or document is privileged under a provision of the Evidence Code [San Francisco Super Ct Rules, Rule 10.5.A.1]; or
- Disclosure would violate a personal, financial, or other interest protected by law, and that disclosure threatens to cause serious harm that outweighs the public interest in disclosure of such information [San Francisco Super Ct Rules, Rule 10.5.A.2]; and
- If the record is to be sealed, the facts justify the findings specified in *Cal Rules Ct, Rule 2.550(d)* [San Francisco Super Ct Rules, Rule 10.5.A.3].

Exception:

Nothing in San Francisco Super Ct Rules, Rule 10.5 precludes the entry of a protective order designed to facilitate the expeditious production of documents during discovery, provided that the order permits counsel to designate as confidential under the terms of the order only documents about which counsel entertains a good faith belief that the document is entitled to confidentiality pursuant to San Francisco Super Ct Rules, Rule 10.5.A.1 or 10.5A.2 [San Francisco Super Ct Rules, Rule 10.5.B].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint Evidence Procedural Considerations Burdens of Proof General Overview Governments Courts Court Records



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III. OBTAINING OR OPPOSING ORDER TO SEAL RECORDS AND UNSEAL RECORDS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.20

2.20 Order Sealing Records Must Contain Findings and Specificity.

2.20[1] Order Must Set Forth Supporting Facts and Direct Sealing of Specific Records. An order sealing the record must (1) specifically set forth the facts that support the findings, and (2) direct the sealing of only those documents and pages, or if reasonably practicable, parts of those documents and pages, that contain the material that needs to be placed under seal. All other parts of each documents or page must be included in the public file [*Cal Rules Ct, Rule 2.550(e)(1)*].

Cross Reference:

Form, see 2.57.

2.20[2] Court May Appoint Referee for Voluminous Records. If the records a party is requesting be placed under seal are voluminous, the court may appoint a referee to help review them, and fix and allocate the referee's fees among the parties [*Cal Rules Ct, Rule 2.550(e)(2)*; see *CCP §§ 639, 645.1* (referees)].

2.20[3] Order Must State Whether Additional Records Are Sealed. The order must state whether, in addition to records in the envelope or container, the order itself, the register of actions, any other court records, or any other records relating to the case, are to be sealed [*Cal Rules Ct, Rule 2.551(e)(2)*].

2.20[4] Order Must State Whether Other Persons May Inspect Sealed Record. The order must state whether any person other than the court is authorized to inspect the sealed record [*Cal Rules Ct, Rule 2.551(e)(3)*].

2.20[5] San Francisco Rule Requires That Order Comply With State Rules. In San Francisco, an order sealing a record must comply with *Cal Rules Ct, Rules 2.550(d), (e)* and *2.551(e)* [San Francisco Super Ct Rules, Rule 10.5.F].

2.20[6] San Francisco Rule Limits Order to Confidential Material and Requires Public File to Designate Location of Sealed Material. In San Francisco, an order sealing any record filed in a proceeding must direct the sealing of only those documents, pages, or, if reasonably practicable, those parts of documents or pages, which contain the information requiring confidentiality. All other parts of the document or page must be included in the public file. For each document or page, or part thereof, filed under seal there must be included in the public file a document bearing a legend in substantially the following form [San Francisco Super Ct Rules, Rule 10.5.C]:

By order dated _____, the complete _____ (*identify document*),
pages or portion thereof, has been filed under seal, and may not be examined without further order of the
court.

Legal Topics:

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

Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureTrialsBench TrialsConstitutional LawBill of
RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental
FreedomsJudicial & Legislative RestraintsPrior RestraintGovernmentsCourtsCourt Records



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2.21 Prohibition Against Disclosure of Sealed Information.

2.21[1] Publicly Filed Records May Not Reveal Material in Sealed or Potentially Sealed Record. A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion or an application to seal [*Cal Rules Ct, Rule 2.551(e)*].

2.21[2] Parties May Not Disclose Contents of Sealed Records. Unless the sealing order provides otherwise, the parties may not disclose the contents of any materials that have been sealed in any subsequently filed records or papers [*Cal Rules Ct, Rule 2.551(e)(4)*].

2.21[3] San Diego Rule Restricts Viewing of Sealed Records to Parties and Attorneys. In San Diego County, only parties and their attorneys of record may view sealed records, unless the order sealing the records states otherwise. Absent a court order to the contrary, persons authorized to view sealed records may not copy them [*San Diego Super Ct Rules, Rule 2.48*]. This rule is part of a broader rule disfavoring confidentiality agreements and protective orders [*see San Diego Super Ct Rules, Rule 2.48*].

Exception:

In a malpractice action arising out of the litigation in which the materials were sealed, one would have justification to copy sealed records.



Cross Reference:

Discussion of local rules disfavoring sealing, see 2.19[4].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint Governments Courts Court Records Torts Malpractice & Professional Liability Healthcare Providers



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2.22 Custody of Sealed Records.

2.22[1] Clerk Relabels Record As Sealed by Court Order. If the court grants an order sealing a record, the clerk must substitute on the envelope or container for the label (*see Cal Rules Ct, Rule 2.551(d)(2)*) a label prominently stating, "SEALED BY ORDER OF THE COURT ON _____ (DATE)," and must replace the cover sheet [*see Cal Rules Ct, Rule 2.551(d)(3)*] with a filed-endorsed copy of the court's order [*Cal Rules Ct, Rule 2.551(e)(1)*].

2.22[2] Court Must Keep Sealed Records Separate and Secure. Sealed records must be securely filed and kept separate from the public file in the case [*Cal Rules Ct, Rule 2.551(f)*].

Judge's Perspective:

In San Diego, sealed documents are sent to the sealed documents desk in the clerk's office. The sealed documents are physically kept in a filing cabinet in the clerk's office. A notice of sealed document is placed in the court file. It contains the case caption, the date of sealing, name of the sealing judge, and a brief description of the contents, e.g., court reporter's notes or confidential records. In courts using electronic filing systems such as LexisNexis File and Serve, there is a mechanism for electronic sealing, making sealed files inaccessible without court order. Despite the availability of this feature, some courts that use electronic filing still require normal hard copies of sealed documents and treat them in the same way as sealed documents are treated in non-electronic filing cases.

2.22[3] Public Agency May Maintain Its Voluminous Original Records. If the records to be placed under seal are voluminous and are in the possession of a public agency, the court may by written order direct the agency, instead of the clerk, to maintain custody of the original records in a secure fashion. If the records are requested by a reviewing court, the trial court must order the public agency to deliver the records to the clerk for transmission to the reviewing court under the California Rules of Court [*Cal Rules Ct, Rule 2.551(g)*].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional

LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior RestraintGovernmentsCourtsClerks of
CourtGovernmentsCourtsCourt Records



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2.23 Sealing Order Is Subject to Modification on Changed Circumstances.

Because of its temporary nature and its infringement on the public right to know, a sealing order in a civil case is always subject to continuing review and modification, if not termination, on changed circumstances [*Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 374, 74 CR2d 69] . The party seeking modification (or termination) must do so under the procedure established by CCP § 1008 [*Wilson v. Science Applications Int'l Corp.* (1997) 52 CA4th 1025, 1032-1033, 60 CR2d 883] .

Example:

The mere fact of a financial settlement between the parties, or a stipulation of the parties to keep records sealed, do not amount to changed circumstances [*Mary R. v. B. & R. Corp.* (1983) 149 CA3d 308, 318, 196 CR 871] .

➡ Cross Reference:

Discussion of terminating sealing order, see 2.24.

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint Governments Courts Court Records



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2.24 Unsealing Records.

2.24[1] Unsealing of Records Requires Court Order. A sealed record may be unsealed only on an order of the court [*Cal Rules Ct, Rule 2.551(h)(1)*].

2.24[2] Party or Public May Bring Motion, Application, or Petition to Unseal Record. A party or member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record [*Cal Rules Ct, Rule 2.551(h)(2)*]. The party seeking termination of a sealing order must do so under the procedure established by *CCP § 1008* [*Wilson v. Science Applications Int'l Corp. (1997) 52 CA4th 1025, 1032-1033, 60 CR2d 883*] .

Example:

The media may move to unseal a court record to obtain access to information that they want to publish [see, e.g., *Copley Press, Inc. v. Superior Court (2006) 39 C4th 1272, 48 CR3d 183*].

2.24[3] Unsealing of Records on Court's Own Motion.

2.24[3][a] Court May Unseal Record on Its Own Motion. The court on its own motion may move to unseal a record [*Cal Rules Ct, Rule 2.551(h)(2)*].

2.24[3][b] Court Must Provide Notice to Parties, Who May File Opposition and Response. If the court proposes to order a record unsealed on its own motion, the court must mail notice to the parties stating the reason for it. Any party may serve and file an opposition within 10 days after the notice is mailed, or within a time the court specifies. Any other party may file a response within five days after the filing of an opposition [*Cal Rules Ct, Rule 2.551(h)(3)*].

➡ Cross Reference:

Discussion of responding to unsealing of records, see *California Trial Guide, § 4.01[2]* (Matthew Bender).

2.24[4] Bringing Motion, Application, or Petition to Unseal Record.

2.24[4][a] Person Bringing Motion, Application, or Petition Must File and Serve Notice. A person may seek

an order unsealing court records by motion, application, or petition. That person must file and serve notice of the motion, application, or petition to unseal on all parties in the case [*Cal Rules Ct, Rule 2.551(h)(2)*].

Consider:

It is advisable to include a declaration setting forth why information should be part of the public record.



Trap:

A person seeking to unseal records must be careful in the motion, application, or petition, and in any supporting papers, to avoid disclosing the information that was sealed. To do so would be to contravene the court's order sealing the records, and could invite contempt proceedings. Compliance with *Cal Rules Ct, Rules 2.551(c)* and *2.551(h)(2)* permits use of the sealed material in the moving papers in redacted form, and the unredacted documents could be filed under seal.



Cross Reference:

Discussion of moving to unseal, see California Forms of Pleading and Practice, § 155.173[12] (Matthew Bender).

2.24[4][b] File Papers in Public Redacted Version and Sealed in Complete Version. The motion, application, or petition and any opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary to comply with *Cal Rules Ct, Rule 2.551(c)*, which prohibits disclosure of sealed material in a publicly filed record [*Cal Rules Ct, Rule 2.551(h)(2)*].



Cross References:

Discussion of *Cal Rules Ct, Rule 2.551(c)*, see 2.21[1].

Motion to unseal records, see *California Trial Guide*, § 4.01[2] (Matthew Bender).

2.24[5] Court Must Consider Matters Relevant to Sealing of Records. In determining whether to unseal a record, the court must consider the matters addressed in *Cal Rules Ct, Rule 2.550(c)-(e)* [*Cal Rules Ct, Rule 2.551(h)(4)*].



Cross Reference:

Discussion of required findings to seal records, see 2.18.

2.24[6] First Amendment Rights Support Unsealing of Records. The rules for sealing of court records recognize the First Amendment right of access to documents used at trial or as a basis of adjudication [see Advisory Committee Comment to *Cal Rules Ct, Rule 2.550*]. A person seeking access to court records that are sealed may cite federal and state constitutional grounds [see US Const, amend I; *Cal Const*, art I, § 2(a); see, e.g., *Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 373, 74 CR2d 69] .



Cross Reference:

See 2.36[2].



Strategic Point--Person Bringing Motion:

Although court records are public records, a person may not obtain access to sealed court records under the Public Records Act for the purpose of using them to argue the merits of the motion to unseal the records [see, e.g., *Copley Press, Inc. v. Superior Court* (1998) 63 CA4th 367, 371-372, 74 CR2d 69 ;

see also Gov Code § 6250 et seq.].



Cross Reference:

Discussion of Public Records Act, see California Forms of Pleading and Practice, Ch. 470C, Public Records Act (Matthew Bender).

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Governments Courts Court Records



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III. OBTAINING OR OPPOSING ORDER TO SEAL RECORDS AND UNSEAL RECORDS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.25

2.25 Order Unsealing Records.

2.25[1] Order Unsealing Records Must State Certain Information, Including Extent to Which Record Is Unsealed. The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both [*Cal Rules Ct, Rule 2.551(h)(5)*].

If, in addition to the records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed [*Cal Rules Ct, Rule 2.551(h)(5)*].

2.25[2] Order Unsealing Records May Set Conditions. The court may set limitations and conditions concerning the unsealing of records [*see, e.g., Church of Scientology v. Armstrong (1991) 232 CA3d 1060, 1068-1070, 283 CR 917*].

Example:

In a case involving documents belonging to a church organization, although the appellate court could not justify why the documents were sealed, it reversed an order completely unsealing the records pursuant to a motion by a third party who requested the documents for the limited purpose of his litigation against the church. The judge who had sealed the records had retired, and the third party brought the motion almost two years after judgment. The successor judge exceeded his authority, although unsealing the records for the sole purpose of allowing the third party access for litigation purposes was proper pursuant to a previous appellate court decision [*Church of Scientology of Cal. v. Armstrong (1991) 232 CA3d 1060, 1068-1070, 283 CR 917*].

2.25[3] Findings Are Not Required. Motions to unseal records are governed by *Cal Rules Ct, Rule 2.551(h)*, which does not require the court to make express findings [*In re Providian Credit Card Cases (2002) 96 CA4th 292, 302, 116 CR2d 833*].

Legal Topics:

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

Constitutional Law
Bill of Rights
Fundamental Freedoms
Freedom of Speech
Free Press
Public Access
Governments
Courts
Court Records



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2.26 Special Procedure for Discovery Documents Subject to Confidentiality Agreement or Protective Order.

A party who files or intends to file with the court for the purposes of adjudication, or to use at trial, records produced in discovery subject to a confidentiality agreement or protective order, and who does not intend to request to have the records sealed, must give the other parties an opportunity to request the records be sealed. Specifically, that party must do all of the following [*Cal Rules Ct, Rule 2.551(b)(3)(A)*]:

- Lodge the unredacted records subject to the confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records, in the manner stated in *Cal Rules Ct, Rule 2.551(d)*.

Cross Reference:

Lodging records, see 2.17[5].

- File copies of the documents that are redacted so that they do not disclose the contents of the records that are subject to the confidentiality agreement or protective order.
- Give written notice to the party who produced the records that the records and the other documents will be placed in the public court file unless that party files a timely motion or application to seal the records under *Cal Rules Ct, Rule 2.551*.

If the party who produced the documents and was served with the notice described above does not file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file the motion or application, the clerk must promptly remove all the documents from the envelope or container where they are located and place them in the public file. If the party files a motion or an application to seal within 10 days or any later time ordered by the court, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court [*Cal Rules Ct, Rule 2.551(b)(3)(B)*; *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 CA4th 588, 601, 57 CR3d 215] .

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of
SpeechFree PressPublic AccessGovernmentsCourtsCourt Records



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2.27 Party Seeking Prejudgment Attachment May Request Disclosure Delay.

A plaintiff who seeks a prejudgment attachment remedy [see *CCP § 483.010 et seq.*] may request, at the time a complaint is filed, that the records in the action or the fact of the filing of the action be made temporarily unavailable to the public under *CCP § 482.050* by filing a declaration stating one of the following [*Cal Rules Ct, Rule 2.580*]:

- "This action is on a claim for money based on contract against a defendant who is not a natural person. The claim is not secured within the meaning of *CCP § 483.010(b)*"; or
- "This action is on a claim for money based on contract against a defendant who is a natural person. The claim arises out of the defendant's conduct of a trade, business, or profession, and the money, property, or services were not used by the defendant primarily for personal, family, or household purposes. The claim is not secured within the meaning of *CCP § 483.010(b)*."

Legal Topics:

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

Civil Procedure Remedies Provisional Remedies Attachments Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Governments Courts Court Records



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Chapter 2 Public Access to Trials and Records

III. OBTAINING OR OPPOSING ORDER TO SEAL RECORDS AND UNSEAL RECORDS

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2.28 Records in Confidential In Camera Proceedings Are Sealed.

If a confidential in camera proceeding is held in which a party is excluded from being represented, the clerk must include in the minutes the nature of the hearing and only those references to writings or witnesses as will not disclose privileged information [*Cal Rules Ct, Rule 2.585(a)*].

Records examined by the court in a confidential in camera proceeding in which a party is excluded from being represented, or copies of them, must be filed with the clerk under seal and must not be disclosed without court order [*Cal Rules Ct, Rule 2.585(b)*].



Warning:

Shifting parts of the proceedings to a bench conference or an in camera proceeding to escape the right to open trial goes beyond the historically accepted uses of these proceedings and is unconstitutional [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 C4th 1178, 1216, 86 CR2d 778, 980 P2d 337*] .

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public
Access Governments Courts Court Records



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2.29 Standard of Review for Orders Sealing or Unsealing Records.

2.29[1] Order Sealing Records Is Reviewed for Abuse of Discretion. The review of an order to seal consists of two stages, by which a reviewing court [see *In re Providian Credit Card Cases* (2002) 96 CA4th 292, 301-302, 116 CR2d 833] :

1. Examines the express findings of fact required by *Cal Rules Ct, Rule 2.550(d)* to determine if they are supported by substantial evidence; and
2. Decides whether, in light of and on the basis of these findings, the trial court abused its discretion in ordering a record sealed.

2.29[2] Order Unsealing Records Is Reviewed for Abuse of Discretion. Review of an order to unseal records is unlike the review of an order to seal records. Motions to unseal records are governed by *Cal Rules Ct, Rule 2.551(h)*, which does not require the court to make express findings. In deciding to unseal records, a trial court is implicitly determining that there is no overriding interest that overcomes the right of public access to the record, and/or that the other requirements of *Cal Rules Ct, Rule 2.550(d)(1)* have not been met. The trial court is not required to make express findings. Instead, the reviewing court determines whether the trial court abused its discretion on the basis of the entire record [*In re Providian Credit Card Cases* (2002) 96 CA4th 292, 302-303, 116 CR2d 833] .

Legal Topics:

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

Civil Procedure Appeals Standards of Review Abuse of Discretion Civil Procedure Appeals Standards of Review Substantial Evidence General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Governments Courts Court Records



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IV. OBTAINING OR OPPOSING GAG ORDER

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2.30 CHECKLISTS: Obtaining or Opposing Gag Order.

2.30[1] Obtaining Gag Order.

- ☐ Determine whether reason for gag order concerns only conduct of an attorney in case that violates the Rules of Professional Conduct.

Authority:

Cal Rules Prof Conduct, Rule 5-120

Discussion:

See 2.34

- ☐ If reason for gag order involves other trial participants, determine extent of desired order:

☐ Trial participants affected, e.g., parties, attorneys, witnesses, parties and attorneys, their agents, witnesses, and court personnel.

Authority:

See, e.g., *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1240, 101 CR2d 558

Discussion:

See 2.33

☐ Duration of gag order.

☐ Scope of gag order.

Authority:

See *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558

Discussion:

See 2.35[2]

☐ To overcome presumption that gag order is unconstitutional, ensure that all following conditions exist:

☐ Speech sought to be restrained poses clear and present danger or serious and imminent threat to protected competing interest.

☐ Order is narrowly tailored to protect that interest.

☐ No less restrictive alternatives are available.

Authority:

Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558

Discussion:

See 2.35[3]

☐ If reason for gag order is to assure party's fair trial, specify resulting prejudice that would occur absent gag order.

Authority:

Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558

Discussion:

See 2.35[2]

☐ For formal motion, draft motion and notice of motion.

☐ Draft motion and notice of motion.

Form:

See 2.58

☐ Draft memorandum.

Authority:

Cal Rules Ct, Rule 3.1113(a)

Discussion:

See 2.35[1]

 Bring motion in timely manner.

Discussion:

See 2.35[4]

**Timing:**

In any situation in which counsel believes a gag order may be important, a motion for such an order should be made immediately. At least the issue of the need for one, or potential need for one, can be raised at the final pretrial conference. If specific conduct of the opponent causes a need for such an order, it can be raised immediately on an ex parte application to shorten time to make a motion for a gag order.

- ☐ Prepare and submit proposed order.

Form:

See 2.59

2.30[2] Opposing Gag Order.

- ☐ Raise following points in response to motion for gag order:

- ☐ Assert constitutional First Amendment grounds of free speech and freedom of press.

Authority:

Cal Const, art I, § 2(a)

Discussion:

See 2.36[2]

- ☐ Assert presumptive invalidity of prior restraint.

Authority:

Organization for a Better Austin v. Keefe (1971) 402 US 415, 419, 91 S Ct 1575, 29 L Ed2d 1

Discussion:

See 2.36[3]

- ☐ Show that moving party failed to overcome presumption that gag order is prohibited prior restraint impinging on constitutional rights.

Authority:

See *Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558*

Discussion:

See 2.36

- ☐ Assert that speech subject to gag order does not pose clear and present danger or serious and imminent threat to protected competing interest.
- ☐ Assert that proposed order is too broad.
- ☐ Assert that less restrictive alternatives would address moving party's concerns.

Authority:

Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558

Discussion:

See 2.36[5], [6]

- ☐ Assert that gag order is inappropriate procedure to protect confidential information from disclosure.

Authority:

Maggi v. Superior Court (2004) 119 CA4th 1218, 1225, 15 CR3d 161

Discussion:

See 2.36[7]

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint



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IV. OBTAINING OR OPPOSING GAG ORDER

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.31

2.31 Options and Strategies for Obtaining and Opposing Gag Order.

Gag orders are used in civil trials, but are more common in criminal trials. The primary issue litigated about gag orders is a defendant's right to a fair trial weighed against free speech and freedom of the press [see *Younger v. Smith* (1973) 30 CA3d 138, 143 n2, 106 CR 225]. A gag order can be appropriate in a civil trial [see *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1242, 101 CR2d 558 (party may raise concern of receiving fair trial, but must show prejudice)]. Counsel in a civil case should not depend on precedents established in criminal cases without first taking into consideration the distinction between them, for example, with respect to a criminal case that was decided based on standards applicable to an accused's right to a fair trial.

To succeed in obtaining a gag order, the moving party must overcome the presumption that the gag order is a prohibited prior restraint of speech, which is a considerable burden implicating constitutional guarantees of free speech, freedom of the press, and freedom of expression. The key is to show prejudice to the party absent the gag order [*Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558].

The party opposing a gag order has an advantage over the moving party in that constitutional guarantees of free speech and freedom of the press, and judicial disfavor of prior restraint, support the opposing party's position [see *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint Evidence Inferences & Presumptions Presumptions



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2.32 Court Can Control Persons Connected With Judicial Proceedings.

Every court has the power to provide for the orderly conduct of proceedings before it or its officers [*CCP* § 128(a)(3)]; and to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto [*CCP* § 128(a)(5)].

✚ Judge's Perspective:

Considering the practical difficulties of obtaining a gag order, counsel should consider negotiating with opposing counsel to reach an informal understanding that can accomplish the same result without involving the court.

➡ Cross Reference:

Discussion of moving for gag order, *California Trial Guide*, § 4.20[2] (Matthew Bender).

Legal Topics:

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

Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior Restraint



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.33

2.33 Gag Order Prevents Trial Participants From Discussing Case.

A gag order prevents participants in a trial from disclosing information about court proceedings to others persons. Persons subject to a gag order can include the parties and their attorneys, their agents, witnesses, and court personnel [see, e.g., *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1240, 101 CR2d 558] . "Gag order" is a term in common use, after slow acceptance by courts [see *Younger v. Smith* (1973) 30 CA3d 138, 143, 106 CR 225 (avoiding use of "gag order," preferring "protective order")].

Legal Topics:

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

Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior Restraint



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.34

2.34 Attorneys Are Subject to Rules of Professional Conduct Concerning Inappropriate Trial Publicity.

The Rules of Professional Conduct control an attorney's behavior with respect to trial publicity. An attorney who is participating or has participated in the investigation or litigation of a matter must not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter [*Cal Rules Prof Conduct, Rule 5-120(A)*].

However, an attorney may state basic information about the case, such as that contained in a public record [*see Cal Rules Prof Conduct, Rule 5-120(B)*]. The attorney may also make a statement that a reasonable attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the attorney or the client. That statement is limited to information necessary to mitigate the recent adverse publicity [*see Cal Rules Prof Conduct, Rule 5-120(C)*].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint Legal Ethics Professional Conduct General Overview Legal Ethics Professional Conduct Tribunals



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.35

2.35 Seeking Gag Order.

2.35[1] Party May Move for Gag Order. A party may move for a gag order to prevent the disclosure of information concerning an ongoing case to persons other than the parties and other trial participants [*see, e.g., Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1242, 101 CR2d 558* ; *see also Cal Rules Ct, Rule 3.1113(a)* (supporting memorandum)].



Cross References:

Form, *see* 2.58.

Seeking gag order, *see California Trial Guide*, §§ 4.20[2], 4.21 (Matthew Bender).



Judge's Perspective:

Given that gag orders are rare in civil cases and the heavy burden required to obtain a gag order, counsel seeking a gag order should strongly consider filing a written motion supported by points and authorities and a declaration.



Strategic Point:

Even if the written motion is simply a short memorandum with bullet points, it permits the court to focus on the exact issues being presented and without the hyperbole opposing counsel may inject.

2.35[2] Moving Party Must Establish Grounds for Gag Order. A party may seek a gag order in the appropriate case. Factors that weigh in favor of a gag order include the following:

- The need to preserve a party's right to a fair trial [*Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1242, 101 CR2d 558*].
- Excessive or sensational media coverage of the trial or a small jury pool [*Brian W. v. Superior Court (1978) 20 C3d 618, 626, 143 CR 717, 574 P2d 788* ; *Younger v. Smith (1973) 30 CA3d 138, 164,*

106 CR 225] .

■ Witnesses' refusal to testify at trial without identity protection [*Sun Co. of San Bernardino v. Superior Court* (1973) 29 CA3d 815, 829-830, 105 CR 873] .

 Cross Reference:

Discussion of establishing grounds for gag order, see *California Trial Guide*, § 4.20[1] (Matthew Bender).

A party who contends his or her right to a fair trial has been or will be compromised by pretrial publicity has the burden of producing evidence to establish the prejudice. It is not enough for a court to decide that the fair trial right might be affected by the exercise of free speech [*Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558 (prejudice regarding fair trial was speculative)].

2.35[3] Moving Party Must Meet Procedural Conditions. The party moving for the gag order must establish that all of the following conditions exist [*Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] :

- The speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest;
- The order is narrowly tailored to protect that interest; and
- No less restrictive alternatives are available.

2.35[4] Moving Party Must Bring Motion in Timely Manner to Prevent Projected Harm. Because a gag order prevents trial participants from discussing an ongoing case, the moving party must file and serve the motion early enough to avoid the harm proposed in the motion, for example, before trial or before jury selection.

 Cross Reference:

Form, see 2.58.

 Judge's Perspective:

Since publicity is often most intense at the start of a jury trial, counsel should file the request early enough so that the motion may be decided before the commencement of the trial.

 Warning:

Delay, or untimely presentation of the motion, may result in information being disseminated that would render the motion moot or demonstrate the lack of urgency to prevent prejudice.

 Cross Reference:

Discussion of inappropriate use of gag order, see 2.36[7].

Legal Topics:

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

Civil Procedure Trials Jury Trials General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.36

2.36 Opposing Gag Order.

2.36[1] Grounds for Opposing Gag Order Include First Amendment Rights. A party opposing the imposition of a gag order may assert various constitutional grounds, such as First Amendment rights and the presumptive invalidity of a prior restraint [*Organization for a Better Austin v. Keefe* (1971) 402 US 415, 419, 91 S Ct 1575, 29 L Ed2d 1 ; *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] .

2.36[2] Federal and California Constitutions Protect Free Speech and Freedom of Press. The First Amendment to the United States Constitution provides that Congress will make no law abridging the freedom of speech, or of the press [US Const, amend I]. The California Constitution provides that every person may freely speak, write and publish his or her sentiments, on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press [*Cal Const, art I, § 2(a)*]. These provisions amount to the prohibition on prior restraints [*Organization for a Better Austin v. Keefe* (1971) 402 US 415, 419, 91 S Ct 1575, 29 L Ed2d 1 ; *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] .

➡ Cross Reference:

Discussion of prior restraints, see 2.36[3].

2.36[3] Prior Restraint Is Disfavored. Orders that restrict or preclude a citizen from speaking in advance are known as "prior restraints," and are disfavored and presumptively invalid [*Organization for a Better Austin v. Keefe* (1971) 402 US 415, 419, 91 S Ct 1575, 29 L Ed2d 1] . This includes prior restraints on discussion of ongoing legal proceedings [*Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] .

➡ Cross Reference:

Discussion of prior restraints, see *California Trial Guide*, § 4.20[1] (Matthew Bender).

2.36[4] Gag Order Is Unconstitutional Unless Constitutional Safeguards Exist. Gag orders on trial participants are unconstitutional unless all of the following conditions exist [*Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] :

- The speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest;
- The order is narrowly tailored to protect that interest; and
- No less restrictive alternatives are available.

Example:

In consolidated actions involving business torts, arising from a physician's alleged misconduct against anesthetized patients, the trial court issued a gag order preventing the trial participants from disclosing the names of those patients, some famous. The court of appeal reversed, holding that the physician-patient privilege and possible prejudice to potential jurors were not considerations that justified prior restraint. Among other problems, the gag order had a chilling effect on the parties' ability to prepare for trial [*Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1242-1245, 101 CR2d 558] .

2.36[5] Opposing Party May Assert That Proposed Order Is Too Broad. In opposition to a motion for a gag order, a party may assert that the proposed order is unconstitutionally broad, either in scope or duration [see *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] .

2.36[6] Opposing Party May Propose Less Restrictive Means to Achieve Moving Party's Purpose. A party opposing a gag order may propose less restrictive measure to protect the moving party's asserted interests [see *Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] .

2.36[7] Gag Order Is Not Appropriate to Protect Confidential Information From Disclosure. Gag orders are not an appropriate method to protect confidential information from disclosure, no matter how damaging or private that information may be [*Maggi v. Superior Court* (2004) 119 CA4th 1218, 1225, 15 CR3d 161] .

Further, a gag order is not an appropriate sanction after confidential information has already been disclosed [*Maggi v. Superior Court* (2004) 119 CA4th 1218, 1225, 15 CR3d 161] . A gag order is preventive, not punitive, in nature [*Younger v. Smith* (1973) 30 CA3d 138, 164-165, 106 CR 225] .

**Cross References:**

Discussion of proper use of gag order, see *California Trial Guide*, § 4.20 (Matthew Bender).

Discussion of use of sealing order to protect confidential information, see 2.11 et seq.

Legal Topics:

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

Constitutional Law
 Bill of Rights
 Fundamental Freedoms
 Freedom of Speech
 Free Press
 Public Access
 Constitutional Law
 Bill of Rights
 Fundamental Freedoms
 Judicial & Legislative Restraints
 Prior Restraint
 Evidence
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2.37 Gag Order Must Include Specific Findings.

The trial court must make express findings showing it applied the proper constitutional standard and considered and weighed the competing interests [*Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] .

Cross Reference:

Form, see 2.59.

Discussion of application of constitutional standard, see 2.36[4].

Legal Topics:

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

Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior Restraint



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2.38 Stipulated Gag Order Is Likely Against Public Policy.

Gag orders based on a stipulation by the parties to keep the proceedings confidential are likely to be invalid as contrary to public policy, and are subject to attack by, a third party [*see, e.g., Mary R. v. B. & R. Corp. (1983) 149 CA3d 308, 316-317, 196 CR 871*].

Example:

After a case brought by a minor against a physician alleging sexual assault had been dismissed by stipulation, the Board of Medical Quality Assurance attempted to intervene and modify the related orders preventing communication about the case and sealing the records. The appellate court affirmed the denial of the application for intervention but held that the gag order and sealing order were against public policy. The court held that it is improper, even on stipulation of the parties, for the court to issue an order designed not to preserve the integrity and efficiency of the administration of justice, but rather to subvert public policy by shielding the doctor from governmental investigation designed to protect the public from misconduct within the medical profession, and that may disclose a professional license was used to establish a relationship that subjected a juvenile patient to criminal conduct. That stipulation is against public policy, similar to an agreement to conceal judicial proceedings and to obstruct justice [*Mary R. v. B. & R. Corp. (1983) 149 CA3d 308, 317, 196 CR 871*].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.39

2.39 Reviewing Court Examines Entire Record to Determine Constitutionality of Gag Order.

A reviewing court will make an independent examination of the entire record to determine the constitutionality of the trial court's gag order in light of the standards set by case law [*Hurvitz v. Hoefflin* (2000) 84 CA4th 1232, 1241-1242, 101 CR2d 558] .

Legal Topics:

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

Civil Procedure Appeals Records on Appeal Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint



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BROADCAST TRIAL COURT'S PROCEEDINGS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.40

2.40 CHECKLISTS: Obtaining or Opposing Order to Allow Media to Photograph, Record, and/or Broadcast Trial Court's Proceedings.

2.40[1] Obtaining Order to Allow Media to Photograph, Record, and/or Broadcast Trial Court's Proceedings.

- ☐ Determine whether desired coverage is completely precluded, e.g., for jury selection.

Authority:

Cal Rules Ct, Rule 1.150(e)(6)

Discussion:

See 2.46

- ☐ Consult local court rules and trial preference concerning procedure for requesting media coverage.

Authority:

See, e.g., Los Angeles Super Ct Rules, Rule 4.1(b)

Discussion:

See 2.45

- ☐ Obtain Judicial Council Forms of Request and Order on Request to permit media coverage.

Authority:

Cal Rules Ct, Rule 1.150(e)(1); Judicial Council Forms MC-500, MC-510

Discussion:

See 2.44[3]

Forms:

See 2.60, 2.61

☐ Fill out Judicial Council forms.☐ Provide details of desired coverage as provided on form, e.g., amount of increased costs.☐ Become familiar with factors that court will consider (set forth on form MC-510), and be prepared to raise factors in support of providing coverage.**Authority:***Cal Rules Ct, Rule 1.150(e)(1); Judicial Council Forms MC-500, MC- 510***Discussion:**

See 2.44[3], [7]

Forms:

See 2.60, 2.61



File forms of request and order at least five court days before proceeding.

Authority:*Cal Rules Ct, Rule 1.150(e)(1)***Discussion:**

See 2.44[4]

☐ If judge holds hearing, be prepared to argue the factors in favor of allowing coverage.**Authority:***Cal Rules Ct, Rule 1.150(e)(2)***Discussion:**

See 2.44[6]

2.40[2] Opposing Request for Order to Allow Media to Photograph, Record, and/or Broadcast Trial Court's Proceedings.☐ In response to request for order to allow media to photograph, record, and/or broadcast proceedings, raise following factors when appropriate:☐ Media failed to comply with request procedures, e.g., by filing request form too late.**Authority:***Cal Rules Ct, Rule 1.150(e)(1)***Discussion:**

See 2.44[4]

- ☐ Requested coverage is prohibited under California Rules of Court.

Authority:

Cal Rules Ct, Rule 1.150(e)(6)

Discussion:

See 2.46

- ☐ Statutory factors, e.g., nature of case, support denial of request.

Authority:

Cal Rules Ct, Rule 1.150(e)(3)

Discussion:

See 2.44[7], 2.47

- ☐ Applicable local court rules support denial or limitation of coverage.

Authority:

See, e.g., Los Angeles Super Ct Rules, Rule 4.1(b); Orange Super Ct Rules, Rule 180(C)

Discussion:

See 2.45

- ☐ Any coverage allowed should be subject to certain conditions, e.g., that images such as faces be obscured

Authority:

See, e.g., *South Coast Newspapers, Inc. v. Superior Court* (2000) 85 CA4th 866, 869, 102 CR2d 487

Discussion:

See 2.49

Legal Topics:

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

Civil Procedure Trials Jury Trials Jurors Selection General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.41

2.41 Options and Strategies for Obtaining and Opposing Order to Allow Media to Photograph, Record, and/or Broadcast Trial Court's Proceedings.

A media agency that wants to cover trial proceedings must request permission, and obtain a court order, allowing it to do so. To support its request, the entity should emphasize the statutory factors that support coverage, for example, the importance of promoting public access to the judicial system [*see Cal Rules Ct, Rule 1.150(e)(3)(B)*].

Strategic Point:



Cal Rules Ct, Rule 1.150(e) contains an ambiguity. The rule requires the court to issue a written order allowing media coverage, but it also indicates, "[t]his rule does not otherwise limit or restrict the right of the media to cover and report court proceedings." The import of the rule seems to be related to coverage by camera or voice or audio recording.

If more than one media agency seeks permission to cover the proceedings, all the agencies involved should preliminarily agree on pooling arrangements, to ensure that the court does not deny the request for coverage on the ground that the agencies cannot cooperate with each other. This agreement must be memorialized in writing and filed in court [*see Cal Rules Ct, Rule 1.150(e)(9)*].

A party seeking to prevent media coverage should emphasize the statutory factors that weigh against coverage, for example, the effect of coverage on the parties' ability to select a fair and unbiased jury [*see Cal Rules Ct, Rule 1.150(e)(3)(G)*]. In addition, a party's opposition to the request is one of those statutory factors that itself supports denial of the request for media coverage [*see Cal Rules Ct, Rule 1.150(e)(3)(C)*].

Strategic Point:



Other points to emphasize that are not specifically mentioned in *Cal Rules Ct, Rule 1.150(e)* include possibly disrupting the proceedings and compromising the ability to conduct a trial efficiently.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewConstitutional LawBill of RightsFundamental
FreedomsFreedom of SpeechFree PressPublic AccessConstitutional LawBill of RightsFundamental FreedomsJudicial &
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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.42

2.42 Media May Not Photograph, Record, or Broadcast Court Proceedings Without Court Order.

Except as provided in *Cal Rules Ct, Rule 1.150*, court proceedings may not be photographed, recorded, or broadcast [*Cal Rules Ct, Rule 1.150(c)*]. In most instances, media coverage requires a written court order [*Cal Rules Ct, Rule 1.150(e)*].

Example:

When a newspaper photographer photographed a criminal defendant in court despite the trial court's denial of the newspaper's motion under *Cal Rules Ct, Rule 1.150* to do so, the trial court acted within its power, and not in violation of the media's First Amendment rights, in ordering the bailiff to confiscate and destroy the film [*Marin Indep. Journal v. Municipal Court* (1993) 12 CA4th 1712, 1722, 16 CR2d 550] .

Exception:

Cal Rules Ct, Rule 1.150 does not prohibit courts from photographing or videotaping sessions for judicial education or publications, and is not intended to apply to closed-circuit television broadcasts solely within the courthouse or between court facilities if the broadcasts are controlled by the court and court personnel [*Cal Rules Ct, Rule 1.150(c)*].

➡ **Cross Reference:**

Requirement for court order to permit media coverage, see 2.44.

Legal Topics:

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

Civil Procedure Trials Jury Trials Jurors Selection General Overview Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access Constitutional Law Bill of Rights Fundamental Freedoms Judicial & Legislative Restraints Prior Restraint



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.43

2.43 Person May Inconspicuously Record Proceedings for Own Use With Court's Permission.

The judge may permit inconspicuous personal recording devices to be used by persons in a courtroom to make sound recordings as personal notes of the proceedings. A person proposing to use a recording device must obtain advance permission from the judge. These recordings may not be used for any purpose other than as personal notes [*Cal Rules Ct, Rule 1.150(d)*].

Examples:

Cal Rules Ct, Rule 1.150(d) seems to contemplate the use of a recording device by a reporter, or by counsel who may want to record the proceedings to aid in preparation of the next day's proceedings. Also, using a recording device would permit the attorney to focus more clearly on the witness, evidence, exhibits, and jury rather than write voluminous notes.

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.44

2.44 Request by Media to Cover Court Proceedings.

2.44[1] Media Coverage Only on Written Court Order. Media coverage (photographing, recording or broadcasting) of a trial proceeding is permitted only on written order of the trial judge. The judge in his or her discretion may permit, refuse, limit, or terminate media coverage. This does not otherwise limit or restrict the right of the media to cover and report court proceedings [*Cal Rules Ct, Rule 1.150(e)*].

2.44[2] Definitions. "Media coverage" means any photographing, recording, or broadcasting of court proceedings by the media using television, radio, photographic or recording equipment [*Cal Rules Ct, Rule 1.150(b)(1)*; Los Angeles Super Ct Rules, Rule 4.1(h); Orange Super Ct Rules, Rule 180(G)].

"Media" or "media agency" means any person or organization engaging in news gathering or reporting, and includes any newspaper, radio, or television station or network, news service, magazine, trade paper, in-house publication, professional journal, other news-reporting, or news-gathering agency [*Cal Rules Ct, Rule 1.150(b)(2)*; see Los Angeles Super Ct Rules, Rule 4.1(h) (definition of "media"); Orange Super Ct Rules, Rule 180(G) (definition of "media")].

"Court" means the courtroom at issue, the courthouse, and its entrances and exits [*Cal Rules Ct, Rule 1.150(b)(3)*; Orange Super Ct Rules, Rule 180(G)].

"Judge" means the judicial officer or officers assigned to or presiding at the proceeding, except as provided in *Cal Rules Ct, Rule 1.150(e)(1)* if no judge has been assigned [*Cal Rules Ct, Rule 1.150(b)(4)*; see Los Angeles Super Ct Rules, Rule 4.1(h); Orange Super Ct Rules, Rule 180(G)].



Cross Reference:

Discussion of local rules on media coverage, see 2.45.

2.44[3] Media May File Judicial Council Form With Proposed Order. The media may request an order permitting media coverage on a form approved by the Judicial Council. A completed, proposed order on a form approved by the Judicial Council must be filed with the request [*Cal Rules Ct, Rule 1.150(e)(1)*].

 Cross Reference:

Forms, see 2.60, 2.61.

2.44[4] Media Must File Form at Least Five Court Days Before Proceeding. The form must be filed at least five court days before the portion of the proceeding to be covered, unless good cause is shown [*Cal Rules Ct, Rule 1.150(e)(1)*].

 Cross Reference:

Form, see 2.60.

2.44[5] Judge Assigned to Proceeding or Supervising Calendar Judge Must Rule on Request; Clerk Notifies Parties. The judge assigned to the proceeding must rule on the request. If no judge has been assigned, the request must be submitted to the judge supervising the calendar department, and thereafter be ruled on by the judge assigned to the proceeding. The clerk must promptly notify the parties that a request has been filed [*Cal Rules Ct, Rule 1.150(e)(1)*].

2.44[6] Judge May Hold Hearing on Request. The judge may hold a hearing on the request, or may rule on the request without a hearing [*Cal Rules Ct, Rule 1.150(e)(2)*].

2.44[7] Court Must Consider Specified Factors. In ruling on the request, the judge must consider the following factors [*Cal Rules Ct, Rule 1.150(e)(3)*]:

- The importance of maintaining public trust and confidence in the judicial system.
- The importance of promoting public access to the judicial system.
- The parties' support of or opposition to the request.
- The nature of the case.
- The privacy rights of all participants in the proceeding, including witnesses, jurors, and victims.
- The effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding.
- The effect on the parties' ability to select a fair and unbiased jury.
- The effect on any ongoing law enforcement activity in the case.
- The effect on any unresolved identification issues.
- The effect on any subsequent proceedings in the case.
- The effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness.
- The effect on excluded witnesses who would have access to the televised testimony of prior witnesses.
- The scope of the coverage and whether partial coverage might unfairly influence or distract the jury.

- The difficulty of jury selection if a mistrial is declared.
- The security and dignity of the court.
- Undue administrative or financial burden to the court or participants.
- The interference with neighboring courtrooms.
- Maintenance of the orderly conduct of the proceeding.
- Any other factor the judge deems relevant.

2.44[8] No Presumption Regarding Media Coverage. *Cal Rules Ct, Rule 1.150* creates no presumption for or against granting permission to photograph, record, or broadcast court proceedings [*Cal Rules Ct, Rule 1.150(a)*].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access



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2.45 Local Court Rules May Determine Procedure for Requesting Coverage, and Terms of Coverage.

2.45[1] Local Court Rules or Trial Court Procedure May Apply. Counsel should consult local court rules and the procedure of the trial court to determine whether additional rules regulate media coverage.

➡ **Cross Reference:**

Discussion of local court rules, see 2.45[2] -[5].

2.45[2] Los Angeles County Court Rules.

2.45[2][a] Submit Request on Judicial Council Form. Requests for media coverage of any type, including pool cameras, must be submitted to the judge on the form approved by the Judicial Council. Requests must indicate placement preferences for microphones [Los Angeles Super Ct Rules, Rule 4.1(b)].

➡ **Cross Reference:**

Form, see 2.60.

2.45[2][b] Submit Special Requests to Film Jury Rooms or Employee Work Areas on Judicial Council Form Five Days Before Filming. Special requests to film jury rooms or employee work areas in the court must be made on a form approved by the Judicial Council. Five days before the proposed filming is to occur, unless good cause is shown, all such requests must be directed to the Los Angeles Superior Court Public Information Office and the following [Los Angeles Super Ct Rules, Rule 4.1(b)]:

- In the Central District: To the presiding judge (for the Central Civil Courthouse), to the presiding judge of the Juvenile Court (for the Edmund E. Edelman Children's Court), to the supervising judge of the Criminal Department (for the Criminal Courts Building), to the supervising judge of the Complex Litigation Department (for the Central Civil West Courthouse), to the supervising judge of the Mental Health Department (for the Mental Health Courthouse), or to the supervising judge of the Traffic Department (for the Metropolitan Courthouse); or

- In other districts: to the district supervising judge and (for any courthouse that has a site judge) also to the site judge.

The request must include the time estimate for filming. Time estimates are enforced by the court [Los Angeles Super Ct Rules, Rule 4.1(b)].

2.45[2][c] Location and Manner of Coverage Are Subject to Limitations. Other than as permitted by the judge in a written order and except for the press room (Room 200 in the Central Courthouse) and such areas as designated by the presiding judge of the Juvenile Court, the supervising judge of the Criminal Department, or the district supervising judge (in coordination with the site judge, if any) for the courthouse in which the photographing or electronic recording is to take place, photographing and electronic recording is not permitted in any part of the court, including, but not limited to, entrances, exits, halls, stairs, escalators, elevators, and courtrooms [Los Angeles Super Ct Rules, Rule 4.1(c)].

Presiding and supervising judges may make orders, including standing media orders, inconsistent with Los Angeles Super Ct Rules, Rule 4.1. Cameras and recording devices must be turned off while transporting them in any area of the court unless permitted by the judge in a written order. Photographing the interior of any courtroom through glass door windows or between the double doors is prohibited. No microphones or cameras of any type are permitted in any courtroom unless the judge has expressly permitted in a written order. Media personnel must turn off audible cell phones and pagers while in courtrooms [Los Angeles Super Ct Rules, Rule 4.1(c)].

"Court" means the courtroom at issue, the courthouse, and its entrances and exits [*Cal Rules Ct, Rule 1.150(b)(3)*; Los Angeles Super Ct Rules, Rule 4.1(h)]. In courthouses that house agencies or offices other than those of the Municipal or Superior Court, such as the district attorney's office or public defender's office, Los Angeles Super Ct Rules, Rule 4.1 does not prohibit or restrict media access, filming or photographing on floors that do not have courtrooms, court operations, court entrances or exits or in those agencies or offices. "Court" does not include areas outside the enclosed physical structure of the courthouse [Los Angeles Super Ct Rules, Rule 4.1(h)].

Groups of people in any hallway, entrance or exit may not become so large as to obstruct pedestrian traffic [Los Angeles Super Ct Rules, Rule 4.1(d)].

Photographing and filming any person wearing a juror badge in the court is prohibited [Los Angeles Super Ct Rules, Rule 4.1(3)].

All media wires and cables in court must be permitted by written order of the court and must be secured or covered [Los Angeles Super Ct Rules, Rule 4.1(f)].

2.45[2][d] Media Personnel Must Comply With State and Local Rules. All media personnel must be familiar with and comply with the Los Angeles Super Ct Rules, *Cal Rules Ct, Rule 1.150*, and any applicable orders [Los Angeles Super Ct Rules, Rule 4.1(g)].

2.45[3] Orange County Court Rules.

2.45[3][a] Filming, Photography, Electronic Recording Prohibited Unless Permitted by Rules. These procedures have been developed for the protection of all parties to ensure the secure and efficient handling of cases and events in all Superior Court, County of Orange, Justice Centers [Orange Super Ct Rules, Rule 180]. No filming, photography, or electronic recording is permitted in the justice centers except as permitted in the courtroom consistent with *Cal Rules Ct, Rule 1.150* and Orange Super Ct Rules, Rule 180 [Orange Super Ct Rules, Rule 180].

2.45[3][b] Violator of Rules Is Subject to Sanctions, Including Contempt. Violation of *Cal Rules Ct, Rule*

1.150 or Orange Super Ct Rules, Rule 180 may result in termination of media coverage, contempt of court proceedings, or monetary sanctions as provided by law [Orange Super Ct Rules, Rule 180].

2.45[3][c] Submit Request for Coverage on Judicial Council Form. Requests for any type of video, still photography, or audio coverage, including pool cameras, must be made in compliance with *Cal Rules Ct, Rule 1.150(e)(1)* and submitted to the judicial officer assigned to hear the case on Judicial Council forms MC-500 "Media Request to Photograph, Record or Broadcast" and MC-510 "Order on Media Request to Permit Coverage." A copy of the request also must be submitted to the Court's Public Information Office [Orange Super Ct Rules, Rule 180(A)].



Cross Reference:

Forms, see 2.60, 2.61.

2.45[3][d] Location and Manner of Coverage Are Subject to Limitations. The following limitations apply, unless an exception is permitted by written judicial order, or as permitted by Orange Super Ct Rules, Rule 180(E) [Orange Super Ct Rules, Rule 180(B)]:

- Videotaping, photographing, or electronic recording by the media and general public is not permitted in any part of the court, including, but not limited to lobby areas, cafeterias, halls, stairs, escalators, and elevators.
- Videotaping, photographing or electronic recording devices must be turned off while transporting them in any area of the court.
- All audible electronic devices must be turned off when they are in courtrooms.
- Any photography of the interior of a courtroom through glass door windows or from the area between the double doors is prohibited.
- When audio and/or video recording is not permitted by the judge assigned to hear the case, electronic recording devices may be taken into the courtroom only if they are not turned on and remain inside an enclosed case, bag, or other containers, unless otherwise specifically prohibited by the judicial officer assigned to hear the case.
- At the Lamoreaux Justice Center, advance authorization by a judicial officer is required for requests to bring cameras or any recording device into the building.

2.45[3][e] Coverage Prohibited in Certain Circumstances. Coverage of the following is prohibited [Orange Super Ct Rules, Rule 180(C); see *Cal Rules Ct, Rule 1.150(e)(6)*].

- A proceeding closed to the public (e.g., juvenile cases).
- Jurors or spectators.
- Jury selection.
- A conference between an attorney and a client, witness, or aide.
- A conference between attorneys.
- A conference between counsel and the judge at the bench ("sidebars").

- A proceeding held in chambers.

2.45[3][f] Permission May Be Revoked If Media Vehicle Is Illegally Parked. No media vehicles may be parked illegally anywhere on the courthouse environs. If at any time any vehicle is parked illegally, the order permitting photographic and electronic coverage may be revoked, in regard to the operator of that vehicle, without any further hearing [Orange Super Ct Rules, Rule 180(D)].

2.45[3][g] Media Activities Are Limited to Certain Court Facilities. Photos, news conferences, and on-camera statements to members of the media and general public are allowed only in areas specified for that purpose [Orange Super Ct Rules, Rule 180(E)]. Requests for exceptions must be made to the court's public information office and receive approval from the presiding judge [see Orange Super Ct Rules, Rule 180(E) (addresses for each court branch)].

2.45[3][h] Make Special Requests for Filming in Writing to Public Information Office. Special requests for filming courtrooms, jury rooms, or employee work areas must be made in writing through the court's Public Information Office before the proposed filming or photographing is to occur. The request should include the amount of time needed to complete the assignment [Orange Super Ct Rules, Rule 180(F)].

2.45[4] Santa Barbara Court Rules.

2.45[4][a] Judicial Officers Have Power to Limit Media Occupancy. All judicial officers are empowered to make such orders as they may deem necessary to limit the occupancy of the courtrooms in which they preside and the public corridors in court facilities immediately adjacent thereto, and to limit and control the behavior of persons gathered therein, when the circumstances indicate that the operations of the court, or public access to the court, are being disrupted or are about to be disrupted by congestion or disturbance. The court security officer can enforce these court orders, and also to implement the intent of Santa Barbara Super Ct Rules, Rule 603, generally, as consistent with the court security plan [Santa Barbara Super Ct Rules, Rule 603 (also providing that court must control use and occupation of courtrooms and adjacent spaces)].

2.45[4][b] Court Must Give Media Notice and Opportunity to Be Heard. Before limiting the activities of members of the news media within the courthouse, or in the areas immediately adjacent to the court building within the courthouse grounds, the court must give notice as is practical in the circumstances to all identifiable news media members who may be affected by an order under Santa Barbara Super Ct Rules, Rule 603, and offer them an opportunity to make a showing that the proposed order is unnecessary, or should be modified. Nothing in Rule 603 is intended to impact the procedures established in the California Rules of Court regarding the coverage of court proceedings by electronic media [Santa Barbara Super Ct Rules, Rule 603].

2.45[4][c] Aggrieved Party May Seek Modification or Exemption by Written Request. Any party aggrieved by an order made pursuant to Santa Barbara Super Ct Rules, Rule 603 may apply to the court to modify the order, or to be exempted from it, by making a request in writing to the judge who issued the order, or to the presiding, acting presiding, or assistant presiding judge of the court, if the judge who issued the order is not available. The written request must be made under penalty of perjury, and must state the specific impact of the order on the party requesting exemption or modification, as well as the specific relief requested [Santa Barbara Super Ct Rules, Rule 603].

2.45[4][d] Film or Electronic Coverage Allowed Only on Written Court Order After Request. As provided by the California Rules of Court, film or electronic media coverage of court proceedings is allowed only on written order of the court. Requests for coverage should be filed with the Calendar Coordinator or Clerk of each Court Division where the matter is to be heard, at least four days before the scheduled hearing. The calendar coordinator or clerk will promptly inform all parties to the action, of the request [Santa Barbara Super Ct Rules, Rule 605].

2.45[5] Santa Clara Court Rules.

2.45[5][a] Media Must Use Judicial Council Form to Request Coverage. The media may request an order permitting media coverage using the approved Judicial Council request form MC-500 and order form MC-510. The judge retains sole discretion for the approval or denial of any request [Santa Clara Super Ct Rules, Rule 3(A)].



Cross Reference:

Forms, see 2.60, 2.61.

2.45[5][b] File Forms With Proposed Order at Least Five Court Days Before Proceeding; Clerk Notifies Parties. The forms must be filed with the Clerk's Office in the division of the court where the request is directed at least five court days before the part of the proceeding to be covered unless good cause is shown. A completed, proposed order on the approved form must be filed with the request. The Clerk's Office will immediately deliver the request to the assigned judge who will rule on the request. If no judge has been assigned, the request will be submitted to the judge supervising the calendar department, and thereafter be ruled on by the judge assigned to the proceeding. The clerk will promptly notify the parties that a request has been filed [Santa Clara Super Ct Rules, Rule 3(A), *see Cal Rules Ct, Rule 1.150(e)(1)*].

2.45[5][c] Judge May Control Location of Media and Equipment. If the request is approved, the judge may specify the placement of media personnel and equipment to permit reasonable media coverage without disruption of the proceedings. Unless the judge in his or her discretion and for good cause orders otherwise, the following rules apply [Santa Clara Super Ct Rules, Rule 3(A), *see Cal Rules Ct, Rule 1.150(e)(7)*]:

- One television camera or one still photographer will be permitted.
- The equipment must not produce distracting sound or light. Signal lights or devices to show when equipment is operating must not be visible.
- Microphones and wires must be unobtrusively located and operated by one person.
- Operators must not move equipment or enter or leave the courtroom while the court is in session, or otherwise cause a distraction.
- Equipment or clothing of media personnel must not bear the insignia or marking of a media agency.

2.45[5][d] Media May Not Film Jurors; Filming of Other Areas of Courthouse by Permission. Photographing and filming any juror or summoned prospective juror is prohibited [Santa Clara Super Ct Rules, Rule 3(B)].

Unless approved by written order of the presiding judge or the facility supervising judge filming, video taping, photographing and electronic recording of any kind is not permitted in any other part of the courthouse, including but not limited to, entrances, exits, halls, stairways, escalators, and elevators. Application for permission for media coverage in these areas of the courthouse must be directed to the presiding judge or the facility supervising judge [Santa Clara Super Ct Rules, Rule 3(C)].

2.45[5][e] Turn Equipment Off During Transportation. Cameras and recording devices must be turned off while being transported in any area of the court unless expressly permitted by court order. Filming, video taping, and photographing of the interior of any courtroom through the glass door windows or through the double doors, or otherwise is prohibited. Microphones or cameras are not permitted in any courtroom unless the judge hearing a matter within the courtroom has expressly authorized their use in a written order pursuant to *Cal Rules Ct, Rule 1.150* and the local rules [Santa Clara Super Ct Rules, Rule 3(C)].

2.45[5][f] Violator of Rules or Order Is Subject to Sanctions, Including Contempt. Any violation of Santa Clara Super Ct Rules, Rule 3 or an order made under Santa Clara Super Ct Rules, Rule 3 is an unlawful interference

with the proceedings of the court and may be the basis for an order terminating media coverage, a citation for contempt of court, or an order imposing monetary or other sanctions as provided by law [Santa Clara Super Ct Rules, Rule 3(D); *see Cal Rules Ct, Rule 1.150(f)*].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public
Access Governments Courts Rule Application & Interpretation



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2.46 Media Coverage Not Permitted Under Certain Circumstances, Such As Jury Selection.

The judge will not permit media coverage of the following [*Cal Rules Ct, Rule 1.150(e)(6)*]:

- Proceedings held in chambers.
- Proceedings closed to the public.
- Jury selection.
- Jurors or spectators.
- Conferences between an attorney and a client, witness, or aide; between attorneys; or between counsel and the judge at the bench.

Legal Topics:

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

Civil Procedure Trials Jury Trials Jurors Selection General Overview Constitutional Law Bill of Rights Fundamental
Freedoms Freedom of Speech Free Press Public Access



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2.47 Party Opposing Request for Media Coverage May Raise Pertinent Statutory Factors.

A party opposing the media's request for coverage of trial proceedings may refute any of the factors raised in support of coverage. In addition, the opposing party may assert any of the enumerated statutory factors favoring denial of the request, or any other factor relevant to the case [*see Cal Rules Ct, Rule 1.150(e)(3)*]. A party's opposition to coverage is itself a statutory ground in support of denial of the request [*see Cal Rules Ct, Rule 1.150(e)(3)(C)*].

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access



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2.48 Order Granting or Denying Request for Media Coverage.

2.48[1] No Findings and Statement of Decision Is Required. The judge ruling on the request to permit media coverage is not required to make findings or a statement of decision [*Cal Rules Ct, Rule 1.150(e)(4)*].

2.48[2] Order May Incorporate Local Rule or Presiding Judge's Order. The order may incorporate any local rule or order of the presiding or supervising judge regulating media activity outside of the courtroom [*Cal Rules Ct, Rule 1.150(e)(4)*].

2.48[3] Media Agency Is Responsible for Compliance With Order. Each media agency is responsible for ensuring that all its media personnel who cover the court proceeding know and follow the provisions of the court order and *Cal Rules Ct, Rule 1.150(e)(4)* [*Cal Rules Ct, Rule 1.150(e)(4)*; see Santa Clara Super Ct Rules, Rule 3(A)].



Cross References:

Discussion of local court rules, see 2.45.

Form, see 2.61.

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public
Access Governments Courts Rule Application & Interpretation



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2.49 Court May Impose Conditions on Grant of Coverage.

2.49[1] Court May Condition Coverage on Media's Payment of Increased Costs. The judge may condition granting of the order permitting media coverage on the media agency's agreement to pay any increased court-incurred costs resulting from the permitted media coverage (e.g., for additional court security or utility service) [*Cal Rules Ct, Rule 1.150(e)(4)*].

2.49[2] Court May Impose Limitations on Coverage Such As Publishing Obscured Facial Images. A court may grant a request for media coverage contingent on other conditions, such as requiring the media to "tilize" or obscure the faces of parties, or restricting the location of cameras in the courthouse [*see, e.g., South Coast Newspapers, Inc. v. Superior Court (2000) 85 CA4th 866, 869, 102 CR2d 487* (order not to publish unobscured images of juvenile criminal defendants in courtroom did not extend to media's right to publish photographs from other sources, e.g., outside courthouse and from school yearbooks)].

2.49[3] Court May Require Media to Demonstrate Compliance. The judge may require media agencies to demonstrate that proposed personnel and equipment comply with *Cal Rules Ct, Rule 1.150*. The judge may specify the placement of media personnel and equipment to permit reasonable media coverage without disruption of the proceedings [*Cal Rules Ct, Rule 1.150(e)(7)*].

2.49[4] Restrictions on Quantity and Placement of Equipment Apply Absent Other Order. Unless the judge in his or her discretion orders otherwise, the following requirements apply to media coverage of court proceedings [*Cal Rules Ct, Rule 1.150(e)(8)*]:

- One television camera and one still photographer are permitted.

✚ Judge's Perspective:

Generally there is a pooling arrangement among various television stations so that only one video camera is used and a similar arrangement for still photos. These arrangements are usually made without the active involvement of the judge.

 Cross Reference:

Discussion of obtaining and opposing order to allow media coverage, see 2.41.

- The equipment used must not produce distracting sound or light. Signal lights or devices to show when equipment is operating must not be visible.
- An order permitting or requiring modification of existing sound or lighting systems requires that the modifications be installed, maintained, and removed without public expense or disruption of proceedings. Microphones and wiring must be unobtrusively located in places approved by the judge and must be operated by one person.
- Operators must not move equipment or enter or leave the courtroom while the court is in session, or otherwise cause a distraction.
- Equipment or clothing must not bear the insignia or marking of a media agency.

Legal Topics:

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

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2.50 Multiple Media Agencies Must Pool Coverage.

If two or more media agencies of the same type request media coverage of a proceeding, they must file a statement of agreed arrangements. If they are unable to agree, the judge may deny media coverage by that type of media agency [*Cal Rules Ct, Rule 1.150(e)(9)*].

Legal Topics:

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

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2.51 Court That Permits Recording May Not Later Limit Broadcast.

Once the proceedings have been recorded according to a valid court order, nothing in *Cal Rules Ct, Rule 1.150* authorizes the court to refuse, limit, or terminate the later broadcast of that proceeding. *Cal Rules Ct, Rule 1.150* does not authorize a judge to edit or control a television station's news broadcasts of a previously recorded judicial proceeding [*KFMB-TV Channel 8 v. Municipal Court (1990) 221 CA3d 1362, 1367, 271 CR 109*] .

Example:

A trial court's order limiting the broadcasting of previously recorded trial court proceedings pursuant to the court's permission under *Cal Rules Ct, Rule 1.150*, to exclude the broadcast of witnesses' testimony in preliminary hearing exceeded the rule's scope [*KFMB-TV Channel 8 v. Municipal Court (1990) 221 CA3d 1362, 1368, 271 CR 109*] .

Legal Topics:

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

Constitutional Law Bill of Rights Fundamental Freedoms Freedom of Speech Free Press Public Access



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2.52 Modifying Order Permitting Media Coverage.

2.52[1] Court May Modify Order on Own Motion or on Application. The order permitting media coverage may be modified or terminated on the judge's own motion, or on application to the judge without the necessity of a prior hearing or written findings [*Cal Rules Ct, Rule 1.150(e)(5)*].

Consider:

Because *Cal Rules Ct, Rule 1.150(e)(1)* permits the media to request the order, it appears that *Cal Rules Ct, Rule 1.150(e)(5)* permits parties and others including media to seek to modify the order. Also, *Cal Rules Ct, 1.150(e)(5)* says notice is to be given "to the parties and each media agency permitted by the previous order," which seems to indicate this is not limited to the parties and prior agencies permitted to cover.

2.52[2] Notice of Modification Is Required. Notice of the application and any modification or termination ordered pursuant to the application must be given to the parties and each media agency permitted by the previous order to cover the proceedings [*Cal Rules Ct, Rule 1.150(e)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic Access



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1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.53

2.53 Sanctions and Contempt for Violation of Media Coverage Rule or Order.

Any violation of *Cal Rules Ct, Rule 1.150* or an order made under it is an unlawful interference with the proceedings of the court, and may be the basis for an order terminating media coverage, a citation for contempt of court, or an order imposing monetary or other sanctions as provided by law [*Cal Rules Ct, Rule 1.150(f)*].



Cross References:

Discussion of contempt, see Ch. 23, Contempt.

Discussion of contempt and sanctions, see California Forms of Pleading and Practice, Ch. 135, Contempt
; Ch. 510, Sanctions (Matthew Bender).

Legal Topics:

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

Civil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewConstitutional
LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic Access



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Chapter 2 Public Access to Trials and Records
VI. FORMS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.54

2.54 Notice of Motion and Motion for Order to Close Proceedings.

Notice of Motion and Motion for Order to Close Proceedings.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION FOR ORDER
Defendant.	)	CLOSING PROCEEDINGS
	)	
	)	

To _____ [party, e.g., Plaintiff John Smith] and to his or 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 for an order closing these proceedings to the public. The motion will be made on the grounds that the facts, as established in the accompanying declaration of _____ [specify], are sufficient to justify closing the proceedings because _____ [specify, e.g., the plaintiff, a minor aged 8, will be unnecessarily traumatized by the presence of the public].

The motion is based on this notice of motion, on the declaration(s) of _____ [name(s)] and the supporting memorandum served and filed with this motion, 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:

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 C4th 1178, 1212, 86 CR2d 778, 980 P2d 337

Grounds:

See 2.07

Related Form of Order:

See 2.55



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Chapter 2 Public Access to Trials and Records
VI. FORMS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.55

2.55 Order Closing Proceedings.

Order Closing Proceedings.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____

ORDER SEALING

RECORDS

The motion of _____ [party, e.g., Plaintiff Mary Jones] for an order closing the proceedings, 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 declaration of _____ [name] 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:

1. There is an overriding interest that overcomes the right of public access to the proceedings, in that _____ [specify overriding interest].
2. This overriding interest supports closing the proceedings as specified below.
3. A substantial probability exists that this overriding interest will be prejudiced if the proceedings are not closed as

specified below, in that _____ [*specify overriding interest*].

4. This closing order has been tailored to narrowly limit closing the proceedings by _____ [*specify*].

5. No less restrictive means exist to achieve the overriding interest than to close the proceedings as specified below.

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that the proceedings of this trial be closed to the public in the following manner: _____ [*specify parts of proceedings to be closed*].

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 C4th 1178, 1212, 86 CR2d 778, 980 P2d 337

Grounds:

See 2.05

Related Form of Motion:

See 2.54



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Chapter 2 Public Access to Trials and Records
VI. FORMS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.56

2.56 Notice of Motion and Motion for Order to Seal Records.

Notice of Motion and Motion for Order to Seal Records.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION FOR ORDER
Defendant.	)	SEALING RECORDS
	)	
	)	

To _____ [party, e.g., Plaintiff John Smith] and to his or 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 for an order directing that the following records be sealed pursuant to *California Rules of Court, Rule 2.550 et seq.*: _____ [specify]. The motion will be made on the grounds that the facts, as established in the accompanying declaration of _____ [specify], are sufficient to justify sealing the specified records pursuant to *California Rules of Court, Rule 2.550 et seq.*

The motion is based on this notice of motion, on the declaration(s) of _____ [name(s)] and the supporting memorandum served and filed with this motion, 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:

Cal Rules Ct, Rule 2.551(b)

Grounds:

See 2.16 -2.18

Related Form of Order:

See 2.57



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VI. FORMS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.57

2.57 Order Sealing Records.

Order Sealing Records.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER SEALING
_____ [name],	)	RECORDS
Defendant.	)	
	)	
	)	

The motion of _____ [party, e.g., Defendant Mary Jones] for an order sealing records under *California Rules of Court, Rule 2.550 et seq.*, 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 declaration of _____ [name] 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:

1. There exists an overriding interest that overcomes the right of public access to the records specified below, in that _____ [specify overriding interest].
2. This overriding interest supports sealing the records specified below.

3. A substantial probability exists that this overriding interest will be prejudiced if the records specified below are not sealed, in that _____ [*specify overriding interest*].

4. The records specified below have been tailored to narrowly limit the overall records to be sealed.

5. No less restrictive means exist to achieve the overriding interest than to seal the records specified below.

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that the following records be _____ [sealed or filed under seal]: _____ [*specify records and/or portions of records to be sealed; if the specified records are lodged with the court, specify also whether, in addition to the lodged records, the order itself, the register of actions, any other court records, or any other records relating to the case are also to be sealed*].

[IT IS FURTHER ORDERED that, other than the court, only the following person(s)] is/are authorized to inspect the records sealed by this order: _____ (*names of person(s) other than court authorized to inspect sealed records*)).

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP § 1003; Cal Rules Ct, Rules 2.550(d), (e), 2.551(e)

Related Form of Motion:

See 2.56



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Chapter 2 Public Access to Trials and Records
VI. FORMS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.58

2.58 Notice of Motion and Motion for Gag Order.

Notice of Motion and Motion for Gag Order.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION FOR GAG ORDER
Defendant.	)	
	)	
	)	

To _____ [party, e.g., Plaintiff John Smith] and to his or 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 for a gag order to prohibit any party or attorney, agent, or representative of a party from giving or discussing outside the courtroom any information or opinion about this action or any issues likely to be involved in this action. The motion will be made on the grounds that the facts, as established in the accompanying declaration of _____ [specify], are sufficient to justify the gag order because _____ [specify, e.g., the speech sought to be restrained poses a clear and present danger to a fair trial].

The motion is based on this notice of motion, on the declaration(s) of _____ [name(s)] and the supporting memorandum served and filed with this motion, 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:

Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1241, 101 CR2d 558

Grounds:

See 2.35

Related Form of Order:

See 2.59



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Chapter 2 Public Access to Trials and Records
VI. FORMS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.59

2.59 Gag Order.

Gag Order.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER SEALING
_____ [name],	)	RECORDS
Defendant.	)	
	)	
	)	

The motion of _____ [party, e.g., Plaintiff Mary Jones] for a gag order 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 declaration of _____ [name] 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:

1. The speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest, in that _____ [specify overriding interest].
2. This gag order has been narrowly tailored to protect that interest by _____ [specify].
3. No less restrictive means exist to protect that interest than to impose this gag order.

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that any party or attorney, agent, or representative of a party is prohibited from giving or discussing outside the courtroom any information or opinion about this action or any issues likely to be involved in this action].

Dated: _____

_____ [signature]
Judge of the Superior Court

NOTES.

Authority:

Hurvitz v. Hoefflin (2000) 84 CA4th 1232, 1241, 101 CR2d 558

Grounds:

See 2.37

Related Form of Motion:

See 2.58



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Chapter 2 Public Access to Trials and Records
VI. FORMS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.60

2.60 Judicial Council Form MC-500--Media Request to Photograph, Record, or Broadcast.

Judicial Council Form MC-500--Media Request to Photograph, Record, or Broadcast.

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

Cal Rules Ct, Rule 1.150(e)(1)

Grounds:

See 2.44

Related Form of Order:

See 2.61



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Chapter 2 Public Access to Trials and Records
VI. FORMS

1-2 MB Practice Guide: Trial & Post-Trial Civil Proc 2.61

2.61 Judicial Council Form MC-510--Order on Media Request to Permit Coverage.

Judicial Council Form MC-510--Order on Media Request to Permit Coverage.

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

Cal Rules Ct, Rule 1.150(e)(4)

Grounds:

See 2.48

Related Form of Request:

See 2.60



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Chapter 3 Notice of Trial

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.syn

§ 3.syn Synopsis to Chapter 3: Notice of Trial

3.01 Scope.

3.02 Objective and Strategy.

3.03 CHECKLIST: Preparing and Serving Notice of Trial.

3.04 Options and Strategy.

3.05 Either Party May Bring Issue in Case to Trial or Hearing.

3.06 Notice Is Required to Allow Parties to Prepare for Trial and to Protect Parties Against Dismissals or Judgments.

3.07 Sending Notice Is Mandatory.

3.07[1] Fifteen Days' Notice Is Required; Court May Not Shorten Time.

3.07[2] Statutory Notice Requirements May Be Excused or Waived.

3.07[3] Fifteen Days' Notice Is Not Required When Trial Is Continued to Later Date.

3.07[4] Fifteen Days' Notice Is Required When Trial Is Advanced.

3.08 Notice of Trial Must Include Name of Party Being Notified, Date Case Has Been Set for Trial, and Location Where Trial Will Occur.

3.09 Service of Notice Must Be Made by Mail.

3.09[1] Court Clerk Normally Serves Notice 20 Days Before Trial.

3.09[2] Party May Serve Notice at Least 15 Days Before Trial.

3.09[3] Service by Mail Does Not Extend Time in Unlawful Detainer Proceedings.

3.10 Filing Notice With Court Is Not Required but Is Recommended.

3.11 CHECKLIST: Asserting Notice of Trial Is Untimely or Insufficient.

3.12 Options and Strategy.

3.13 If Notice of Trial Was Served but Was Not Timely, Make Written or Oral Motion to Continue.

3.14 If Notice Was Not Served, Seek Relief From Judgment.

3.15 Failure to Appear After Proper Service Leads to Entry of Judgment or Dismissal.

3.16 Party Seeking to Proceed With Trial Has Burden of Proving Compliance With 15-Day Notice Requirement.

3.17 Failure to Give Proper Notice Is Grounds for Granting New Trial.

3.18 Notice of Time and Place Case Has Been Set for Trial.



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Chapter 3 Notice of Trial
I. STRATEGY

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.01

3.01 Scope.

This chapter covers:

- Objectives and strategies for completing, serving, and filing the "notice of trial" form [see 3.02].
- The preparation of the notice of trial, including discussion of who may bring an issue to trial [see 3.05], the purpose of the notice [see 3.06], the required notice period [see 3.07], and the contents of the notice [see 3.08; Form: see 3.18].
- Serving the notice of trial [see 3.09].
- Filing the notice of trial with the court [see 3.10]
- Opposing the notice of trial on grounds that it was not given or that if given it was untimely or insufficient [see 3.13, 3.14].
- The consequences associated with failing to appear after the notice has been properly served [see 3.15].
- Who has the burden of proving compliance with the notice of trial requirements [see 3.16].
- The failure to give the notice as a grounds for granting a new trial [see 3.17].

Core Statute:

CCP § 594

Legal Topics:

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



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Chapter 3 Notice of Trial
I. STRATEGY

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.02

3.02 Objective and Strategy.

The notice of trial is used by one party to give the other party and his or her attorney notice that the case has been set for trial. The purpose of the notice is twofold:

1. To enable the parties to prepare for trial; and
2. To prevent the possibility of a judgment or dismissal without the opportunity of being present.

Failure to appear once proper service has been accomplished will likely lead to entry of judgment against the party who failed to appear.

Counsel should note the difference between a "notice of trial" [see CCP § 594] and a "demand for a jury trial" [see *Cal Const*, art I, § 16; CCP § 592]. The notice is a procedural form used simply to notify opposing parties and counsel that the case has been set for a trial date. However, a demand for a jury trial seeks to have the case heard by a jury. This request should be made in the Case Management Statement. In addition, the notice of trial should not be used for special requests, such as a request to bifurcate.



Strategic Point:

The notice of trial and the demand for jury trial do not interact; relying on the notice of trial to "demand" a jury trial runs the risk of waiving a jury trial as untimely. If a party seeks to have a trial on an issue [see 3.05], and not the whole case, then attention should be paid to whether it is advisable to move to bifurcate the issue first and if granted, then serve notice of trial. Both of these must be requested in a timely fashion. Although courts have discretion to permit a party who does not timely make a jury demand to do so at a later date, such a late demand does not provide assurance the relief will be granted.



Cross References:

Discussion of the jury trial demand, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.37 -23.49.

Discussion of waiving the right to trial by jury, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.48.

Specific discussion of waiving the right to a jury because of the failure to make a timely announcement that a party demands a jury trial, see *Ch. 5, Non-Jury Trials*, 5.14[4].

Discussion of the general steps needed to prepare for trial, see *Ch. 1, Preparing for Trial*.

Many courts send notices of trial dates as a matter of routine, without determining, in advance, the availability of some, or all, counsel for trial on the noticed date. Prompt objection to such notices of trial, when the noticed date is inconvenient, is similarly important because failure to do so may result in a requirement to file a noticed motion at a later date, which might not be granted.

Objection to the notice of trial may be made on the grounds that the notice was never served or, if served, the service did not provide the statutorily prescribed period of notice. Alternatively, a motion to continue the trial date is appropriate. If service of the notice has been properly made on a party, failure to appear at the trial will likely lead to a judgment against that party. At that point it is necessary to seek relief from the judgment.

 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 ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Demands



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Chapter 3 Notice of Trial
II. PREPARING AND SERVING NOTICE OF TRIAL

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.03

3.03 CHECKLIST: Preparing and Serving Notice of Trial.

- ☐ Prepare notice of trial.
- ☐ Serve copy of notice on adverse party.
- ☐ Execute proof of service.
- ☐ File original of notice and proof of service with court.

Authority:

CCP § 594

Discussion:

See 3.07 -3.10

Form:

See 3.18

Legal Topics:

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

Civil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedureTrialsGeneral Overview



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Chapter 3 Notice of Trial
II. PREPARING AND SERVING NOTICE OF TRIAL

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.04

3.04 Options and Strategy.

Once a trial date has been set, preparation of the notice of trial is a quick process. Service of the notice of trial is required. However, there is no statutory requirement that the notice and accompanying proof of service be filed with the court clerk, although it is good practice to do so. If the notice and proof of service are filed and the adverse party fails to appear at the trial, the appearing party must be sure to bring to the court's attention that the proof of service is in the file and ask that it be introduced into evidence [*see CCP § 594(b)* (requirement that proof of service be introduced into evidence)]. Failure to appear once proper service has been accomplished will likely lead to entry of judgment for the adverse party [*see 3.10, 3.15*].



Strategic Point:

More often than not, this is an event performed by plaintiff's counsel (and in many cases, by the court). When required to do so, make certain the required information regarding the date, time, and location of the trial is accurately set forth in the notice.

Legal Topics:

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

Civil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedureTrialsGeneral Overview



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Chapter 3 Notice of Trial

II. PREPARING AND SERVING NOTICE OF TRIAL

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.05

3.05 Either Party May Bring Issue in Case to Trial or Hearing.

Either party may bring an issue to trial or to a hearing and, in the absence of the adverse party, proceed with the case and take a dismissal, verdict, or judgment, as the case may require, unless the court for good cause otherwise directs [CCP § 594(a)]. However, if the issue to be tried is an issue of fact, proof must first be made to the court's satisfaction that the adverse party had 15 days' notice of the trial (or five days' notice in an unlawful detainer action) [CCP § 594(a); see CCP § 594(b)]. If the adverse party has served notice of trial on the party seeking the dismissal, verdict, or judgment of the action at least five days before the trial, the adverse party is deemed to have had such notice [CCP § 594(a)].

► Cross References:

Discussion of service of notice, see 3.09.

Discussion of burden of proving compliance with notice requirement, see 3.16.

Legal Topics:

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

Civil Procedure Dismissals Involuntary Dismissals General Overview Civil Procedure Trials General Overview



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Chapter 3 Notice of Trial
II. PREPARING AND SERVING NOTICE OF TRIAL

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.06

3.06 Notice Is Required to Allow Parties to Prepare for Trial and to Protect Parties Against Dismissals or Judgments.

The purpose of requiring notice of the time and place for trial is twofold [*Au-Yang v. Barton* (1999) 21 C4th 958, 962, 90 CR2d 227, 987 P2d 697] :

1. To enable the parties to prepare for trial; and
2. To prevent the possibility of a judgment or dismissal without the opportunity of being present.

That is, only certain preparations can be made after a trial date is set, such as subpoenaing and scheduling of witnesses, scheduling of counsel, and making arrangements for transportation of witnesses, parties, counsel, and exhibits. Additionally, CCP § 594(a) reflects the legislative determination that 15 days is the minimum period parties should be allowed for these preparations [*Au-Yang v. Barton* (1999) 21 C4th 958, 962, 90 CR2d 227, 987 P2d 697] .

Consider:

Note that some deadlines run from the date the matter is set for trial, such as designation of experts and disclosure of opinions and depositions. The notice requirement sets those dates and procedures in motion. Discovery cut-off follows from that date as well. In most cases, the parties will have started serious trial preparations long before the notice of trial is actually served.



Strategic Point:

Whether the minimum notice period or a longer period is provided, courts expect the parties to be prepared to proceed when the matter is assigned to a trial department. This includes having, on the date scheduled for trial (or other date set forth in the court's local rules), jury instructions, forms of verdicts, trial subpoenas served on witnesses, and exhibits prepared and marked so the matter will proceed in an orderly and timely fashion that will not disrupt the court's schedule or inconvenience jurors.



Cross References:

Discussion of exceptions and waiver of notice, see 3.07[2].

Discussion of the general steps needed to prepare for trial, see Ch. 1, Preparing for Trial.

Legal Topics:

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

Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil
ProcedureJudgmentsGeneral Overview



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Chapter 3 Notice of Trial
II. PREPARING AND SERVING NOTICE OF TRIAL

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.07

3.07 Sending Notice Is Mandatory.

3.07[1] Fifteen Days' Notice Is Required; Court May Not Shorten Time. *CCP § 594(a)*, providing that a trial may not take place unless the adverse party was given at least 15 days' notice, is a mandatory and jurisdictional requirement. A judgment entered following a trial conducted in violation of the requirement is void [*Urethane Foam Experts, Inc. v. Latimer* (1995) 31 CA4th 763, 767, 37 CR2d 404] .

The court may not shorten the 15-day time for notice. However, the period may be shortened by waiver or consent of the parties [*Au-Yang v. Barton* (1999) 21 C4th 958, 963, 90 CR2d 227, 987 P2d 697 , 21 C4th 958, 90 CR2d 227, 987 P2d 697] .

3.07[2] Statutory Notice Requirements May Be Excused or Waived. Compliance with the mandatory notice of trial requirements may be excused or waived in the following circumstances:

- When the adverse party is in fact represented at the trial even though the notice was defective [see *Sheldon v. Landwehr* (1911) 159 C 778, 782, 116 P 44] .
- When the adverse party had actual notice of the trial date [see *People v. Smith* (1994) 26 CA4th 113, 127-129, 31 CR2d 488 (defendant's presence at settlement conference gave actual notice that the matter was continued)].
- When the parties stipulate to shortened time or waiver of the notice [see *People v. Busick* (1968) 259 CA2d 744, 748, 66 CR 532 (counsel at the pretrial conference signed a stipulation that the trial date could be set on 12 hours' notice by the court)].

3.07[3] Fifteen Days' Notice Is Not Required When Trial Is Continued to Later Date. When a trial is "trailed" or continued to a later date, the 15-day notice of *CCP § 594(a)* is not required because the absent party's opportunities to plan and prepare for trial are unlikely to be harmed by the continuance. That party will have had sufficient time to complete trial preparations by the original date, and will have learned of the continued date either on appearing at the original trial date or through reasonable diligence [see *Au-Yang v. Barton* (1999) 21 C4th 958, 965, 90 CR2d 227, 987 P2d 697] .

Similarly, a 15-day notice period does not apply to the resumption of a trial following a continuance. The general rule in such a case is that after notice of trial in the first instance has been properly given, it becomes the duty of all interested parties to keep themselves informed by diligent inquiry of subsequent continuances [*In re Phillip F. (2000) 78 CA4th 250, 256-257, 92 CR2d 693*] .

3.07[4] Fifteen Days' Notice Is Required When Trial Is Advanced. Unlike when a trial is "continued," when a trial date is "advanced" a failure to comply with the 15-day notice requirement is likely to result in prejudice to the absent party's trial preparations and planning. Thus, a party who obtains an order advancing the trial date must comply with *CCP § 594(a)* by giving the opposing party 15 days' notice of the new trial date [see *Au-Yang v. Barton (1999) 21 C4th 958, 965, 90 CR2d 227, 987 P2d 697*] .



Cross References:

Discussion of motions for precedence or preference and motions to advance, reset, or specially set, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 23.25 -23.36*.

Form of a motion to advance, specially set, or reset a case for trial, see *California Forms of Pleading and Practice, § 551.250A* (Matthew Bender).

Legal Topics:

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

Civil ProcedurePretrial MattersContinuancesCivil ProcedureTrialsGeneral Overview



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Chapter 3 Notice of Trial
II. PREPARING AND SERVING NOTICE OF TRIAL

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.08

3.08 Notice of Trial Must Include Name of Party Being Notified, Date Case Has Been Set for Trial, and Location Where Trial Will Occur.

As with all other pleadings, the notice of trial should include the case caption and case number [see *Cal Rules Ct, Rule 2.111*]. It must also identify the party who is being served with the notice as well as that party's attorney. In addition, the notice must include the date the case has been set for trial, the department or division of the court will the trial will take place, and the street address of the courthouse [see *CCP § 594*].



Cross Reference:

Form of notice of trial, see 3.18.

Legal Topics:

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



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II. PREPARING AND SERVING NOTICE OF TRIAL

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.09

3.09 Service of Notice Must Be Made by Mail.

3.09[1] Court Clerk Normally Serves Notice 20 Days Before Trial. *CCP § 594's* requirement to serve the notice of trial, as well as the proof of service when the adverse party fails to appear, is mandatory [*Au-Yang v. Barton* (1999) 21 C4th 958, 963, 90 CR2d 227, 987 P2d 697] . The court clerk must serve the notice on all the parties by mail not less than 20 days before the date set for trial (or 10 days in an unlawful detainer proceeding) [*CCP § 594(b)*].



Warning:

If the clerk fails to serve the notice, the party may serve within five more days. To be sure that the court serves the notice properly, contact the clerk to remind him or her to serve the notice of trial [*see CCP § 594(b)*; *see 3.09[2]* (service by party)].

Consider:

This process raises a unique issue. Most attorneys attach a signed proof of service to documents that are served, and the words of the proof of service state that the document has been sent. The proof of service cannot be signed, under penalty of perjury, and then attached to the document and served. The better practice would be to serve the document and have a separate proof of service for the document, whatever it is, including the "notice of trial." Whenever the court sets a matter for hearing, at a pretrial or case management conference, the notice is sent out soon thereafter.

3.09[2] Party May Serve Notice at Least 15 Days Before Trial. If the clerk fails to serve the notice, it may be served by mail by either party on the adverse party not less than 15 days before the date set for trial (or 10 days in an unlawful detainer proceeding) [*CCP § 594(b)*]. If notice is served by a party, proof of that service may be made by introducing into evidence either an affidavit or certificate pursuant to *CCP § 1013a(1)* or (2) or other competent evidence [*CCP § 594(b)*].



Warning:

The attorney must check with the clerk's office to ensure that notice was served on time [*see CCP § 594(b)*; *see 3.09[1]* (service by clerk)].

**Strategic Point:**

Many attorneys make it a habit to always serve the notice of trial themselves, in case the court clerk fails to do so.

**Cross Reference:**

Discussion of which party bears the burden of proving compliance with the 15-day notice requirement, see 3.16.

3.09[3] Service by Mail Does Not Extend Time in Unlawful Detainer Proceedings. *CCP § 1013*, regarding extensions of time when service is by mail, does not extend the notice of trial requirements under *CCP § 594(a)* for unlawful detainer proceedings [*CCP § 594(b)*].

**Cross Reference:**

Discussion of unlawful detainer, see Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation, Ch. 5, Unlawful Detainer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewGovernmentsCourtsClerks of Court



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3.10 Filing Notice With Court Is Not Required but Is Recommended.

CCP § 594 does not include a requirement that the 15-day notice itself, or the proof of service of the notice, be filed with the court. However, because *CCP § 594* gives the court clerk authority to serve the notice, filing the notice and proof of service is the better practice. Essentially, that means the notice and proof of service is in the case file with the court. Thus, if the notice and proof of service are filed and the adverse party fails to appear at the trial, the appearing party must be sure to bring to the court's attention that the proof of service is in the file and ask that it be introduced into evidence [*see CCP § 594(b)* (requirement that proof of service be introduced into evidence)]. Failure to appear once proper service has been accomplished will likely lead to entry of judgment for the adverse party [*see 3.15*].



Warning:

Always make sure to serve the notice of trial before filing the proof of service.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewGovernmentsCourtsClerks of Court



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Chapter 3 Notice of Trial

III. ASSERTING NOTICE OF TRIAL IS UNTIMELY OR INSUFFICIENT

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.11

3.11 CHECKLIST: Asserting Notice of Trial Is Untimely or Insufficient.

- ☐ If party made an appearance on date of trial, make written or oral motion objecting to notice of trial.
- ☐ Seek continuance of trial date.
- ☐ If party did not appear and judgment was entered, seek relief from judgment.
- ☐ If party is objecting to notice of trial, party who served notice should be prepared to provide evidence of compliance with 15-day notice requirement, such as the clerk of the court's certificate of service.
- ☐ Move for new trial if notice of trial was insufficient.

Authority:

CCP § 594

Discussion:

See 3.13 -3.17

Legal Topics:

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

Civil ProcedurePretrial MattersContinuancesCivil ProcedureTrialsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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Chapter 3 Notice of Trial

III. ASSERTING NOTICE OF TRIAL IS UNTIMELY OR INSUFFICIENT

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.12

3.12 Options and Strategy.

There are two circumstances in which objecting to the notice of trial may be proper: (1) the party was not served with any notice, or (2) the notice that was served was insufficient in that it did not provide the required time to prepare for trial.

If a party is not served with any notice and the trial proceeds, that party will likely need to take steps to seek relief from the judgment entered. The more common scenario, however, occurs when notice was given but the notice was untimely or otherwise insufficient. In this instance, the party should still appear to prevent judgment being entered and to seek a continuance to properly prepare for trial. Note that preparations can be extensive, and clearing calendars and issuing witness subpoenas are time consuming and need the required notice period.

If the "notice" is simply a vehicle to try a legal or factual issue that depends on the resolution of other issues, the objection should identify those other issues and seek to put the trial over until those other issues have been resolved.

Occasionally, the trial date scheduled by the court is inconvenient for all parties. The usual procedure on receiving such notice is to obtain an agreement from other counsel to have the trial scheduled for a more convenient date and then promptly notify the court. Usually, but not always, the court will accommodate the parties submitting such a stipulation. It can happen that a court schedules a trial in the first instance for a date that is not convenient to one or more parties or their attorneys and later refuses to change the scheduled date. This often occurs when there is delay by one or more parties in advising the court of the objectionable scheduling.

Legal Topics:

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

Civil Procedure Pretrial Matters Continuances Civil Procedure Trials General Overview Civil Procedure Judgments Relief From Judgment General Overview



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1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.13

3.13 If Notice of Trial Was Served but Was Not Timely, Make Written or Oral Motion to Continue.

If the notice of trial was served but was insufficient because it did not provide the statutory 15-day notice to prepare under *CCP* § 594, a written motion to continue the trial is appropriate. The attorney should appear to avoid the taking of a judgment against him or her and present the motion to continue [see *Au-Yang v. Barton* (1999) 21 *C4th* 958, 963, 90 *CR2d* 227, 987 *P2d* 697] . If there was no time to prepare a written motion, an oral motion to continue on the first day of trial would also be appropriate.

➡ Cross Reference:

Discussion of motions to continue, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure; Ch. 30, Continuances.

Legal Topics:

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

Civil ProcedurePretrial MattersContinuancesCivil ProcedureTrialsGeneral Overview



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3.14 If Notice Was Not Served, Seek Relief From Judgment.

If a party is not served with any notice of trial, and the trial proceeds without that party, it is necessary to take steps to seek relief from the judgment entered, at the earliest possible time.

Cross Reference:

Discussion of seeking relief from judgment, see Ch. 29, Setting Aside Judgments and Orders.

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview



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III. ASSERTING NOTICE OF TRIAL IS UNTIMELY OR INSUFFICIENT

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.15

3.15 Failure to Appear After Proper Service Leads to Entry of Judgment or Dismissal.

When the defendant has answered but fails to appear at trial after having been properly served the notice of trial, the plaintiff's remedy is to proceed with the matter as an uncontested trial. At that point plaintiff may introduce evidence on which the court may render judgment [see *CCP § 594*; *Heidary v. Yadollahi* (2002) 99 CA4th 857, 863-864, 121 CR2d 695] . However, note that a default judgment is not proper in this situation. Rather, a default is proper only when the defendant has not filed an appropriate responsive pleading [see *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 CA4th 694, 705, 10 CR3d 724] , although one court has found that a proceeding under *CCP § 594* taken against a party was in the nature of a default [see *Benson Motors, Inc. v. Macmorris Sales Corp.* (1965) 238 CA2d Supp 937, 48 CR 123] .

Strategic Point:



An attorney representing a party in an uncontested proceeding has a heightened obligation to be certain to provide the court the proper, and timely served, notice of trial and proof of service. Failure to do so will likely lead to the setting aside of any judgment obtained in the unopposed proceeding. Proving the case in the absence of the opposing party is much the same as proving a default. Not all witnesses need be called, as they would be in a trial. Present just the evidence that proves the elements of the causes of action, the grounds for damages and relief, and secures the party's position, if the matter is subject to review. However, it is important to put on all the evidence that is necessary to establish issues that can be used in subsequent proceedings on a collateral estoppel or res judicata basis.



Cross Reference:

Discussion of defaults, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief.

Note that *CCP § 581(b)(5)* provides for discretionary dismissal "when either party fails to appear on the trial and the other party appears and asks for dismissal." However, *CCP § 581(b)(5)* is subject to the 15 days' notice of trial requirements of *CCP § 594*. "A court should not dismiss an action under [*CCP § 581*], for failure of the plaintiff to appear on the trial, except upon proof made in compliance [*CCP § 594*], designed to prevent the manifest injustice of dismissing a party's action, or trying it in his absence, because of his failure to appear at a time at which he could not be held to have had notice that the trial would be had, or that any proceeding would be taken against him" [*In re Estate of*

Dean (1906) 149 C 487, 492, 87 P 13] .

**Cross Reference:**

Discussion of seeking relief from judgment, see Ch. 29, Setting Aside Judgments and Orders.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureTrialsGeneral OverviewCivil ProcedureJudgmentsGeneral Overview



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1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.16

3.16 Party Seeking to Proceed With Trial Has Burden of Proving Compliance With 15-Day Notice Requirement.

The party seeking to proceed with trial has the burden of proving compliance with the statutory 15-day notice requirement [*Au-Yang v. Barton* (1999) 21 C4th 958, 963, 90 CR2d 227, 987 P2d 697] . Proof is typically in the form of the court clerk's certificate, or, if notice is served by a party, an affidavit [CCP § 594(b); see CCP § 1013a]. Other evidence that proves service includes a party's admission that he or she had actual notice of trial for the required period combined with documentary evidence showing conclusively that due and regular notice of trial had been given [see *Kalmus v. Kalmus* (1951) 103 CA2d 405, 418, 230 P2d 57] .

► Cross Reference:

Discussion of service of notice, see 3.09.

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.17

3.17 Failure to Give Proper Notice Is Grounds for Granting New Trial.

Failure to give the required notice of trial is a ground for granting a new trial on either of the following theories:

- That lack of notice constituted an irregularity in the proceedings by which either party was prevented from having a fair trial [*see CCP § 657(1)*].

Example:

Irregularities in a timely served notice may include typographical errors that set forth the wrong date of the noticed trial or the wrong location of the trial.

- That there has been an error in law [*see CCP § 657(7)*].

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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Chapter 3 Notice of Trial
IV. FORMS

1-3 MB Practice Guide: Trial & Post-Trial Civil Proc 3.18

3.18 Notice of Time and Place Case Has Been Set for Trial.

Notice of Time and Place Case Has Been Set for Trial.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff	)	NO. _____
vs.	)	NOTICE OF TIME AND
_____ [name],	)	PLACE SET FOR TRIAL
Defendant.	)	Trial Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	

To _____ [identify party, e.g., plaintiff John Smith] and to his/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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Chapter 4 Final Pretrial Conference

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.syn

§ 4.syn Synopsis to Chapter 4: Final Pretrial Conference

4.01 Scope.

4.02 Objective and Strategy.

4.03 CHECKLIST: Coordinating Various Pretrial Conferences.

4.04 Options and Strategies.

4.05 Rules Applicable to Setting Pretrial Conference.

4.05[1] Judicial Council Has Authority to Issue Court Rules Governing Pretrial Conferences.

4.05[2] Courts May Have Local Rules Governing Pretrial Conferences.

4.06 Scheduling of Pretrial Conferences Varies Widely Between Different Counties.

4.07 Courts Use Series of Pretrial Conferences to Manage Case.

4.07[1] Case Management Conference Is First Opportunity to Frame Trial Issues.

4.07[2] Mandatory Settlement Conference Will Help Ascertain Liability Issues.

4.07[3] Court May Require Trial Readiness Conference Weeks Before Trial to Finalize Case and Require Parties to Submit Report.

4.07[4] Court May Require Final Status Conference Several Days Before Trial for Exchange of Trial Information.

4.07[5] Final Pretrial Conference Occurs on Day of Trial.

4.08 Notice of Pretrial Conferences.

4.09 Continuance of Pretrial Conferences.

4.09[1] Request to Continue in Local Rules.

4.09[2] Mandatory Postponement of Scheduled Pretrial Conference for Member of California Legislature When Legislature in Session.

4.10 Court Should Permit Parties to Appear by Telephone.

4.11 Local Rules May Allow Pretrial Conference Orders to Be Subsequently Amended.

4.12 Local Rules May Permit Pretrial Exchange Lists to Be Subsequently Modified.

4.13 CHECKLIST: Organizing and Addressing Various Topics to Be Reviewed at Pretrial Conferences.

4.14 Options and Strategies.

4.15 Resolve Judge, Parties, and Issues for Trial.

4.15[1] Seek Disqualification of Judge If Appropriate.

4.15[2] Ascertain Identity of Identifiable Fictitious Parties.

4.15[3] Determine Scope of Issues to Be Tried.

4.15[3][a] Reduce Issues at Pretrial Conference.

4.15[3][b] Reduce Issues by Stipulation.

4.15[3][c] Reduce Issues by Severance.

4.15[3][d] Expand Issues by Consolidation.

4.16 Organize Documentary and Demonstrative Evidence for Trial.

4.16[1] Make Requests for Judicial Notice.

4.16[2] Determine Objection to Deposition Use at Trial.

4.16[3] Resolve Issues Concerning Exhibits.

4.16[4] Request Viewing of Scene, Property, or Demonstration.

4.17 Organize Testimonial Evidence for Trial.

4.17[1] File List of Witnesses.

4.17[2] Finalize Matters Concerning Expert Witnesses.

4.17[3] Set Order of Examination and Cross-Examination of Witnesses in Multiple-Party Cases.

4.17[4] Request Limits on Examination.

4.17[5] File Motion to Exclude Witnesses From Courtroom.

4.17[6] Consider Motions In Limine.

4.18 Organize Jury Selection and Jury Instructions.

4.19 Organize Trial Mechanics.

4.19[1] Resolve Courtroom Access, Technology, and Communications Issues.

4.19[1][a] File Motion for Closure of Trial Proceedings to Public.

4.19[1][b] Review Media Access and Courtroom Security.

4.19[1][c] Arrange Facilities for Disabled Participants.

4.19[1][d] Request Use of Technology at Trial.

4.19[1][e] Resolve Mandatory and Permissive Use of Interpreters and Translators.

4.19[1][f] File Motion for Gag Order.

4.19[1][g] Determine Rules for Sidebar Conferences.

4.19[2] Resolve Court Records Issues.

4.19[2][a] Request Availability and Access to Daily Transcripts.

4.19[2][b] File Motion to Seal Court Records.

4.19[3] Determine Whether to File Motion to Bifurcate.

4.19[4] Resolve Jury Handling Issues in Jury Trial.

4.19[5] Finalize Timing of Trial and Its Parts.

4.19[5][a] Resolve Remaining Motions for Continuance.

4.19[5][b] Set Time Limits.

4.19[5][c] Set Daily Schedule of Trial Sessions.

4.19[5][d] Schedule Arguments on Legal Issues.

4.19[5][e] Request Order of Arguments in Multiple-Party Cases.

4.19A Use of Judicial Tutorials.

4.19A[1] Courts Sometimes Request Judicial Tutorials for Complicated Matters.

4.19A[2] Judicial Tutorial Form and Content Are Discretionary.

4.20 CHECKLIST: Making and Responding to Motions In Limine.

4.20[1] Proponent of Motion.

4.20[2] Opponent of Motion.

4.21 Options and Strategies.

4.22 Grounds for Filing Motion In Limine.

4.22[1] File Motion In Limine to Prevent Presentation of Incompetent, Irrelevant, or Inadmissible and Prejudicial Evidence From Trial.

4.22[2] Motion In Limine Is Not Available to Limit Evidence From Trial in Other Ways.

4.23 Motions In Limine Are Excepted From Prohibition Against Local Rules Governing Motions.

4.24 Timing of Filing of Motion In Limine.

4.24[1] Judicial Council Rules Allow Trial Judge Discretion.

4.24[2] Local Rules May Set Limits on Timing and Place for Filing of Motion In Limine or on Judge's Discretion to Accept Filing.

4.25 Filing Motions In Limine.

4.25[1] Motion In Limine May Have to Be in Writing.

4.25[2] File Motion With Supporting Memorandum.

4.26 Give Notice of Motion When Required or Desired.

4.26[1] Necessity for Notice of Motion In Limine Depends on Applicable Rules.

4.26[1][a] Judicial Council Rules of Court Do Not Require Notice of Motion.

4.26[1][b] Local Rules May Require Statutory Notice of Motion In Limine.

4.26[2] Service of Motion In Limine.

4.26[2][a] Judicial Council Rules of Court Allow Trial Judge Discretion.

4.26[2][b] Local Rules May Fix Timing of Service of Motion In Limine.

4.27 Opposing Motions In Limine.

4.27[1] File Opposition to Motion In Limine.

4.27[2] Timing of Filing and Service of Opposition to Motion In Limine May Be Set by Local Rules.

4.28 Court May Hold Hearing on Preliminary Fact in Determining Motion In Limine.

4.29 Trial Judge Has Discretion in Ruling on Motion In Limine.

4.29[1] Only Trial Judge May Rule on Motion In Limine.

4.29[2] Court May Have Discretion to Delay Ruling on Motion In Limine.

4.29[3] Court May Grant Motion Subject to Offer of Proof.

4.29[4] Court May Have Discretion to Dismiss Entire Action If Court Finds Plaintiff Failed to State a Cause of Action.

4.29[5] Motions In Limine to Exclude Certain Types of Evidence May Be Deemed Granted at a Specified Time.

4.29[6] Statement of Decision Ordinarily Not Required on Motion In Limine.

4.30 Trial Judge May Reconsider or Modify Ruling on Motion In Limine.

4.31 Order In Limine May Be Enforced With Order of Contempt, or Motion for New Trial or to Vacate Judgment.

4.32 Review of Orders In Limine.

4.32[1] Interlocutory Review Is Generally Not Available.

4.32[1][a] Decision on Motion Is Not Appealable.

4.32[1][b] Writ of Mandate May Compel Court to Hear Motion, and Other Writ Relief May Be Available.

4.32[2] Review of Order After Judgment Is Treated As Review of Decision on Admissibility.

4.32[2][a] Motion In Limine Must Properly Preserve Right to Appeal Admission of Evidence After Denial of Motion.

4.32[2][b] Preservation of Right to Appeal Exclusion After Granting of Motion Requires Offer of Proof Unless Offer Would Be Futile.

4.32[2][c] Standard of Review Is Abuse of Discretion.

4.33 Joint Trial Readiness Conference Report--San Diego County Superior Court Rules Appendix B

4.34 Notice of Motion and Motion In Limine.

4.35 Order Granting Motion In Limine--With Findings.



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Chapter 4 Final Pretrial Conference
I. STRATEGY

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.01

4.01 Scope.

This chapter covers:

- Objectives and strategy for final pretrial conference [see 4.02].
- Coordinating various pretrial conferences [see 4.03 et seq.; Form: [see 4.33].
- Organizing and addressing topics raised at final pretrial conferences [see 4.13 et seq.].
- Making and opposing a motion in limine [see 4.20 et seq.; Forms: [see 4.34, 4.35].

Core Statutes:

CCP §§ 575-576

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial
MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersMotions in LimineGeneral Overview



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Chapter 4 Final Pretrial Conference
I. STRATEGY

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.02

4.02 Objective and Strategy.

The general purposes of a final pretrial conference are to:

- Familiarize the judge with the nature of the case.
- Acquaint counsel with the court's ground rules.
- Secure agreements and stipulations of the parties that may better define or narrow the issues to be tried.
- Resolve in advance any procedural problems that may arise in the course of the trial.
- Resolve in advance any particular evidentiary issues that may come up in trial (anticipating an opponent's objections to evidence).



Strategic Point:

Counsel should keep in mind a kind of reverse motion in limine. If there are issues that relate to documents or testimony that you are relying on, and if you want to avoid the unfortunate situation of having something refused admission at trial on a "surprise" objection, you should raise these issues with the court at the final pre-trial conference. If you cannot get the matter resolved then, which is unlikely, you will have educated the judge and he or she will be ready to hear the matter on a much more informed basis when it comes up. Further, the opposition cannot claim "surprise" later. Note that this is not particularly helpful in the case of evidence (documentary or otherwise) that is being held out for use as impeachment.

- Rule on any matters that should be disposed of before the commencement of the trial.

Ordinarily, the judge will seek to obtain from counsel arrangements, admissions, and stipulations that will permit the trial to proceed in an orderly, expeditious, and fair manner with a minimum risk of error.

Although a statute provides for the Judicial Council to promulgate rules governing the time, manner, and nature of pretrial conferences [see *CCP* § 575], there are as yet no unified state rules governing this step of trial practice. Instead, local rules govern pretrial conferences, resulting in procedures and time requirements that vary from county to county. To that end, this chapter is organized along two lines: (1) a review of the various types of pretrial conferences that occur across the state, and (2) a review of the topics that need to be addressed during pretrial conferences. After identifying which conferences will be required in a given county, and when, counsel can then use the list of topics covered to prepare for the requirements of that county.

➤ **Cross Reference:**

Discussion of case management, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 23, Case Management.

➤ **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 MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersMotions in LimineGeneral Overview



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Chapter 4 Final Pretrial Conference
II. COORDINATING VARIOUS PRETRIAL CONFERENCES

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.03

4.03 CHECKLIST: Coordinating Various Pretrial Conferences.

☐ Ascertain applicable requirements for pretrial conference by checking:

- ☐ Applicable statutes.
- ☐ California Rules of Court.
- ☐ Rules of the court in which the action was filed.
- ☐ Local practice in the court in which the action was filed.

Discussion:

See 4.05

☐ Calendar time, date, and place for each pretrial conference in the case.

Discussion:

See 4.06

☐ List subjects to be discussed at each pretrial conference.

Discussion:

See 4.07

☐ Determine preparation required for discussing each topic for each pretrial conference, including responses to possible arguments or motions from opposing parties.

☐ Calendar self-imposed deadlines for preparation required to discuss topics in sufficient time before the pretrial conference at which the topic is to be discussed.

☐ Prepare necessary notice for any pretrial conferences for which notice is required.

Discussion:

See 4.08

☐ Seek permission for appearance by telephone when permitted and appropriate.

Authority:

CCP § 367.5

Discussion:

See 4.10

☐ Prepare for discussion of topics to be discussed at each pretrial conference, attend conference.

☐ When necessary and permitted, seek amendment of pretrial conference orders or exchange lists.

Discussion:

See 4.11, 4.12

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesPretrial ConferencesGovernmentsCourtsRule Application & Interpretation



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II. COORDINATING VARIOUS PRETRIAL CONFERENCES

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4.04 Options and Strategies.

Understanding how to approach a final pretrial conference requires understanding how the conference fits in with the other conferences that have occurred throughout the case.

Of the various pretrial conferences likely to occur in a case that goes to trial, the first conference is usually the case management conference. While many of the issues that can arise in pretrial conferences may be dealt with at the outset in the case management conference, some of those issues may crop up again for reconsideration in a later conference.

The second likely pretrial conference to occur is a settlement conference. Some local rules combine a settlement conference with consideration of other issues. Like the case management conference, the results of settlement efforts from an unsuccessful settlement conference may be the starting point for further efforts of the court to get the parties to settle at a later point.

In class actions, upon notice of any party, one or more conferences between the court and counsel for the parties may be held to discuss class issues, review conduct and scheduling of discovery, scheduling of hearings and other matters [see *Cal Rules Ct, Rule 3.762*], and the court may issue appropriate orders [see *Cal Rules Ct, Rule 3.763*].



Cross References:

Requesting case conferences in class actions, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 33.12 et seq.*

Depending on the court, some sort of trial preparation conference will occur close to the trial date. This type of pretrial conference is the main subject of this chapter. The trial preparation conference also addresses any remaining issues from the case management and settlement conferences.



Strategic Point:

The specific matters covered at a pretrial conference depend on the nature of the case, the complexity of the issues, and the number of parties. Typically, the court and counsel will discuss significant issues that may impact on trial scheduling, for example, the time each side anticipates will be necessary to present

their claims and defenses, whether there remain significant evidentiary issues to be resolved, how jury selection will be conducted, and the timing for the submission of jury instructions. In all cases, counsel should closely examine local court rules for variations on the general case management approach, consult the clerk of court when in doubt about local practice, and put together a timeline of likely conferences, the topics of those conferences, and the preparation needed to address those topics on the appointed dates. Self-imposed deadlines for preparations and the dates of conferences should be calendared to ensure that counsel makes the best possible presentation at each conference.

Pretrial motions may be heard at a pretrial conference scheduled for additional purposes, or a law and motion hearing called specifically to hear one or more noticed motions.



Cross Reference:

Discussion of law and motion hearings, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 26.56 *et seq.*

Shortly before trial, the judge normally meets informally with counsel to confer about the case, although some courts that otherwise require a before-trial conference may dispense with the conference in a non-jury short cause. The meeting is normally held in the judge's chambers, but may be held in open court. Normally, the judge's courtroom clerk will be present to take notes, but whether a court reporter is present and reports the entire proceedings depends on the judge and the rules or policies of the court in which the trial is held. Some judges prefer that the entire proceedings be reported. Other judges prefer to cover the preliminary matters informally without a reporter present, and to call in the reporter only after the parties have agreed to admit or stipulate to certain matters and the judge is prepared to rule on other matters.

Legal Topics:

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

Civil ProcedureSettlementsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Conferences



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II. COORDINATING VARIOUS PRETRIAL CONFERENCES

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.05

4.05 Rules Applicable to Setting Pretrial Conference.

4.05[1] Judicial Council Has Authority to Issue Court Rules Governing Pretrial Conferences. The Judicial Council has statutory authority to promulgate court rules governing pretrial conferences and their time, manner, and nature in civil cases in the superior courts [CCP § 575]. However, to date, the Judicial Council has not done so.

4.05[2] Courts May Have Local Rules Governing Pretrial Conferences. Under their general authority to promulgate rules "designed to expedite and facilitate the business of the court" [see CCP § 575.1], individual courts may issue rules governing pretrial conferences, which apply to the extent that they do not conflict with statutes and the California Rules of Court [see *Carlson v. Department of Fish & Game* (1998) 68 CA4th 1268, 1279, 80 CR2d 601] .



Warning:

The court may impose sanctions for noncompliance with local rules [see CCP § 575.2; *Cal Rules Ct, Rule 2.30*]. When scheduling conferences, follow the court's practices to avoid possible sanctions [see *Blum v. Republic Bank* (1999) 73 CA4th 245, 248, 86 CR2d 226] .

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial
MattersConferencesPretrial ConferencesCivil ProcedureSanctionsGeneral OverviewGovernmentsCourtsRule
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Chapter 4 Final Pretrial Conference
II. COORDINATING VARIOUS PRETRIAL CONFERENCES

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.06

4.06 Scheduling of Pretrial Conferences Varies Widely Between Different Counties.

Local rules of court vary in the specified timing set forth for holding pretrial conferences. Counsel should check local rules for applicable scheduling requirements.

Strategic Points:



- Unlike direct or individual calendar courts, master calendar courts have different judges hearing pretrial issues from those who are assigned to the trial of a given case. Depending on the master calendar court, the parties may face more than one judge during the succession of the pretrial conferences that a case goes through, especially if the parties raise a number of pretrial preparatory or dispositive motions. Thus, the parties may have one judge for case management, another for the settlement conference, another for pretrial motions, and another for the trial. In such master calendar courts, counsel must be mindful of the strategic use of peremptory challenges against a judge under *CCP § 170.6*. Note too that a county, such as Los Angeles, may have different practices in some courts (e.g., assignment to one judge for all purposes in central civil court, or an independent calendar assignment--also called "I/C"), and a master calendar elsewhere within the same county (e.g., Santa Monica).

- The effect of having different judges "manage" cases (other than those which are deemed complex) as each proceeds through litigation is that different judges must be educated about each matter to prepare for each respective hearing. These judges typically do not have the time, or the inclination, to put the myriad issues regarding each case into context. Unlike cases designated as "complex," this fragmented, master calendar process, during which each judge may only know a small piece of the litigation, frequently leads to inefficient case management and matters not being resolved at an early date. This leads, obviously, to matters being more expensive to litigate than the nature of the matter might otherwise have warranted. The assignment of matters to a single judge occasionally alleviates these shortcomings in the case management process.



Cross Reference:

Disqualification of judge depending on court's assignment method, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 22.09.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial
MattersConferencesPretrial ConferencesGovernmentsCourtsRule Application & Interpretation



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II. COORDINATING VARIOUS PRETRIAL CONFERENCES

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.07

4.07 Courts Use Series of Pretrial Conferences to Manage Case.

4.07[1] Case Management Conference Is First Opportunity to Frame Trial Issues. A nonexempt civil case assigned to a case management program is scheduled for a case management conference within 180 days after the complaint is filed, which presents the first opportunity to frame trial issues [*Cal Rules Ct, Rule 3.721*].



Warning:

Attorneys and parties may be sanctioned for failing to comply with local rules [*see CCP § 575.2; Gov Code § 68608(b); Cal Rules Ct, Rule 2.30*]. Counsel should always check local court rules for provisions applicable to case management requirements.



Cross Reference:

Discussion of sanctions for failure to comply with local rules, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 35.07*.

Prerequisite:

Before the case is set for a case management conference, the court must determine whether the rules require a particular civil case to be:

- Assigned to case management program.
- Exempted from time goals.
- Assigned to expedited plan.

Local rules may further provide which types of cases do not need to be assigned to a case management program.

Example--Los Angeles County:

Limited civil cases brought before the Los Angeles County Superior Court do not ordinarily receive a case management conference. Rather, the trial court makes its review *ex parte* within the time for holding a case management conference [Los Angeles Super Ct Rules, Rule 7.9(a)(2)].

 Cross Reference:

Discussion of court's determination whether case management program is required, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 23.03 et seq.*



Timing:

The case management conference must be scheduled within 180 days of the filing of the complaint [Cal Rules Ct, Rule 3.721; accord Los Angeles Super Ct Rules, Rule 7.9(a)(1)]. The court will give notice of the case management conference at least 45 days before the conference is scheduled to occur [Cal Rules Ct, Rule 3.722(b)].

Exception:

Local court rules may put the burden of providing notice of a case management conference to the plaintiff.

Example--San Francisco County:

The clerk of the San Francisco County Superior Court will designate on the face of the complaint a date for the case management conference, which the plaintiff must serve on all defendants [San Francisco Super Ct Rules, Rule 3.4(A)]. However, if the case is assigned to a single assignment judge, the clerk's designated date is vacated in favor of a new date for the case management conference scheduled by the presiding judge with the judge assigned to the case [San Francisco Super Ct Rules, Rule 3.2(B)(2)].



Strategic Point:

The parties to the case must meet and confer in person or by telephone at least 30 days before the case management conference on what issues will be discussed at the case management conference [Cal Rules Ct, Rule 3.7244; accord Los Angeles Super Ct Rules, Rule 7.9(b)(1) (court may provide for another time frame); San Francisco Super Ct Rules, Rule 3.4(B)]. This meet and confer gives counsel the first sense of the opposing party's formal case and the strengths and weaknesses of counsel's own case.

 Cross Reference:

Discussion of topics for meet and confer, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 23.08[4]*.



Strategic Point:

The parties to the case must file and serve completed case management statements at least 15 days before the case management conference. The statement is made on Judicial Council Form CM-110, which requires that the parties provide information concerning the topics to be discussed at the case management conference [Cal Rules Ct, Rule 3.725; accord Los Angeles Super Ct Rules, Rule 7.9(b)(2); San Francisco Super Ct Rules, Rule 3.4(B) (filing statement 25 days before the conference facilitates issuance of case management order without appearance)].

 Cross Reference:

Discussion of and form for case management statement, see *Matthew Bender[(R)] Practice Guide:*

California Pretrial Civil Procedure, 23.06 et seq., 23.58.

Counsel and parties 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, Rules 3.722, 3.670(c)(1)*; Los Angeles Super Ct Rules, Rule 7.9(a)(1); San Francisco Super Ct Rules, Rule 3.4(F) (request and payment of fee required five days in advance)].

Exception:

The trial court may decide to issue a case management order without prior appearance of representatives at a case management conference [*Cal Rules Ct, Rule 3.722(d)*; accord San Francisco Super Ct Rules, Rule 3.4(C)].

Court rules spell out the topics to be discussed at the case management conference [*see Cal Rules Ct, Rule 3.727*; San Francisco Super Ct Rules, Rule 3.2(B)(2)], which parties who are required to attend the conference must be familiar with and prepared to discuss [*Cal Rules Ct, Rule 3.722(c)*]. The Case Management Statement filed before the conference is where the party makes the first set of decisions that will frame the final pretrial conference, and ultimately the course of the trial. The primary topics to be addressed are:

- Jury or non-jury trial.
- Trial date.
- Length of trial.
- Representation.
- Preference.
- ADR.
- Parties participating.
- Settlement conference.
- Insurance.
- Jurisdiction.
- Related cases.
- Bifurcation.
- Motions.
- Discovery.



Cross Reference:

Discussion of topics for case management conference and form of Case Management Statement, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 23.09, 23.58.*

Unless the court decides that appearance at a case management conference is not necessary, the court will issue a case management order after the case management conference. The order must address issues set forth in court rules [see *Cal Rules Ct*, Rule 3.728; accord Los Angeles Super Ct Rules, Rule 7.9(a)(3)].



Strategic Point:

Local rules may allow an objection to an order issued without appearance at a case management conference [see, e.g., San Francisco Super Ct Rules, Rule 3.4(D)].



Cross Reference:

Issues set in case management order, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.10[2].

The case management order is binding unless subsequently modified by the court [see CCP § 576; *Cal Rules Ct*, Rule 3.730].



Cross Reference:

Modification of case management order, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.10[3].

4.07[2] Mandatory Settlement Conference Will Help Ascertain Liability Issues. The trial court has discretion whether to set one or more mandatory settlement conferences in a case management order [see *Cal Rules Ct*, Rules 3.728(10), 3.1380(a); accord Los Angeles Super Ct Rules, Rule 7.9(d)(1); San Francisco Super Ct Rules, Rule 3.4(C); see also San Diego Super Ct Rules, Rules 2.1.15, 4.07[1]].



Strategic Point:

In theory, the mandatory settlement conference is completely separate from all other pretrial proceedings, and has no impact on trial. However, the conference is another opportunity to review the evidence, particularly regarding liability, and further assess the case's weaknesses and strengths in light of developments to date. Trial strategy may be affected by information raised during the conference.

Prerequisite:

At least five court days before the date of the initial mandatory settlement conference, each party must submit to the court and serve on other parties a settlement conference statement. The statement must discuss in detail, among other things, all facts and law pertinent to the issues of liability and damages [see *Cal Rules Ct*, Rule 3.1380(c)].



Warning:

The statement must include a settlement demand by plaintiff and a settlement offer by defendant [see *Cal Rules Ct*, Rule 3.1380(c)]. If a settlement offer refers to CCP § 998, the party refusing to accept it may be liable for the opposing party's costs if the outcome of trial is less favorable to the refusing party than the terms of the settlement offer [see CCP § 998].



Cross References:

Discussion of Settlement Conferences, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.14 et seq.

Discussion of offers to compromise under CCP § 998, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 37.03 et seq.

Consider:

Keep in mind the rules governing confidentiality of statements made in settlement conferences, and in particular during mediation conferences. Are the rules governing mediation applicable to mandatory settlement conferences? In addition, what are the court's powers concerning settlement conferences? For example, what if it is apparent that a party appearing does not have "full authority" to settle? And, what does "full authority to settle" mean? Some courts believe that if a party gets to a point where they refuse to negotiate further because they have gone as high as they can, they are not authorized to settle. However, having "full authority" to settle does not mean one has to "cave in" to any last settlement demand because the settlement officer (judge or otherwise) believes that it is fair.

 Cross Reference:

Discussion of and form for settlement conference statement, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.17[1], 23.63.

Discussion of mediation privilege and methods to avoid waiving right to use evidence for trial or proving settlement, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 24.56[4], 37.36.



Timing:

The court sets forth the time, date, and place of the mandatory settlement conference in the case management order [*Cal Rules Ct, Rule 3.728(10)*].

 Cross Reference:

Setting of mandatory settlement conference at request of party or on motion of court, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.14 et seq.

California Rules of Court require persons with full authority to settle a case to personally attend a mandatory settlement conference [*Cal Rules Ct, Rule 3.1380(b)*]; accord Los Angeles Super Ct Rules, Rule 7.9(d)(1)]. Local rules may set additional requirements for who must appear at a settlement conference. However, courts may not impose sanctions on a nonparty insurer for its purported failure to participate in good faith in a mandatory settlement conference [*Vidrio v. Hernandez* (2009) 172 CA4th 1443, 1455-1460, 92 CR3d 178] .

Example--Los Angeles County:

Persons with full authority to settle a case before the Los Angeles County Superior Court include [Los Angeles Super Ct Rules, Rule 7.9(d)(1), (3), (4)]:

- The litigants (unless consent of the particular litigant is not required for the settlement).
- Attorneys for the parties appearing in the action, who must be the attorneys who will try the case, unless good cause is shown for a substitution of other counsel.
- An authorized representative of any insurance company that has coverage involved in the case
- An authorized representative of a corporation or other business or government entity that is a litigant.

- At the request of plaintiff, a claimant, or his or her representative, under a lien that bears on a potential settlement

The court may nonetheless "expressly" excuse any person with authority to settle a case from attending the settlement conference for good cause [Los Angeles Super Ct Rules, Rule 7.9(d)(1)]. A request to excuse attendance must be by stipulation of the parties or ex parte application under the local rules [see Los Angeles Super Ct Rules, Rule 9.9]. A person excused from personal attendance by the judge must still appear at the conference by telephone [Los Angeles Super Ct Rules, Rule 7.9(d)(2)].

Furthermore, Los Angeles County Superior Court rules require attorneys attending the settlement conference for parties appearing in the action to be intimately familiar with "the pertinent available evidence involving both liability and damages" and be prepared to discuss the case in detail [Los Angeles Super Ct Rules, Rule 7.9(d)(3); *see also* 4.15[3][e] (reducing issues by settlement)].

Local rules may specify other requirements for mandatory settlement conferences.

Example--Los Angeles County:

Conferences concerning settlement of cases before the Los Angeles County Superior Court are not reported, but the express terms of a settlement agreement are placed on the record [Los Angeles Super Ct Rules, Rule 8.7].

4.07[3] Court May Require Trial Readiness Conference Weeks Before Trial to Finalize Case and Require Parties to Submit Report. Local court rules may provide for a trial readiness conference weeks before trial for finalizing the case and preparation of a conference report for submission to the court. A great deal of issues may be resolved weeks before trial, whereas these matters may wait until a few days before trials in other counties.

Example--San Diego County:

Civil actions before the San Diego County Superior Court are routinely scheduled for a trial readiness conference [San Diego Super Ct Rules, Rule 2.1.15].



Timing:

The trial readiness conference generally will be scheduled for four weeks before the trial date [San Diego Super Ct Rules, Rule 2.1.15]. However it is not unusual for judges to schedule a trial readiness conference less than four weeks before trial, especially if the parties are engaged in last minute trial preparations.

Prerequisite:

The parties must meet before the scheduled trial readiness conference and attempt to settle as many of the issues in the case as possible. If the parties do not settle the case in its entirety at the conference, they must file at the joint trial readiness conference a joint trial readiness conference report in the form provided in Appendix B of the local rules of the San Diego County Superior Court [San Diego Super Ct Rules, Rule 2.1.15]. The report requires the following items:

- Joint brief summary of the nature of the case.
- Legal issues in dispute.
- List of exhibits with descriptions and objections.

- List of standard and special jury instructions.
- Special verdict forms.
- List of witnesses.

Cross Reference:

Form for joint trial readiness conference report filed in San Diego County Superior Court, see 4.33.



Warning:

The failure to disclose and identify all trial exhibits to be used in the case in chief [see 4.16[3]] and all witnesses to be called at trial [see 4.17[1]], as well as fully complete all items called for on the form for the joint trial readiness conference report, may result in the restriction or exclusion of undisclosed or unidentified evidence at trial [see San Diego Super Ct Rules, Rule 2.1.15].

Consider:

Some courts may provide that no part of the joint trial readiness conference report can be received into evidence against any party in later proceedings [see San Diego Super Ct Rules, Rule 2.1.15].

Attending counsel must be both familiar with all issues of the case and authorized to enter into stipulations concerning those issues. The court will review and issue at the trial readiness conference an advance trial review order setting forth specific trial preparation requirements of the trial department [San Diego Super Ct Rules, Rule 2.1.15].



Warning:

The court's order is binding on all parties and may not be reconsidered on grounds of counsel's unfamiliarity with the case as of the conference, including any unusual evidentiary or legal issues that may be appropriate for stipulation or arise at trial [San Diego Super Ct Rules, Rule 2.1.15].

Cross Reference:

Discussion of reducing issues by stipulation, see 4.15[3][b].

Strategic Points:



- Having the conference earlier means counsel should be preparing for trial earlier. All the other considerations apply to the ordinary final pre-trial conference. There is also merit in any trial preparation to do it earlier. Thus, in reality, the timing of the conference should not alter the considerations in preparing for the conference.
- As noted, the earlier the scheduling of a readiness conference at which the myriad issues discussed above are covered, the sooner counsel will be required to prepare their cases for trial. In doing so, counsel should determine the strengths, and weaknesses, of their cases and appropriately evaluate them for settlement purposes.

4.07[4] Court May Require Final Status Conference Several Days Before Trial for Exchange of Trial

Information. Local court rules may provide for a final status conference several days before trial for exchange of trial information.

Example--Los Angeles County:

Los Angeles County Superior Court rules require counsel to attend a final status conference [Los Angeles Super Ct Rules, Rule 7.9(h)].



Timing--Conference:

The final status conference in cases before Los Angeles County Superior Court ordinarily takes place no more than 10 days before the trial date [Los Angeles Super Ct Rules, Rule 7.9(h)]. However, the court has discretion to schedule the final status conference more than 10 days before the trial date [Los Angeles Super Ct Rules, Rule 7.9(i)(1)].



Timing--Exchange of Documents:

The lists and jury documents must ordinarily be exchanged at least five days before the final status conference [Los Angeles Super Ct Rules, Rule 7.9(h)], but the court has the authority to require the submission of the trial documents to the court more than five days before the conference [Los Angeles Super Ct Rules, Rule 7.9(i)(3)].

Prerequisites:

Before the final status conference, the parties must exchange and file [Los Angeles Super Ct Rules, Rule 7.9(h)]:

- Lists of pre-marked exhibits.
- Jury instruction requests.
- Witness lists.
- Jury preinstructions.



Warning:

The failure to exchange and file these items may bar witnesses, exhibits, or having a jury trial [Los Angeles Super Ct Rules, Rule 7.9(h)].



Strategic Point:

If trial begins more than 30 days after the set trial date, a party "has the right to request a modification" of a final status conference order or exchange list [Los Angeles Super Ct Rules, Rule 7.9(h)].

In addition to the required exchanges, the parties to a case before the Los Angeles County Superior Court must file and serve trial preparatory motions [*see, e.g., 4.19[1][a]* (motion for closure of trial proceeding to public), 4.19[1][b] (motion to exclude witnesses from courtroom), 4.19[1][f] (motion for gag order), 4.19[2][b] (motion to seal court records)] and dispositive motions, other than motions for summary judgment, but including motions in limine [*see 4.20 et seq.*] and motion for bifurcation [*see 4.19[3]*] for consideration at the final status conference [Los Angeles Super Ct Rules, Rule 7.9(h)].

**Timing:**

Trial preparatory motions and dispositive motions must be filed and served [Los Angeles Super Ct Rules, Rule 7.9(h)]:

- In individual calendar (I/C) cases, with statutory notice for timely hearing at the final status conference. Statutory notice must be filed and served at least 16 court days before the final status conference, although this period is increased for methods of service other than personal [*CCP* § 1005(b), 1010; *Cal Rules Ct, Rule 3.1300(a)*], and the court may generally order a shorter notice period [*Cal Rules Ct, Rule 3.1300(b)*].

**Cross Reference:**

Discussion of making statutorily noticed motions, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.39 *et seq.*

- In master calendar (M/C) cases, at least five days before the date of the final status conference, for hearing on the first day of trial.

The court may also order an in-person meeting of the parties before the final status conference to consider joint trial documents for submission to the court [Los Angeles Super Ct Rules, Rule 7.9(i)(2)].

In addition to the exchange of lists, requests, and motions filed before the final status conference, described above, the severing of unserved or recently served fictitiously named parties [*see 4.15[2]*] will be considered at a final status conference before Los Angeles County Superior Court [Los Angeles Super Ct Rules, Rule 7.9(h)].

Unless otherwise ordered by the court, lead counsel must attend the final status conference [Los Angeles Super Ct Rules, Rule 7.9(h)].

**Strategic Point:**

The matters covered by the scheduling of an earlier readiness conference must, nevertheless, be completed in advance of trial. Counsel with a scheduled trial date should, therefore, allow sufficient time to complete these tasks.

4.07[5] Final Pretrial Conference Occurs on Day of Trial. The day of trial serves in some courts as the catch-all day for conference consideration of any remaining issues before the actual commencement of trial. Local rules may provide for pretrial consideration of specific issues at a conference on the day of trial.

Example--Alameda County:

After meeting and conferring, the parties to a civil action before the Alameda County Superior Court must file a statement of the case for presentation on the first day of trial [Alameda Super Ct Rules, Rule 4.6(9)].

Example--Los Angeles County:

Before summoning a panel of prospective jurors, a judge of the Los Angeles County Superior Court will determine if a jury trial has been properly demanded, if trial by jury will be waived, and if the jury fee has been paid. If the court determines that the trial will be by jury, the judge will organize jury selection [*see 4.18*], and determine various jury handling issues [*see 4.19[4]*] and any other trial matter the judge deems appropriate [Los Angeles Super Ct Rules, Rule 8.20].

The local rules provide that a judge in a master calendar court will also consider outstanding noticed trial preparatory or dispositive motions [*see 4.07[4]*] on the first day of trial [Los Angeles Super Ct Rules, Rule 7.9(h)].



Strategic Point:

Trial counsel must be familiar with the court's rules regarding the various information that must be submitted to the court on the day of trial. If the court has not already had a conference to discuss all of the issues mentioned above, counsel should be ready to resolve them. If there are issues relating to admissibility of evidence at trial, either evidence as to which counsel objects, or evidence counsel believes is admissible, pertinent, and important but anticipates difficult objections from opposing counsel, then counsel should be ready to discuss this evidence. If there are any points counsel wishes to make especially clear, to persuade the judge, lay groundwork for a future objection when the evidence or other matter comes up during trial, or simply to prepare a record for appeal, it is advisable to present a short, one or two page, written memorandum that can be made part of the record.

Legal Topics:

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

Civil Procedure
 Pretrial Matters
 Conferences
 Case Management
 Civil Procedure
 Pretrial Matters
 Conferences
 Final Pretrial
 Conferences
 Civil Procedure
 Pretrial Matters
 Conferences
 Pretrial Conferences
 Civil Procedure
 Sanctions
 General
 Overview
 Governments
 Courts
 Rule Application & Interpretation



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Chapter 4 Final Pretrial Conference
II. COORDINATING VARIOUS PRETRIAL CONFERENCES

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.08

4.08 Notice of Pretrial Conferences.

The amount of notice the court will give for pretrial conferences depends on the type of conference:

- Case management conference--45 days [*Cal Rules Ct, Rule 3.722(b)*].
- Mandatory settlement conference--set by the court in the case management order resulting from the case management conference [*Cal Rules Ct, Rule 3.728(10)*].
- Trial readiness and pretrial conference--consult local rules.



Timing:

Courts vary in the manner and time for sending these notices. Indeed, some local rules provide for when readiness documents must be submitted, i.e., the requirement and time that in limine motions must be prepared and served on opposing counsel. In addition, the requirement for the preparation of trial briefs, proposed voir dire, and jury instructions are occasionally only set forth in local rules.

Example:

In San Diego County, within a few days of the case management conference the court sends counsel notice of the trial readiness date and trial date.

Legal Topics:

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

Civil Procedure Settlements General Overview Civil Procedure Pretrial Matters Conferences Case Management Civil Procedure Pretrial Matters Conferences Final Pretrial Conferences Civil Procedure Pretrial Matters Conferences Pretrial Conferences



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4.09 Continuance of Pretrial Conferences.

4.09[1] Request to Continue in Local Rules. Local rules may permit continuances of pretrial conferences, but often restrict the matter to the Presiding Judge.

Example--Sacramento County:

In civil matters, a continuance of a setting conference, pretrial conference, or a trial, whether or not opposed, can be only by order of the Presiding Judge or the Presiding Judge's designee [Sacramento Super Ct Rules, Rule 3.4(E)].



Warning:

A stipulation by the parties is usually not a sufficient basis for a continuance of a pretrial conference; and a motion for a continuance must be made by noticed motion [see Cal 3d App Dist Super Ct Rules, Rule 4.1].



Strategic Point:

Requesting a continuance of the pretrial conference will impact the readiness for the trial date. Be prepared to move for both the conference and the trial date to continue if good cause can be shown.



Cross Reference:

Moving for continuance, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 30, Continuances.

4.09[2] Mandatory Postponement of Scheduled Pretrial Conference for Member of California Legislature When Legislature in Session. Subject to stated exceptions, a member of the California Legislature is entitled to a postponement of a pretrial conference [see CCP § 595.1] 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 when the Legislature is in session or in a recess of no more than 40 days. 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, postponement must be given to the earlier recess date rather than a date during adjournment [*CCP* § 595].

Exception:

The granting of a postponement 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 postponement should not be granted [*CCP* § 595].

The postponement of a pretrial conference for a legislator suspends the running of any period of time for a ruling or proceeding by the court or for the performance by a party of an act affected by the postponement for the same duration as the postponement [*CCP* § 595].

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial

MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersContinuancesGovernmentsState & Territorial GovernmentsEmployees & Officials



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4.10 Court Should Permit Parties to Appear by Telephone.

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].

Accordingly, to improve access to the courts and reduce litigation costs, the California Rules of Court suggest that courts should permit parties, to the extent feasible, to appear by telephone at appropriate conferences, hearings, and proceedings in civil cases [Cal Rules Ct, Rule 3.670; see Cal Rules Ct, Rule 1.6(3) (definition of "civil case")].

Example--Los Angeles County:

Los Angeles Super Ct Rules, Rule 7.20(a) permits counsel to request a telephone appearance for any pretrial hearing at which no evidence will be taken; with certain exceptions.

Local rules may modify the provisions for when an appearance by telephone may occur under the California Rules of Court.

Example--Los Angeles County:

While one of those enumerated subjects excluded from appearance by telephone by right is a settlement conference, a person may be excused from personal attendance at a mandatory settlement conference by a judge for good cause and instead appear at the conference by telephone [Los Angeles Super Ct Rules, Rule 7.9(d)(2)].

The California Rules of Court allow a party to exercise the right to appear by telephone by either placing the phrase "Telephone Appearance" below the title of the moving or opposing papers, or giving notice of the intent to appear by telephone [Cal Rules Ct, Rule 3.670(g)].



Timing:

A party giving notice of appearance by telephone must give that notice to the court and all parties at least three court days before the appearance [Cal Rules Ct, Rule 3.670(g)].

Again, local rules may modify the provisions for how an appearance by telephone may be undertaken under the California Rules of Court.

Example--Los Angeles County:

The Los Angeles County Superior Court requires a request to appear by telephone to be made in accordance with the provisions for time and manner of notice in the California Rules of Court [see Los Angeles Super Ct Rules, Rule 7.20(b)]. Furthermore, the court may charge a teleconferencing fee and require participants to follow necessary procedures for use of the equipment [see Los Angeles Super Ct Rules, Rule 7.20(c)]. The court is to set a hearing in which a telephonic hearing is noticed on the court's regular calendar at the same time as hearings on similar matters not involving appearance by telephone [Los Angeles Super Ct Rules, Rule 7.20(d)].

► Cross Reference:

Discussion of making a telephone appearance, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.18 et seq.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesGovernmentsCourtsRule Application & Interpretation



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4.11 Local Rules May Allow Pretrial Conference Orders to Be Subsequently Amended.

Any judge may allow the amendment of a pretrial conference order before or after commencement of trial; the judge may do so on "such terms that may be proper" and "in the furtherance of justice" [CCP § 576].

Example--Los Angeles County:

If actual trial does not commence within 30 days of the set trial date, any party has the right to request a modification of any final status conference order [Los Angeles Super Ct Rules, Rule 7.9(h)].

Example--San Diego County:

The San Diego County Superior Court's advance trial review order is binding on all parties and may not be reconsidered on grounds of counsel's unfamiliarity with the case as of the trial readiness conference, including any unusual evidentiary or legal issues that may be appropriate for stipulation or arise at trial [San Diego Super Ct Rules, Rule 2.1.15].



Warning:

The failure to request a correction or modification of a pretrial order or to move to modify or to amend it is a waiver of the right to present any issues other than those set forth in the order [*Bilardi Constr., Inc. v. Spencer* (1970) 6 CA3d 771, 784, 86 CR 406 (applying CCP § 576)].

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial
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4.12 Local Rules May Permit Pretrial Exchange Lists to Be Subsequently Modified.

The local rules of court applicable to a pretrial exchange of lists, such as of witnesses or exhibits, may permit subsequent modification of the list by the party who exchanged it under specified conditions.

Example--Los Angeles County:

If actual trial does not commence within 30 days of the set trial date, any party has the right to request a modification of any previously submitted required exchange list [Los Angeles Super Ct Rules, Rule 7.9(h)].

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial
MattersConferencesPretrial ConferencesGovernmentsCourtsRule Application & Interpretation



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1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.13

4.13 CHECKLIST: Organizing and Addressing Various Topics to Be Reviewed at Pretrial Conferences.

☐ Compile a list of legal and factual issues that the facts of a case raise for possible consideration in a pretrial conference and reference to statutes, rules, and local practice.

☐ Make sure to include statements and exchange lists required to be submitted before particular pretrial conferences.

☐ Make sure to consider issues that the other parties might raise.

☐ Review topics often raised during pretrial conferences:

☐ General issues:

☐ Disqualification of judge.

☐ Fictitious parties.

☐ Scope of issues to be tried.

☐ Amendment of pleadings.

☐ Stipulations.

☐ Consolidation/bifurcation.

☐ Continuances.

- ☐ Settlement.
- ☐ Motions in limine.
- ☐ Documentary and demonstrative evidence.
 - ☐ Judicial notice.
 - ☐ Exhibits.
 - ☐ Views of scene, property, or demonstrations.
 - ☐ Video demonstrations, power point presentations, or blow-up photographs; charts; excerpts of documents enlarged on boards or graphics presented with computer assisted software.
- ☐ Testimonial evidence.
 - ☐ Witness lists.
 - ☐ Depositions.
 - ☐ Expert witnesses.
 - ☐ Order of examination.
 - ☐ Limits on examination.
 - ☐ Motion to exclude witnesses.
- ☐ Jury selection.
- ☐ Jury instructions.
- ☐ Trial mechanics.
 - ☐ Closure of proceedings to public.
 - ☐ Disabled access.

☐ Interpreters.

☐ Use of technology, including trial practice software (e.g., "Sanction," "Trial Director," "Visionary," etc.), and issues concerning manner in which video is coordinated with text in presenting deposition testimony.

☐ Gag orders.

☐ Sidebar rules.

☐ Daily transcripts.

☐ Sealing of records.

☐ Time limits.

☐ Daily schedules.

☐ Argument schedules.

☐ Judicial tutorials.

Discussion:

See 4.15 -4.19A

☐ Ascertain which pretrial conference in the jurisdiction in which the case was filed will discuss each issue raised by the facts of the case.

☐ If written rules do not provide a clear answer as to when a particular issue may be addressed in a pretrial conference, consult the court clerk on local practice.

☐ Calendar each pretrial conference, the topics to be discussed at each, and preparation time for each topic to be discussed at a given pretrial conference.

☐ Prepare and submit all required statements and exchange lists within the applicable deadlines.

☐ Prepare all arguments and required statements in time for the particular pretrial conference on each issue to be considered at that conference.

☐ Attend the conference and deliver arguments and evidence pertinent to each issue discussed.

- ☐ Follow up with the court on any issues needing attention subsequent to the pretrial conference.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial
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4.14 Options and Strategies.

This analysis discusses the various topics most commonly reviewed at pretrial conferences. While some are topics covered in case management conferences or settlement conferences, they are included here because residual issues and supplemental discussion of the topics come up frequently enough in subsequent pretrial conferences. Beyond that, pretrial motions may be heard at a pretrial conference planned to cover other topics, or at a solely law and motion hearing. Discussion of those motions should be consulted for appropriate guidance.

The various topics and issues are treated at different points in the lead-up to trial depending on local rules and practices. For that reason, there is not one single roadmap applicable to all pretrial conferences in California courts.

Strategic Points:



- Counsel must compile an individual roadmap of topics to raise or that may be raised by other parties in pretrial conferences with respect to each individual case. Counsel must then ascertain the local pretrial conference framework in which counsel will be expected to address each of those topics. As each topic is discussed, counsel can log progress on the roadmap as to whether an issue has been completed, resolved, or whether additional issues remain to be addressed at subsequent pretrial conferences.
- Once a case is scheduled for trial, and occasionally before receiving such a date, counsel should set up notebooks that have tabs for each trial preparation matter that is anticipated, such as witness outlines and summaries, dispositive motions (which are sometimes revised in the form of trial and bench briefs), in limine motions, jury instructions, and voir dire. Jury instructions, in particular, are helpful to outline issues to be proved and disproved at trial. A review of the applicable jury instructions in cases involving novel issues is helpful in formulating discovery early in the litigation.

Discussion of each topic may involve a wide range of considerations that can only be undertaken with a detailed examination of the issues of the specific case. For that reason, the following sections are a list of common topics and references to detailed discussion of issues coming into play on each topic.

**Strategic Point:**

Of course, anticipating and preparing for opposing counsel's pretrial efforts to gain advantage is a crucial part of the effort to gain the most favorable outcome for the counsel's own client. For that reason, not only must counsel examine issues that he or she may wish to raise in a pretrial conference, but also those that counsel for other parties might conceivably raise.

Judicial tutorials can help the court in bench trials (as well as jury trials) that address complex technology or other complicated matters. Counsel should be forthright with the court about recommending a tutorial. The content and format of any tutorial is at the court's discretion.

**Cross Reference:**

Discussion of judicial tutorials, see 4.19A.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial Conferences



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4.15 Resolve Judge, Parties, and Issues for Trial.

4.15[1] Seek Disqualification of Judge If Appropriate. In certain instances, a pretrial conference is the proper venue for filing a peremptory challenge to the judge assigned to a case, particularly in courts using a master calendar:

- In cases in a direct calendar or individual calendar (I/C) court that are not subject to the Trial Court Delay Reduction Act, a peremptory challenge to the judge must be filed at least five days before trial if the identity of the judge is known at least 10 days before trial [*CCP* § 170.6(a)(2)].
- In cases in a direct calendar or individual calendar (I/C) court or single assignment judge subject to the Trial Court Delay Reduction Act, parties to the case must file a peremptory challenge to the judge within 10 [San Francisco Super Ct Rules, Rule 3.2(A)(3)] or 15 [*Gov Code* § 68616(i); accord Los Angeles Super Ct Rules, Rule 7.5(a)] days of the assignment of the case to the judge.
- A peremptory challenge to a judge in case in a master calendar (M/C) court must be filed with the judge supervising the master calendar not later than the time the action is assigned for trial [*CCP* § 170.6(a)(2); accord Los Angeles Super Ct Rules, Rule 7.5(c)].
- A peremptory challenge may not be made when the subsequent proceeding is a continuation of an earlier action [*Manuel C. v. Superior Court* (2010) 181 CA4th 382, 386, 104 CR3d 787] .

Example--Los Angeles County:

If counsel have been placed on call and the assignment is made by telephone, the challenge must be stated orally during the telephone call in which the assignment is made, and must be confirmed in writing within four court hours by delivering a written challenge to the Master Calendar Department from which the case was assigned [Los Angeles Super Ct Rules, Rule 7.5(d)].



Cross Reference:

Discussion of peremptory challenge to judge, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 22.03 et seq.

In addition, a pretrial conference by the same or different judge may consider a challenge to a judge for cause if the judge orders a hearing on a challenge occurring before trial [see CCP § 170.3(c)(6)].

To disqualify a judge under the Due Process Clause based on an objective assessment of the circumstances in the particular case, there must be the probability of actual bias on the part of the judge that is too high to be constitutionally tolerable. If only the appearance of bias is at issue, a litigant's recourse is to seek disqualification under state disqualification statutes [*People v. Freeman* (2010) 47 C4th 993, 996, 103 CR3d 723, 222 P3d 177] .

 Cross Reference:

Discussion of challenge to judge for cause, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 22.15 et seq.

4.15[2] Ascertain Identity of Identifiable Fictitious Parties. The final pretrial conference may determine the status of named or fictitiously named parties. The court may determine whether they have all been served, whether any have been dismissed from the action, whether they have answered and/or are in default, whether any defaults have been entered, and whether the pleadings have been amended with the true identity of an identifiable fictitious party [see CCP § 474].

 Cross Reference:

On substituting fictitiously named party, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 34.31[1], 34.33.

Example--Los Angeles County:

At the final status conference the court must consider severing for trial all unserved or recently served fictitiously named parties [Los Angeles Super Ct Rules, Rule 7.9(h)].

4.15[3] Determine Scope of Issues to Be Tried.

4.15[3][a] Reduce Issues at Pretrial Conference. The trial court may reduce issues for trial by determining at the final pretrial conference:

- Any causes of action that have been dismissed.
- Any law and motion, discovery, or summary judgment proceedings that have resulted in the dismissal or the striking of any pleading or portion of a pleading or the adjudication of any factual or legal issues.
- The status and effect of any pending cross complaints, setoffs, credits against judgment, liens, or pleadings in intervention.

4.15[3][b] Reduce Issues by Stipulation. The trial court may seek one last time to reduce issues for trial by asking whether stipulations can be reached as to those issues about which there is no controversy, and whether stipulations can be reached as to facts not in controversy or waiving a foundation, or other objections, as to the admissibility of testimony, tests, or experiment [see CCP § 283(1)].

 Cross Reference:

Discussion of and forms for entering into stipulations, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 28.03 et seq.

4.15[3][c] Reduce Issues by Severance. If not already determined at a trial setting conference, the court may determine at the final pretrial conference whether any causes of actions should be severed from the present case [*see, e.g., CCP § 379.5* (severance of permissively joined parties), *CCP § 1048* (severance of actions generally)].

 Cross References:

Discussion of severance of causes of actions or parties, *see Ch. 1, Preparing for Trial, 1.15 et seq.*

See also *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 32, Notice of Related Cases, Consolidation, Coordination, and Severance of Actions, 32.23 et seq.*

4.15[3][d] Expand Issues by Consolidation. If not already determined at a trial setting conference, the court may determine at the final pretrial conference whether any other actions should be consolidated with the present case [*see, e.g., CCP § 377.62(b)* (consolidation of wrongful death and survival cases), *CCP § 1048* (consolidation of actions generally)].

 Cross Reference:

Discussion of consolidation of actions, *see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 32.07 et seq.*

Legal Topics:

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

Civil ProcedurePartiesFictitious NamesCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersSeparate Trials



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1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.16

4.16 Organize Documentary and Demonstrative Evidence for Trial.

4.16[1] Make Requests for Judicial Notice. A trial court is required to take judicial notice of evidence specified in *Evid Code* § 451 and may take judicial notice of evidence specified in *Evid Code* § 452. A party intending to request judicial notice at trial may, among other things, file a written request for it at a pretrial conference [see *Evid Code* § 453(a)].

Strategic Point:



Considering that the court must afford each party a reasonable opportunity to be heard on the propriety of taking judicial notice [*Evid Code* § 455(a)], bringing requests for judicial notice before trial allows resolution of any objections to occur outside the hearing of the jury and without disruption to the trial itself.



Cross Reference:

Requirements for judicial notice, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.17.

4.16[2] Determine Objection to Deposition Use at Trial. A pretrial conference may be an appropriate venue for determining the effect of an objection to the use of a deposition at trial. While depositions not objected to in a timely manner [see *CCP* § 2025.460(b) (waiver of errors in deposition for failure to timely object)] may be used at trial for specified purposes [see *CCP* § 2025.620], a deposition taken after the service of a written objection under *CCP* § 2025.410(a) may not be used against an objecting party who did not attend the deposition, unless the court determines that the objection was not valid [*CCP* § 2025.410(b)].

When the court grants permission to use a deposition, local rules may specify conditions for doing so.

Example--Alameda County:

Depositions to be used at trial in the Alameda County Superior Court must be lodged with the court at the first trial appearance [Alameda Super Ct Rules, Rule 4.6(4)].

 Cross Reference:

Use of depositions at trial, see *Ch. 11, Questioning Witnesses and Objections, 11.52 -11.58*.

4.16[3] Resolve Issues Concerning Exhibits. Local court rules require exchange and filing of exhibit lists as well as marking of exhibits in association with preparation for a pretrial conference.

Example--Los Angeles County:

At least five days before the final status conference, the parties must exchange and file lists of pre-marked exhibits [Los Angeles Super Ct Rules, Rules 7.9(h), (i)(6), 8.60; *see* 4.07[4] (final status conference)]. All exhibits must be prenumbered before counsel or a witness makes any reference to them [Los Angeles Super Ct Rules, Rule 8.60].

Exception:

Exhibits "anticipated in good faith to be used for impeachment" are excepted from the exchange and filing requirement [Los Angeles Super Ct Rules, Rule 8.60]. Counsel entering exhibits entered during trial under this exception must informally mark them before referring to them and for showing to opposing counsel, and then give them to the clerk after evidence concerning them is taken [Los Angeles Super Ct Rules, Rule 8.61].



Warning:

The failure to exchange and file the list may bar presentation of omitted exhibits at trial [Los Angeles Super Ct Rules, Rule 7.9(h)].

To facilitate marking of exhibits, the court is to assign each party a sequential block of numbers that the respective party is to use sequentially to mark exhibits. Documents of more than one page should, when possible, be internally paginated in sequence [Los Angeles Super Ct Rules, Rule 8.62].

Example--San Diego County:

Lists of exhibits to be introduced at trial must be included in the joint trial readiness conference report prepared and submitted to the court before the joint trial readiness conference [San Diego Super Ct Rules, Rule 2.1.15. The report must include the exhibit number, who submitted the exhibit, a description of the exhibit, and any legal grounds for objecting to the exhibit].



Warning:

The failure to disclose and identify all trial exhibits in the joint trial readiness conference report may result in the restriction or exclusion of undisclosed or unidentified evidence at trial [San Diego Super Ct Rules, Rule 2.1.15].

However, local rules may also specify that lists of exhibits must only be filed before trial.

Example--Alameda County:

The Alameda County Superior Court requires the filing of an exhibit index [Alameda Super Ct Rules, Rule 4.6(3)]. A motion in limine is the proper form of an objection to an exhibit on an opponent's exhibit index [Alameda Super Ct Rules, Rule 4.6(3)].



Warning:

The failure to file an exhibit index may result in the exclusion of additional exhibits from trial [Alameda Super Ct Rules, Rule 4.6(3)].

Local rules may specify what constitutes a proper request for an exhibit from a third party.

Example--Los Angeles County:

If a party proposes to obtain documents in the custody of a nonparty, such as by subpoena duces tecum, and the documents may be produced by certification or otherwise in lieu of personal appearance by a witness custodian, the request for those documents must specify that they be delivered not later than the first day for which the trial is calendared [Los Angeles Super Ct Rules, Rule 8.58].

Particular types of exhibits may require special handling under local court rules.

Example--Los Angeles County:

Counsel must obtain court permission before bringing large, dangerous, or bulky exhibits enumerated in the local rule into the courtroom, and must substitute for those proposed exhibits by photograph, technical report, or dummy object. However, counsel may request, outside the hearing of the jury, permission of the court for nonetheless bringing the actual exhibit into the courtroom [see Los Angeles Super Ct Rules, Rule 8.59].

A party may be able to seek to have portions of an exhibit consisting of documentary evidence redacted before trial under local rules.

Example--Alameda County:

Exhibits involving medical, personal, and consumer records may be redacted before trial [Alameda Super Ct Rules, Rule 4.6(8)].

Example--Los Angeles County:

The court may withhold exhibits containing inadmissible matter from presentation to the jury until the inadmissible matter is deleted. The proponent of the exhibit may make the deletion, if practicable, by photocopying or another reproduction method that deletes the inadmissible matter. If deletion is not practicable, the parties may resolve the issue by stipulation, or the court may have the admissible matter read into the record [Los Angeles Super Ct Rules, Rule 8.68].

A pretrial conference may consider whether the parties will stipulate in writing to the return of exhibits after the trial [see *CCP* § 1952(a)]. Local court rules may also provide for return of exhibits after trial [see, e.g., Alameda Super Ct Rules, Rule 4.18; Los Angeles Super Ct Rules, Rule 8.59 (large, dangerous, or bulky exhibits); San Francisco Super Ct Rules, Rule 10.6 (exhibits produced by witness or party)].

4.16[4] Request Viewing of Scene, Property, or Demonstration. A pretrial conference may consider a motion by a party or the court for an order for a view during the trial by the factfinder of any of [see *CCP* § 651(a)]:

- The property that is the subject of the litigation.
- The place where an event relevant to the issues in the trial occurred.
- A relevant, admissible object, demonstration, or experiment that cannot with reasonable convenience be viewed in the courtroom.

Local rules may specify the means of requesting the viewing of a scene, property, or demonstration.

Example--Los Angeles County:

A contemplated motion for a viewing must be disclosed at the trial conference before the Los Angeles County Superior Court, or as soon as possible after its contemplation [Los Angeles Super Ct Rules, Rule

8.93; see 4.07[5] (trial conference)].



Cross Reference:

Discussion of requesting views of scene, property, or demonstration, see *Ch. 11, Questioning Witnesses and Objections*, 11.117.

Legal Topics:

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

Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersConferencesPretrial
ConferencesEvidenceDemonstrative EvidenceAdmissibilityEvidenceDocumentary EvidenceWritingsGeneral
OverviewEvidenceJudicial NoticeGeneral Overview



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Cathcart Durie McGee Prather

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Chapter 4 Final Pretrial Conference

III. ORGANIZING AND ADDRESSING VARIOUS TOPICS TO BE REVIEWED AT PRETRIAL CONFERENCES

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.17

4.17 Organize Testimonial Evidence for Trial.

4.17[1] File List of Witnesses. Local court rules may call for exchange of witness lists in association with preparation for a pretrial conference.

Example--Los Angeles County:

At least five days before the final status conference, the parties must exchange and file lists of witnesses [Los Angeles Super Ct Rules, Rule 7.9(h), (i)(5) (final status conference)].



Warning:

The failure to exchange and file the list may bar presentation of omitted witnesses at trial [Los Angeles Super Ct Rules, Rule 7.9(h)].

Example--San Diego County:

Lists of witnesses to be called at trial must be included in the joint trial readiness conference report prepared and submitted to the court before the joint trial readiness conference [San Diego Super Ct Rules, Rule 2.1.15 (trial readiness conference)].



Warning:

The failure to disclose and identify all witnesses to be called at trial may result in the restriction or exclusion of undisclosed or unidentified evidence at trial [San Diego Super Ct Rules, Rule 2.1.15].

However, local rules may also specify that lists of witnesses must only be filed before trial.

Example--Alameda County:

The court requires service of witness lists on opposing counsel three days before trial and filing of the lists with the trial department clerk on the day of trial [Alameda Super Ct Rules, Rule 4.6(7)].

Example--San Francisco County:

The joint statement on trial time limits agreed to between parties and submitted to the court must

describe witnesses to be called, the amount of time needed for examination, and a brief description of the witnesses' testimony [San Francisco Super Ct Rules, Rule 6.8(B); *see* 4.19[5][b]].

Consider:

The list of witnesses filed with the joint statement on trial time limits cannot be used to limit witnesses to be called at trial [San Francisco Super Ct Rules, Rule 6.8(D)].

4.17[2] Finalize Matters Concerning Expert Witnesses. A requested exchange of expert witness information may occur at a meeting of counsel [CCP § 2034.260(a)], such as a pretrial conference. A pretrial conference may consider a motion for a protective order promptly filed after receipt of a demand to exchange information concerning expert trial witnesses [see CCP § 2034.250(a)].



Warning:

The court will impose a monetary sanction on a person who unsuccessfully makes or opposes a motion for protective order unless either [CCP § 2034.250(d)]:

- The person acted with substantial justification.
- Other circumstances make the imposition of the sanction unjust.

Furthermore, the court entering a protective order may limit the number of expert witnesses [CCP § 2034.250(b)(6)] or otherwise at any time [Evid Code § 723].

Counsel may be required to submit hypothetical questions to be asked of expert witnesses in advance for consideration at a pretrial conference; however this is rarely required. Local rules may specify when advance submission is required.

Example--Los Angeles County:

A party calling an expert witness and intending to ask a hypothetical question need not prepare and submit in advance a written statement of the question, unless the court otherwise directs [Los Angeles Super Ct Rules, Rule 8.85].

4.17[3] Set Order of Examination and Cross-Examination of Witnesses in Multiple-Party Cases. If counsel in a multiple-party case have not agreed among themselves, the court may at a pretrial conference determine the order of the parties' presentations of evidence [CCP § 607(8); *see also* Evid Code § 320 (court determines order of proof)] and cross-examination of other parties' witnesses [see Evid Code §§ 320, 776(b)].

4.17[4] Request Limits on Examination. At a pretrial conference, the court may consider limitations on examination of witnesses allowed under the Evidence Code, including:

- Exclusion of time-consuming or prejudicial, confusing, or misleading testimony [Evid Code § 352].
- Limitation on examination of expert witnesses concerning scientific, technical, or professional publications that may be excluded [see Evid Code § 721(b)].
- Limitation of examination of persons under the age of 14 or with a substantial cognitive impairment [Evid Code § 765(b)].
- Determining whether a party may cross-examine his or her own witness [Evid Code § 773(b)].

- Barring cross-examination concerning irrelevant character traits [*see Evid Code § 786*], instances of conduct concerning relevant character traits [*see Evid Code § 787*], or inadmissible felony convictions of a witness [*see Evid Code § 788*] for purposes of impeaching credibility of the witness.

- Any other issue involving the court's reasonable control over the mode of interrogation of witnesses [*Evid Code § 765(a)*].

Cross Reference:

Making motions in limine to limit examination of witnesses, see 4.20 et seq.

4.17[5] File Motion to Exclude Witnesses From Courtroom. At the final pretrial conference, a party may seek a ruling on a motion for the court to exclude from the courtroom any witness not at the time under examination so that the witness cannot hear the testimony of other witnesses [*see Evid Code § 777(a)*; accord Los Angeles Super Ct Rules, Rule 8.84]. However, the court may not exclude a party to the action, and if the party is a person other than a natural person, an officer or employee designated by its attorney is entitled to be present [*Evid Code § 777(b), (c)*].



Timing--Los Angeles County:

Trial preparatory motions such as a motion to exclude witnesses from the courtroom must be filed and served [Los Angeles Super Ct Rules, Rule 7.9(h)]:

- In individual calendar (I/C) cases, with statutory notice for timely hearing at the final status conference. Statutory notice must be filed and served at least 16 court days before the final status conference [*see 4.07[4]*], although this period is increased for methods of service other than personal [*CCP § 1005(b), 1010; Cal Rules Ct, Rule 3.1300(a)*], and the court may generally order a shorter notice period [*Cal Rules Ct, Rule 3.1300(b)*].

- In master calendar (M/C) cases, at least five days before the date of the final status conference, for hearing on the first day of trial.

Distinguish:

A motion to exclude a witness is directed at preventing the witness from hearing other evidence, whereas a motion in limine is directed at preventing mention or presentation of prejudicial evidence within the hearing of the jury.

Cross Reference:

Discussion of motion to exclude witness from courtroom, see *Ch. 11, Questioning Witnesses and Objections, 11.03 -11.08*.

4.17[6] Consider Motions In Limine. Motions in limine to resolve evidentiary issues are often brought during a pretrial conference, depending on local rules for the timing of these motion.

Cross Reference:

Discussion of motions in limine, see 4.20.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesPretrial ConferencesEvidenceProcedural ConsiderationsPreliminary

QuestionsAdmissibility of EvidenceGeneral OverviewEvidenceTestimonyExpertsGeneral
OverviewEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceTestimonySequestration



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4.18 Organize Jury Selection and Jury Instructions.

At the pretrial conference for a jury trial, the court may seek to determine:

- Whether a jury trial has been properly demanded and fees timely posted [*see* Los Angeles Super Ct Rules, Rule 8.20].



Cross Reference:

Discussion of when trial by jury may be had, a form of demand and a form of waiver of jury trial, and forms for use in moving for a jury trial, or vacating the setting of a jury trial, when the right is not guaranteed, see California Forms of Pleading and Practice, Ch. 322, Juries and Jury Selection (Matthew Bender).

- Whether the parties will waive a jury trial.
- Whether counsel will stipulate to trial by fewer than 12 jurors [*see* Cal Const, art I, § 16; CCP § 220; Los Angeles Super Ct Rules, Rule 8.20(c)].
- The number of alternate jurors, if any, to be called [*see* CCP § 234; Los Angeles Super Ct Rules, Rule 8.20(d)].
- Whether counsel will stipulate to excuse jurors who express a desire not to sit because of potential length of the trial running beyond expiration of their jury service term [*see* Los Angeles Super Ct Rules, Rule 8.20(e)].
- The areas of proposed voir dire interrogation to be directed to prospective jurors and any limits to be imposed by the judge on voir dire examination by counsel [*see* Los Angeles Super Ct Rules, Rule 8.20(a)].

Distinguish:

Some courts may require that any party requesting the trial judge to voir dire the prospective jurors with questions that are not set forth in Cal Rules Ct, Stds Jud Admin,

Std 3.25(c), (d) prepare and submit to the court the proposed questions in writing and furnish copies for the other parties [see Los Angeles Super Ct Rules, Rule 8.20(h)].

- Whether any part of the voir dire should be conducted by written questions (for example, questions that might be embarrassing to a juror).
- Use of juror questionnaire.
- Whether any counsel contends the case is one of "unusual circumstances" or contains "unique or complex elements, legal or factual" within the meaning of Cal Rules Ct, Stds Jud Admin, Std 3.25 (relating to examination of prospective jurors in civil cases), such that usually improper voir dire questions may be asked [see Los Angeles Super Ct Rules, Rule 8.20(a)].



Strategic Point:

In considering counsel's request for permission to ask usually improper voir dire questions, the judge might require prior written submission to him or her of the questions to be asked. Counsel seeking permission may have a higher likelihood of success in the request by having the questions already prepared for presentation to the judge at the time of making the request.

- In multiple-party cases, the order in which counsel will conduct their supplemental voir dire examination of prospective jurors [see Cal Rules Ct, Stds Jud Admin, Std 3.25(a)(2)].
- In multiple-party cases, whether there are issues as to the number of "sides" and allocation of peremptory challenges within the meaning of *CCP* § 231 and, if so, whether stipulations may be reached with regard to them [see Los Angeles Super Ct Rules, Rule 8.20(f)].
- The schedule for the jury selection process [see Cal Rules Ct, Stds Jud Admin, Std 2.25]



Cross Reference:

Discussion of jury selection, see Ch. 6, Jury Selection.

Jury instructions must be submitted to court and served on other parties before the first witness is sworn [*CCP* § 607a]; however, local court rules may advance the submission and service before trial. Local court rules, such as in Los Angeles County, may advance the date as early as five days before the final status conference [Alameda Super Ct Rules, Rules 4.4(H)(8), (9)]. Determine the court's requirements for submission and service of instructions and plan accordingly.



Cross Reference:

Timing and preparation of jury instructions, see *Ch. 16, Jury Instructions, 16.03 -16.11*.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireCivil ProcedureTrialsJury TrialsJury Demands



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4.19 Organize Trial Mechanics.

4.19[1] Resolve Courtroom Access, Technology, and Communications Issues.

4.19[1][a] File Motion for Closure of Trial Proceedings to Public. Substantive courtroom proceedings in ordinary civil cases are presumptively open. Alternatively, the party may show closure is supported by an overriding interest that overcomes the public's right of access to the proceeding [*CCP* § 124; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 C4th 1178, 1217-1221, 86 CR2d 778, 980 P2d 337 (also setting procedure for motion)].



Timing--Los Angeles County:

Motions such as a motion to close court proceedings to the public must be filed and served [Los Angeles Super Ct Rules, Rule 7.9(h)]:

- In individual calendar (I/C) cases, with statutory notice for timely hearing at the final status conference. Statutory notice must be filed and served at least 16 court days before the final status conference [*see* 4.07[4]], although this period is increased for methods of service other than personal [*CCP* § 1005(b), 1010; *Cal Rules Ct, Rule 3.1300(a)*], and the court may generally order a shorter notice period [*Cal Rules Ct, Rule 3.1300(b)*].

- In master calendar (M/C) cases, at least five days before the date of the final status conference, for hearing on the first day of trial.



Cross Reference:

Discussion of motion to close trial to public, *see Ch. 2, Public Access to Trials and Records, 2.03 -2.10.*

4.19[1][b] Review Media Access and Courtroom Security. Some cases attract media attention, and counsel should be prepared to review how the judge will exercise his or her discretion under *Cal Rules Ct, Rule 1.150* for photographing, recording, and broadcasting court proceedings, and the use of personal recording devices by counsel. Security in the courtroom should also be addressed, particularly for cases in which a higher degree of security may be

necessary, such as high-profile cases and crowd control.



Cross Reference:

Discussion of media access to courts, see 2.40 et seq.

4.19[1][c] Arrange Facilities for Disabled Participants. Local rules may provide for accommodation of disabled participants, which is an appropriate subject for pretrial conferences.

Example--Los Angeles County:

In addition to complying with all applicable laws relating to accessibility, the Los Angeles County Superior Court may confer with counsel as to how courtroom facilities and procedures may further reasonably accommodate disabled participants [Los Angeles Super Ct Rules, Rule 8.19].

4.19[1][d] Request Use of Technology at Trial. The court may at a pretrial conference consider requests for use of technology at trial. The Rules of Court encourage the court to be receptive to using technology in managing the trial and the presentation of evidence [Cal Rules of Ct, Stds Jud Admin, Std 2.20(b)(5)]. Local rules may provide for use of technology in the courtroom.



Strategic Point:

In particular, there may be some physical needs counsel will have with certain technology such as enlarged screens, viewing by jury, court, and all counsel of what is shown, or where items are located. Counsel should be careful to raise all issues concerning physical imposition of the equipment on the court, as well as the technical aspects of the software or technology itself.

Example--Los Angeles County:

The Los Angeles County Superior Court does not permit the use of a blackboard, paper, or a bulletin board to write or summarize testimony, or diagram, calculate, or outline a chronology from testimony during the opening statement or presentation of evidence without the consent of the judge [Los Angeles Super Ct Rules, Rules 8.12, 8.40], and the court may for good cause limit their use in final arguments [Los Angeles Super Ct Rules, Rule 8.49]. Similarly, counsel may not in an opening statement display to the jury nor make reference to a chart, graph, map, picture, model, video, or any other graphic device unless one of the following applies [Los Angeles Super Ct Rules, Rule 8.40]:

- The item is marked as an exhibit and was received in evidence.
- Opposing counsel stipulates to its use.
- Prior consent of the court has been obtained.

A graphic device used for argument must be shown to adversaries, remain available for reference, and be marked for identification [Los Angeles Super Ct Rules, Rule 8.74].



Judge's Perspective:

Some courts simply request that counsel apprise one another of any demonstrative evidence intended for use in opening statement. The court becomes involved only if there is an objection. Courts generally will not preclude the use of demonstrative evidence unless there is a reasonable possibility that the jury will be precluded from viewing that evidence at trial. Stated in other words, if the jury will eventually be allowed to see the evidence during trial over any objection, that demonstrative evidence may be used in

opening statement.

4.19[1][e] Resolve Mandatory and Permissive Use of Interpreters and Translators. Remaining issues concerning appointment or compensation of interpreters and translators are appropriately resolved in pretrial conferences. While judicial proceedings must be conducted in the English language [see *CCP* § 185], an interpreter is required when:

- A witness is incapable of hearing or understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, the court, and the jury [*Evid Code* § 752(a)].
- The court finds that a party is unable to understand and speak English sufficiently to comprehend the proceedings and to assist counsel in conduct of the case [Cal Rules of Ct, Stds Jud Admin, Std 2.10(a)].

Local rules may place the burden on a party to ascertain the need for an interpreter, to obtain one, and to compensate the interpreter.

Example--Los Angeles County:

A party desiring an interpreter must arrange for the presence and payment of the interpreter. Without the consent of the parties, the Los Angeles County Superior Court may not use an interpreter who is a relative or friend [Los Angeles Super Ct Rules, Rule 8.18].

Example--San Francisco County:

A party desiring an interpreter must notify the court and other parties to the action and arrange for the presence and payment of the interpreter [San Francisco Super Ct Rules, Rule 10.1(A)]. Unless the interpreter is an Official Court Interpreter, the name of the interpreter and his or her qualifications must be provided to the court and opposing counsel at least five days before the date of the interpreter's appearance [San Francisco Super Ct Rules, Rule 10.1(B)].

Similarly, a translator is required when the written characters in a writing offered in evidence are incapable of being deciphered or understood directly. In such event, a translator must be sworn to decipher or translate the writing [*Evid Code* § 753(a)].



Cross Reference:

Use of interpreters and translators, see Ch. 8, Interpreters.

4.19[1][f] File Motion for Gag Order. Gag orders are disfavored and presumptively invalid [*Maggi v. Superior Court* (2004) 119 CA4th 1218, 1225, 15 CR3d 161] . A motion for a gag order must pass constitutional muster as not violating the prohibition against prior restraint of free speech [see *Maggi v. Superior Court* (2004) 119 CA4th 1218, 1225, 15 CR3d 161] . Probably, such an order could be requested by oral or written motion with reasonable notice to the opposing party.



Timing--Los Angeles County:

Trial preparatory motions such as a motion for a gag order must be filed and served [Los Angeles Super Ct Rules, Rule 7.9(h)]:

- In individual calendar (I/C) cases, with statutory notice for timely hearing at the final status conference. Statutory notice must be filed and served at least 16 court days before the final status conference [see 4.07[4]], although this period is increased for methods of service other than personal [

CCP § 1005(b), 1010; Cal Rules Ct, Rule 3.1300(a)], and the court may generally order a shorter notice period [*Cal Rules Ct, Rule 3.1300(b)*].

- In master calendar (M/C) cases, at least five days before the date of the final status conference, for hearing on the first day of trial.



Strategic Point:

While consideration of motions for gag orders is not limited to final pretrial conferences, the closed nature of the conferences commends the presentation of a potentially provocative motion for a gag order in a manner timely for their consideration at the final, if not an earlier, pretrial conference.



Cross Reference:

Discussion of filing motion for gag order, see *Ch. 2, Public Access to Trials and Records, 2.30 -2.39*.

4.19[1][g] Determine Rules for Sidebar Conferences. The final pretrial conference may establish when sidebar conferences will be permitted and their length. Trial management standards call for the court to permit sidebar conferences only when necessary and to keep them as short as possible [*Cal Rules of Ct, Stds Jud Admin, Std 2.20(b)(8)*].

4.19[2] Resolve Court Records Issues.

4.19[2][a] Request Availability and Access to Daily Transcripts. The final pretrial conference presents an opportunity to request a daily transcript of the trial, if permitted by local rules.

Example--San Diego County:

A party to a civil action before the San Diego County Superior Court may request daily transcripts of trial proceedings. The court may grant a request for daily transcripts as long as it does not disrupt the regular assignment of court reporters. The requesting party must deposit the daily fee for the service, as determined by the office of chief or assistance chief executive officer of the respective division of the court [*San Diego Super Ct Rules, Rule 2.5.7*].

4.19[2][b] File Motion to Seal Court Records. Unless confidentiality is required by law, court records are presumed to be open [*Cal Rules Court, Rule 2.550(c)*]. A party seeking to file a record under seal must first file a noticed motion for a sealing order accompanied by a set of points and authorities and a declaration containing facts sufficient to justify the sealing [*Cal Rules Court, Rule 2.551(b)(1)*; *San Francisco Super Ct Rules, Rule 10.5(D), (G)*]. The motion must allege an overriding interest that overcomes the right of public access to the record [*Cal Rules Court, Rule 2.550(d)(1)*; accord *San Francisco Super Ct Rules, Rule 10.5(A), (F)*].



Timing--Los Angeles County:

Trial preparatory motions such as a motion to seal court records must be filed and served [*Los Angeles Super Ct Rules, Rule 7.9(h)*]:

- In individual calendar (I/C) cases, with statutory notice for timely hearing at the final status conference. Statutory notice must be filed and served at least 16 court days before the final status conference [*see 4.07[4]*], although this period is increased for methods of service other than personal [*CCP § 1005(b), 1010; Cal Rules Ct, Rule 3.1300(a)*], and the court may generally order a shorter notice period [*Cal Rules Ct, Rule 3.1300(b)*].

- In master calendar (M/C) cases, at least five days before the date of the final status conference, for hearing on the first day of trial.



Strategic Point:

While consideration of motions to seal records is not limited to final pretrial conferences, the closed nature of the conferences commends the presentation of motions to seal in a manner timely for their consideration at the final, if not an earlier, pretrial conference.



Cross Reference:

Discussion of motion to seal court records, see *Ch. 2, Public Access to Trials and Records, 2.11 -2.29*.

4.19[3] Determine Whether to File Motion to Bifurcate. The trial court may allow a bifurcated trial of issues when it would promote the convenience of witnesses, the ends of justice, or the economy of and efficiency of handling the litigation [*CCP* §§ 598, 1048].



Timing:

California case management rules require a party to state whether he or she intends to file a motion for bifurcation in the case management statement [*Cal Rules Ct, Rule 3.727(10)*]. The motion is heard no later than the pretrial conference where one is held or, in other cases, no more than 30 days before trial [*CCP* § 598].

In addition, local court rules may set forth other timing rules for filing motions to bifurcate.

Example--Los Angeles County:

Trial preparatory motions such as a motion to bifurcate must be filed and served [Los Angeles Super Ct Rules, Rule 7.9(h)]:

- In individual calendar (I/C) cases, with statutory notice for timely hearing at the final status conference. Statutory notice must be filed and served at least 16 court days before the final status conference [see 4.07[4]], although this period is increased for methods of service other than personal [*CCP* §§ 1005(b), 1010; *Cal Rules Ct, Rule 3.1300(a)*], and the court may generally order a shorter notice period [*Cal Rules Ct, Rule 3.1300(b)*].
- In master calendar (M/C) cases, at least five days before the date of the final status conference, for hearing on the first day of trial.



Strategic Point--Defendant:

Bifurcation of equitable and legal issues so that equitable issues are tried first may help to avoid or minimize a jury trial in cases when a jury might be sympathetic to the plaintiff's case. If the trial court's rulings on the equitable issues resolve many of the legal issues, the issues remaining for consideration by the jury and, therefore, the effect of the sympathetic character of the plaintiff's case will be minimized.



Cross References:

Discussion of seeking and resisting bifurcation of trial, see *Matthew Bender[(R)] Practice Guide:*

California Pretrial Civil Procedure, 23.20 et seq.

Discussion of whether bifurcation is desirable trial strategy, see *Ch. 1, Preparing for Trial, 1.15 et seq.*

4.19[4] Resolve Jury Handling Issues in Jury Trial. In an action in which a trial by jury will be selected, the pretrial conference may address the following issues, among others:

- Whether there should be a limited preinstruction of the jury [see *Westover v. Los Angeles* (1942) 20 C2d 635, 639, 128 P2d 350 ; *Kelly v. Trans Globe Travel Bureau, Inc.* (1976) 60 CA3d 195, 203-204, 131 CR 488] .

Example--Los Angeles County:

Los Angeles Super Ct Rules, Rule 8.20(b) allows for a text of a brief statement of the case to be read by the trial judge to the panel of prospective jurors. The statement is prepared at the final status conference [Los Angeles Super Ct Rules, Rule 7.9(h), (i)(4)].

- Whether in longer trials trial days will be scheduled to permit jurors time for personal business. When a trial involves a jury, the trial judge is to manage proceedings with particular emphasis upon the needs of the jury [Cal Rules of Ct, Stds Jud Admin, Std 2.20(a), (b)(9)].

- Requests for or agreeing on jury instructions [Los Angeles Super Ct Rules, Rule 7.9(h), (i)(7) (final status conference considers requests); San Francisco Super Ct Rules, Rule 6.3 (conference two court days after assignment of case to judge ascertains agreement or not on proposed jury instructions)].

- When instructions are to be read to the jury [Los Angeles Super Ct Rules, Rule 8.51 (listing three options)].

- Whether the court should admonish the jury at the end of each trial day in accordance with *CCP § 611* [Los Angeles Super Ct Rules, Rule 8.54 (parties may stipulate waiver to daily admonition)].

- An agreed special verdict form with interrogatories, unless the court has ordered a general verdict form [Los Angeles Super Ct Rules, Rule 7.9(i)(7) (final status conference)].

- Whether the jury is to take a written copy of jury instructions into the jury deliberation room [Los Angeles Super Ct Rules, Rule 8.52].

Strategic Point:



The 2007 California Rules of Court [see *Cal Rules Ct, Rules 2.1030-2.1036*] should be raised with the court at the final pretrial conference, if not earlier, to determine what discretionary procedures the court prefers.



Cross Reference:

Discussion of jury instructions, see *Ch. 16, Jury Instructions.*

4.19[5] Finalize Timing of Trial and Its Parts.

4.19[5][a] Resolve Remaining Motions for Continuance. A motion for continuance, granted only for good cause [Cal Rules Ct, Rule 3.1332(a), (c); see e.g., *Forrest v. Department of Corporations* (2007) 150 CA4th 183, 199-202, 58 CR3d 466] , is best made as early as possible in the course of pretrial conferences, and as soon as grounds for

making it exist. Given that the motion, before commencement of trial, generally requires a noticed motion or ex parte application with supporting declarations [*Cal Rules Ct, Rule 3.1332(b)*], stipulation of counsel offers the quickest route to consideration of a request by the judge.

 Cross Reference:

Discussion of moving for continuances, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 30, Continuances.

Furthermore, individual statutes may provide for continuances in specific situations.

 Cross Reference:

Partial list of specific statutes on continuances, such as contempt, property partitions, and others, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 30.04[3].

Local court rules may also govern continuances in the respective court.

Example--Alameda County:

Motions for continuance must be made to the case management division, unless either [Alameda Super Ct Rules, Rule 4.5]:

- The motion is made on or after the Monday preceding the date of trial, in which case it is made in the assigned department.
- The motion is made jointly with another noticed law and motion in accord with the respective local rule.

In that court, a continuance may not be granted to accommodate a witness [Alameda Super Ct Rules, Rule 4.6(7)].

Example--San Francisco County:

Motions for continuance must be in a writing directed to the presiding judge or his or her designee, and may be ex parte if specified conditions are met [San Francisco Super Ct Rules, Rule 6.1(B)].

Finally, the Trial Court Delay Reduction Act allows parties to actions in the superior courts to stipulate to a single continuance, not to exceed 30 days, within 30 days of filing of responsive pleadings [*Gov Code § 68616(d)*].

Distinguish:

Motions to continue a trial are generally raised when an intrusive matter compels a request to change an established trial date. Motions for preference based on grounds for preference, or to advance, specially set, or reset a trial date on grounds for doing so, are usually made upon receipt of the initial calendared trial date, because the reason for the preference, advancement, special setting, or resetting is known at that time.

Exception:

The one instance where a motion to advance, specially set, or reset a trial date receives consideration in a pretrial conference is when the motion is made because the five-year statutory period under *CCP §§ 583.310, 583.360* for mandatory dismissal for failure to prosecute is close to expiring. The motion in that case requires a showing of good faith, diligence, and excusable delay [*see Cal Rules Ct, Rules 3.1335(e), 3.1342(e)*].

 Cross Reference:

Discussion of motions for preference or to advance, specially set, or reset a trial date, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 23.25 et seq.*

4.19[5][b] Set Time Limits. The court may set time limits at a pretrial conference. The court may set limits that are reasonable after consultation with counsel [Cal Rules of Ct, Stds Jud Admin, Std 2.20(b)(2)]. Local rules may also specify the court's discretion to set time limits.

Example--San Francisco County:

The San Francisco County Superior Court may exercise discretion whether to set time limits for a trial, including time limits on [San Francisco Super Ct Rules, Rule 6.8(A)]:

- Voir dire.
- Opening statements.
- Examination of witnesses.
- Closing argument.

Before trial, the parties must meet and confer on how much time they will need for each of these aspects of trial. They must afterward prepare a joint statement on the total amount of time required for trial if they have agreed on that total, or separate statements setting aside their individual assessment of the time required by each party. A statement must also include [San Francisco Super Ct Rules, Rule 6.8(B)]:

- A witness list of the names of witnesses to be called for direct examination by each party.
- A brief description of the subject of each witness's testimony.
- The number of hours of direct examination required for each witness.
- Total numbers of direct examination required by each party.



Timing:

The parties must file their statement or statements at least five days before the trial date [San Francisco Super Ct Rules, Rule 6.8(C)(2)].

The court will hold a hearing on the statements before the commencement of trial and may impose time limits taking into consideration, among other things, the ability of the parties to organize their presentation on the amount of notice given under the particular time limits [San Francisco Super Ct Rules, Rule 6.8(C)(2)].

The court also has discretion whether to later deviate from its established time limits [San Francisco Super Ct Rules, Rule 6.8(E)].

4.19[5][c] Set Daily Schedule of Trial Sessions. A pretrial conference presents an opportunity to set the time trial will start each day and the number of hours set each day for the trial. The court is to inform the parties of the number of

hours set each day for the trial [Cal Rules of Ct, Stds Jud Admin, Std 2.20(b)(3)] and attempt to maintain continuity in the days and hours of the trial [Cal Rules of Ct, Stds Jud Admin, Std 2.20(b)(6)].

Prerequisite:

In setting the daily schedule of the trial, the court may ask each counsel's estimate of the length of the trial.

 Judge's Perspective:

From the standpoint of jury morale and convenience, it is advisable never to underestimate the length of time for trial. Jurors are never disappointed when trials finish ahead of schedule but often become frustrated when trials exceed the time estimate.



Strategic Point:

Local practice will heavily influence the trial court's scheduling of daily sessions for a trial before it. In longer trials the court may consider scheduling trial days that permit the jurors time for personal business [Cal Rules of Ct, Stds Jud Admin, Std 2.20(b)(9)]. Of course, the schedule will also be affected by dark days on the court's calendar that the court sets aside for nontrial business. Local rules may have additional requirements pertinent to trial scheduling.

Example--Los Angeles County:

Parties to cases before the Los Angeles County Superior Court should communicate with one another and exchange good faith estimates as to the length of witness examination together with any other information pertinent to trial scheduling [Los Angeles Super Ct Rules, Rule 8.81].

Consider:

In a particularly lengthy trial, or in the case of complex litigation in trial, counsel may try to persuade the judge that four and a half days of trial per week should be scheduled, with a half day for weekly "housekeeping" purposes such as motions relating to evidence, formal movement into admission of evidence, and other issues that routinely interrupt the trial and keep jurors in the hallway waiting on the court and counsel. If you have a conflict at some point when trial is likely to be in session, raise that conflict at the pretrial conference and ask if the court can be "dark" for that period of time.



Strategic Point:

Considering the possibility of the need to reschedule a particular witness or cancel a day's trial session, the parties should be certain to verify and exchange contact information for purposes of making last-minute schedule changes.



Strategic Point--Defendant:

Trial scheduling, and in particular, time estimates, can play a significant, albeit subtle, role in juror opinions about the trial attorneys. When jurors are told by the court, before any evidence is presented, "this case will likely take X days of your time," jurors, who have no vested interest in a matter, except to the extent it imposes on their time, develop an expectation they will be able to return to their normal lives no later, if not sooner, than the date stated by the court. Invariably, when an estimate is exceeded, it is the defense, who presents its case-in-chief after jurors have already heard plaintiff's presentation, who will appear to have breached the court's promised time estimate. This presents the defense with several alternatives, none of them desirable. The defense might choose to truncate its case and not present certain

evidence or not develop it as thoroughly. The defense might also ignore the estimate provided by the court and present its case in the same manner, and in the same time, as it would have done had plaintiff adhered to the estimate. The defense might also ask for a mistrial which, if granted, may require the defense to incur the costs and expenses related to starting the trial again.

A preferred alternative is to address trial estimates in the pretrial conference including arriving at an understanding how a breach of the trial estimates will be addressed by the court. Federal, and some state, courts can impose time limits, sometimes but not always negotiated between the court and the parties. The parties are free to use, or not use, any of their allotted time as they choose. Time used by each side is tracked by a timer, as in a chess match. The time used conducting a direct examination is charged against the allotted time for the party calling the witness. Time spent cross examining the witness is charged against the party conducting the cross examination. If time runs out for a given party, that party may no longer call witnesses, present evidence, or conduct cross examinations.

Time limits, used for the purpose of trial management, require the parties to present their cases more efficiently and often result in the omission of extraneous and redundant presentations.

Counsel for plaintiffs and defendants should be mindful of their availability to participate in trials on scheduled dates. Busy attorneys are usually faced with having multiple matters to attend to at any given time. They can be assured there is little more disconcerting events than to be scheduled for more than one trial on the same date and none of the courts to which those multiple matters are assigned is willing to provide relief to the conflicted attorney. Similarly, when selecting dates for trial, defense counsel, in particular, may wish to keep in mind how factors having nothing to do with the facts in a case or the manner in which evidence is presented, may have an impact on the outcome. Avoid defending a case in which the jury is likely to return a verdict during the an awkward time of year, such as the Christmas season.

4.19[5][d] Schedule Arguments on Legal Issues. At a pretrial conference, the court may schedule arguments on legal issues. The court should try to schedule arguments on legal issues at the beginning or end of the day so as not to interrupt the presentation of evidence [Cal Rules of Ct, Stds Jud Admin, Std 2.20(b)(7)]. This may be the best practice, but as a practical matter it is entirely up to the judge. Local court rules may also specify conditions for arguments on legal issues.

4.19[5][e] Request Order of Arguments in Multiple-Party Cases. If counsel in a multiple-party case have not agreed among themselves, the court may at a pretrial conference determine the order of the parties' presentations of opening and closing arguments [CCP § 607(8)].

Example--Los Angeles County:

The Los Angeles County Superior Court may limit the length of final arguments [Los Angeles Super Ct Rules, Rule 8.49].



Cross Reference:

Discussion of seeking order of arguments in multiple-party cases, see Ch. 1, Preparing for Trial.

Legal Topics:

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

Civil Procedure
Pretrial Matters
Conferences
Pretrial Conferences
Civil Procedure
Pretrial Matters
Continuances
Civil Procedure
Pretrial Matters
Separate Trials
Civil Procedure
Trials
Jury Trials
General Overview
Constitutional Law
Bill of Rights
Fundamental Freedoms
Freedom of Speech
Free Press
Public Access



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III. ORGANIZING AND ADDRESSING VARIOUS TOPICS TO BE REVIEWED AT PRETRIAL CONFERENCES

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.19A

4.19A Use of Judicial Tutorials.

4.19A[1] Courts Sometimes Request Judicial Tutorials for Complicated Matters. It is not unusual for a court to request a judicial tutorial in advance of a bench trial, such as in trade secret and other cases based on complicated technology. This preliminary education can greatly improve trial efficiency and establish agreed terms, to avoid confusion. If trial counsel believes that the subject matter is sufficiently complex to merit such a presentation, trial counsel should suggest a tutorial in advance of trial.

4.19A[2] Judicial Tutorial Form and Content Are Discretionary. Judicial tutorials can range in format from trial counsel each presenting an objective version of the relevant technology, to each side's technology expert giving a presentation and answering the court's questions, to an independent expert appointed by the court providing a tutorial. Each of these presentation styles has its merits, but the point is that the format is entirely at the court's discretion.

Tutorials can be presented in cases involving subjects other than complex technology, industrial and medical processes, trade secrets, and the like. Courts are accustomed to tutorials, and realize that they are helpful to juries, particularly in complex cases. Thus, tutorials involving movement of groundwater, the mechanics and operations of factories, and complex construction of buildings, are all helpful. With the high quality of computer graphics, tutorials can be created to demonstrate many aspects of a cases. If the tutorial is clear, succinct, and helpful, and especially in cases in which the parties can agree on a tutorial, most courts will entertain the use of a video or other visual tutorial.



Strategic Point:

The form and content of a judicial tutorial is often dictated by the experience and intellect of the trial judge. This is another example underscoring the need to conduct research regarding the judge to whom a trial is assigned.

Counsel may find that his or her client's position is more effectively presented if the tutorial is an objective and neutral attempt to explain the complex technological, scientific (e.g., hydrology), or other complicated matter. An educated and informed court or jury can better evaluate the facts of the case, and the court will be more likely to allow an unbiased tutorial. An effective tutorial should not be a substitute for argument.

**Strategic Point:**

Counsel should be aware that opposing counsel may attempt to use the tutorial to slant the explanation presented of the complicated matter to his or her advantage. An effective tutorial, like stipulated facts or the neutral statement about the case read to the jury at the outset of the trial by the court, should be objectively neutral.

**Cross Reference:**

Discussion of management of complex cases, see Deskbook on Complex Civil Litigation, Ch. 2, Case Management (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConferencesPretrial Conferences



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IV. MAKING AND RESPONDING TO MOTIONS IN LIMINE

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4.20 CHECKLIST: Making and Responding to Motions In Limine.

4.20[1] Proponent of Motion.



Timing: Timing of a motion in limine is determined by local rule. Review local rules before filing motion.

Example--San Francisco County:

Motions in limine must be filed in the San Francisco County Superior Court at least 10 days before trial if by mail, or at least five days before trial if served personally.

Authority:

San Francisco Super Ct Rules, Rule 6.2

Discussion:

See 4.24

☐ Ascertain facts in your own case and in opponent's case that could be subject to motion in limine.



Identify specific facts that are admissible but the potentially prejudice to even mention before jury weighs the probative value of the evidence.



Decide whether motion should address potentially prejudicial facts, after considering, among other things:



Whether opposing counsel has not indicated any knowledge of or interest in these facts.



Whether opposing counsel may later learn of facts of which he or she appears before trial to have no knowledge.

- ☐ Whether opposing counsel may later decide to introduce those facts at trial in which he or she shows no interest before trial.
- ☐ Identify specific irrelevant or otherwise inadmissible facts for which a pretrial ruling on admissibility would be optimal.

Authority:

Evid Code § 352; Wayne v. Staples, Inc. (2006) 135 CA4th 466, 473, 37 CR3d 544

Discussion:

See 4.22

- ☐ For any eligible facts opponent may raise and any mention of which you want excluded, prepare sufficient copies of the following papers for presentation to the court and all counsel:

- ☐ Motion in limine stating grounds for inclusion or exclusion of the subject evidence or reference, including notice of motion when required or desired.
- ☐ Memorandum.
- ☐ Declarations, if required in support of motion or memorandum.
- ☐ Proposed order in limine.

Authority:

Cal Rules Ct, Rules 3.1112-3.1115

Discussion:

See 4.25, 4.26[1]

Form:

See 4.34

- ☐ File the motion in limine by the time designated in local court rules.

Discussion:

See 4.24

- ☐ Serve motion (and notice of motion, when required) by the time designated in local court rules.

Discussion:

See 4.26[2]

- ☐ For any facts subject to opponent's motion in limine that you want the opportunity to introduce at trial, prepare

and file opposition to the motion in limine within the time specified in local rules or specified by the judge.

Discussion:

See 4.27

- ☐ Argue motion at designated hearing.
- ☐ Serve any written order on the motion in limine on other parties in accordance with local rules.

4.20[2] Opponent of Motion.



Timing: Timing of a motion in limine is determined by local rule. Review local rules before filing opposition.

Example--San Diego County:

Papers opposing motions in limine must be filed and served two court days before the trial call unless otherwise directed by the court.

Authority:

San Diego Super Ct Rules, Rule 2.1.18

Discussion:

See 4.27[2]

- ☐ Ascertain facts in your own case and in movant's case that are the subject of the motion in limine.
 - ☐ Identify specific facts that are admissible but are potentially prejudice to even mention before jury weighs the probative value of the evidence.
- ☐ Decide whether opposition should be made:
 - ☐ Certain evidence may work against the theory of the case and would better off excluded even though marginally valuable; consider stipulating to motion, but frame stipulation in light most favorable to case.
 - ☐ Consider whether sufficient grounds exist for opposition and if movant committed any procedural errors.
 - ☐ Consider filing separate motion in limine as well as opposition to address other evidence; movant will usually only raise matters favoring that side.

Authority:

Evid Code § 352; Wayne v. Staples, Inc. (2006) 135 CA4th 466, 473, 37 CR3d 544

Discussion:

See 4.27[1]

☐ File and serve opposition:

- ☐ Memorandum.
- ☐ Declarations, if required to support memorandum.

Authority:

Cal Rules Ct, Rules 3.1112-3.1115

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedurePretrial MattersMotions in
LimineExclusion of Evidence



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4.21 Options and Strategies.

A motion in limine, literally a motion "on or at the threshold," is a motion that requests the court, in advance of a proceeding, to make an order determining questions of procedure or evidence or restricting conduct of the participants.

Strategic Point--Proponent of Motion:



The usual purpose of a motion in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party [*Condon-Johnson & Associates, Inc. v. Sacramento Municipal Utility District* (2007) 149 CA4th 1384, 1392, 57 CR3d 849] . A motion in limine is made to exclude evidence before it is offered before the jury, in order to avoid the obviously futile attempt to "unring the bell" with a motion to strike in the proceedings before the jury [*Ulloa v. McMillin Real Estate and Mortgage, Inc.* (2007) 149 CA4th 333, 337-338, 57 CR3d 1] .

Strategic Point--Opponent of Motion:



A motion in limine may educate the opponent about problems with the evidence, which the opponent may then be able to solve Carefully consider whether to raise an evidentiary issue in a motion in limine or during the trial when the evidence is presented.

A ruling on a pretrial motion in limine is necessarily tentative because subsequent evidentiary developments may change the context. Ordinarily, the opponent of evidence need not object until the evidence is offered at trial. A pretrial motion in limine is merely an additional protective device for the opponent of the evidence, to prevent the proponent from even mentioning potentially prejudicial evidence to the jury [*Rufo v. Simpson* (2001) 86 CA4th 573, 608, 103 CR2d 492] .

Strategic Point--Proponent of Motion:



A motion in limine can be used to prevent the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence (including during opening statement), in addition to

the prejudicial effect of the evidence itself. Thus, if counsel anticipates that opposing counsel may make some effort to introduce evidence or facts the mere introduction of which (even before it is *admitted* into evidence) in open court is likely to create an adverse inference in the jurors' minds, a motion in limine may be advisable.

Unlike an objection to all evidence, which may be used to end the trial and obtain judgment on the pleadings without the introduction of evidence, motions in limine are usually directed at particular items of evidence, rather than at a plaintiff's entire case [*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 CA4th 327, 333, 44 CR3d 426]. Furthermore, they permit more careful consideration of evidentiary issues than would take place during trial. They minimize side-bar conferences and disruptions during trial, allowing an uninterrupted flow of evidence. By resolving potentially critical issues at the outset, they enhance the efficiency of trials and promote settlements [*Kelly v. New W. Fed. Sav.* (1996) 49 CA4th 659, 669-670, 56 CR2d 803] .

Strategic Point:



The outcome of motions in limine gives the parties a sense of the judge's predilections with respect to admissibility of evidence that may be important to the ultimate outcome. Motions in limine can help bring the parties to settlement, especially in complex business cases, by clarifying the likely evidentiary framework that would apply to a trial and, as a result, the factual determinations remaining for the jury to make.

Accordingly, parties should consider asking the judge's permission to file motions in limine well in advance of trial in order to obtain "early determination of legal issues central to the case" [*Wayne v. Staples, Inc.* (2006) 135 CA4th 466, 473, 37 CR3d 544 (motions in limine used, with permission of court, to decide whether declared value insurance coverage was unconscionable and whether parcel shipping order form was deceptive)].

Consider--Dismissal:

Orders in limine may exclude sufficient evidence to render the plaintiff's case subject to dismissal [see 4.29[4]]. However, this is rare. More commonly, in limine motions often give both counsel more predictability as to possible outcome of the case and may lead to a settlement of the case.

Consider--Proponent of Motion:

One consideration for proponents of motions in limine might be, if the objection to evidence is relevance, whether the judge is likely to grant the motion or wait until the evidence is presented in the context of testimony or other foundation that might change the result. In that case, counsel should consider whether the motion in limine simply alerts opposing counsel to an evidentiary problem that counsel might not otherwise be prepared to overcome.

Strategic Point:



Attorneys are obliged to zealously represent the interests of their clients. In that regard, the fact that a motion may be lost at one point in a proceeding does not necessarily preclude counsel from raising the same motion later in the case. This is not to say counsel should continue to argue a motion on which the court has rendered its ruling. Rather, when appropriate, counsel should ask the court denying in limine motions to do so without prejudice to the opportunity to raise the motion during trial after further foundation is presented on which the court may base its ruling.



Strategic Point--Preserving Record:

Do not chance the possible waiver of the evidentiary issue if the motion is denied before trial. Renew the grounds for objecting to the evidence at trial when the evidence is introduced. Note, however, that a motion in limine is a sufficient objection to protect the record on appeal when it satisfies *Evid Code* § 353 [*Boston v. Penny Lane Centers, Inc.* (2009) 170 CA4th 936, 950, 88 CR3d 707 ; see 4.32[2][a]].



Cross References:

Discussion of motions in limine generally, see California Forms of Practice and Pleading, Ch. 373, Motions in Limine (Matthew Bender).

Legal Topics:

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

Civil Procedure Dismissals Involuntary Dismissals General Overview Civil Procedure Pretrial Matters Motions in Limine General Overview Civil Procedure Pretrial Matters Motions in Limine Exclusion of Evidence



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4.22 Grounds for Filing Motion In Limine.

4.22[1] File Motion In Limine to Prevent Presentation of Incompetent, Irrelevant, or Inadmissible and Prejudicial Evidence From Trial. The scope of a motion in limine is any kind of evidence that could be objected to at trial, either as incompetent or irrelevant [*Redevelopment Agency v. Tobriner* (1989) 215 CA3d 1087, 1097 n.5, 264 CR 481] or as subject to discretionary exclusion as unduly prejudicial [*Clemens v. American Warranty Corp.* (1987) 193 CA3d 444, 451, 238 CR 339] .

Prerequisite:

The court may only rule on a motion in limine concerning a question of mixed facts and law upon an examination of a complete set of facts underlying the question of law involved [*Silva v. Union Pac. R.R. Co.* (2000) 85 CA4th 1024, 1029-1030, 102 CR2d 668] .

Examples:

- Duty of railroad to fence was a question of facts and law, and trial court's ruling on the motion in limine that no duty existed was improper on the sole basis of factual allegations asserted in the motion and response papers [*Silva v. Union Pac. R.R. Co.* (2000) 85 CA4th 1024, 1029-1030, 102 CR2d 668] .
- Evidence may be excluded by motion in limine when it is inadmissible due to:
 - ☐ Res judicata [*Alpha Mech., Heating & Air Conditioning, Inc. v. Travelers Cas. & Sur. Co. of America* (2005) 133 CA4th 1319, 1325, 35 CR3d 496] or collateral estoppel [*Roos v. Red* (2005) 130 CA4th 870, 888, 30 CR3d 446] .
 - ☐ Prejudicial nature outweighs probative value [Evid Code § 352].
 - ☐ Statutory and case law exclusion of evidence, such as:

- Mediation evidence [*Evid Code* § 1119].
- Subsequent safety measures [*Evid Code* § 1151].
- Offer of compromise [*Evid Code* § 1152; *Caira v. Offner* (2005) 126 CA4th 12, 30-31, 24 CR3d 233] .
- Liability insurance [*Evid Code* § 1155].
- Its unreliability as scientific evidence under the test articulated in *People v. Kelly* (1976) 17 C3d 24, 130 CR 144, 549 P2d 1240 and *Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 US 579, 113 S Ct 2786, 125 L Ed2d 469 [see, e.g., *Geffcken v. D'Andrea* (2006) 137 CA4th 1298, 1310, 41 CR3d 80 (unreliable mold spore testing)].
- Discovery exclusions [see, e.g., CCP § 2034 (non-designated experts)].

Exception:

Local court rules may limit the availability of motions in limine from what the decisions generally allow.

Example--San Diego County:

San Diego County Superior Court rules limit the scope of motions in limine to evidentiary issues when attempts to "unring the bell" would be unduly prejudicial or futile, as defined in *Clemens v. American Warranty Corp.* (1987) 193 CA3d 444, 451, 238 CR 339 [San Diego Super Ct Rules, Rule 2.1.18].

Distinguish:

A motion to exclude a witness is directed at preventing the witness from hearing other evidence [see *Ch. 11, Questioning Witnesses and Objections, 11.03 et seq.*], whereas a motion in limine is directed at preventing mention or presentation of prejudicial evidence within the hearing of the jury.

The ground of prejudicial effect applies the balancing test of *Evid Code* § 352. The trial court's discretion in denying a motion in limine based on *Evid Code* § 352 is properly exercised when the record contains affirmative indications that the trial court fully understood and executed its duty to weigh the probative value against the prejudicial effect of the evidence [*Ramona Manor Convalescent Hosp. v. Care Enters.* (1986) 177 CA3d 1120, 1137, 225 CR 120 ; *Geffcken v. D'Andrea* (2006) 137 CA4th 1298, 1310, 41 CR3d 80] .

Distinguish:

Excluding relevant, nonprejudicial, nonconfusing evidence under *Evid Code* § 352 merely because it hurts a party's case is error [*Smalley v. Baty* (2005) 128 CA4th 977, 985, 27 CR3d 575 (exclusion was erroneous)].

➡ Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 352, see Cotchett, *California Courtroom Evidence*, 7.01 (Matthew Bender).

Local rules may require the use of motions in limine for objections.

Example--Alameda County:

The Alameda County Superior Court requires a party to file a motion in limine in order to:

- Object to exhibits or exhibit indexes [Alameda Super Ct Rules, Rule 4.6(3)].

- Objections to redaction of exhibits involving medical, personal, and consumer records before trial in that court must be made via motion in limine [Alameda Super Ct Rules, Rule 4.6(8)].

4.22[2] Motion In Limine Is Not Available to Limit Evidence From Trial in Other Ways. A motion in limine has been denied when a party attempted to use it for:

- Compelling a witness or party to conform his or her trial testimony to a preconceived factual scenario based on one version of prevaricating testimony given during pretrial discovery [*Kelly v. New W. Fed. Sav.* (1996) 49 CA4th 659, 672, 56 CR2d 803] .

Example:

Motion in limine could not properly exclude evidence regarding one of two elevators that could have been the site of an accident given that the plaintiff who initially identified one elevator as the one involved, later suggested that she was uncertain as to which was involved [*Kelly v. New W. Fed. Sav.* (1996) 49 CA4th 659, 672, 56 CR2d 803] .

- Excluding evidence when a reasonable, less drastic alternative can cure the defect in its admissibility [see *Fatica v. Superior Court* (2002) 99 CA4th 350, 353, 120 CR2d 904] .

Example:

Testimony of expert witness about plaintiff's previous medical treatment who had not been prepared to discuss records of plaintiff's previous medical treatment at deposition could not be excluded at trial by motion in limine, because the element of surprise could be obviated by ordering additional deposition of the expert witness [*Fatica v. Superior Court* (2002) 99 CA4th 350, 353, 120 CR2d 904] .

- Managing matters of day-to-day trial logistics and common professional courtesy [*Kelly v. New W. Fed. Sav.* (1996) 49 CA4th 659, 671, 56 CR2d 803] .

Example:

Requests that counsel inform opposing counsel the day before of what witnesses will be called the next day and that no exhibits be shown to the jury without first being seen by all counsel and the court are not proper subjects of motions in limine [*Kelly v. New W. Fed. Sav.* (1996) 49 CA4th 659, 671, 56 CR2d 803] .

- In a malicious prosecution action brought by an insured against its insurer to preclude the insured from presenting any evidence that the insurer lacked probable cause to prosecute an underlying action, on the basis that the insured's purported admission that it owed a small amount for unpaid premiums resolved the probable cause issue as to the much larger amount of unpaid premiums the insurer had claimed in the underlying action [*Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp.* (2003) 114 CA4th 906, 914, 8 CR3d 199] .

Example--Los Angeles County:

A motion in limine cannot be used for the purpose of seeking an order to try an issue before the trial of another issue or issues before the Los Angeles County Superior Court. Such motions may only be made in compliance with CCP § 598 [Los Angeles Super Ct Rules, Rule 8.92(c)].

In addition, local rules of court may prohibit the use of motions in limine for specific purposes in the respective superior court.

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineExclusion of EvidenceEvidenceCompetencyGeneral
OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral
OverviewEvidenceRelevanceGeneral OverviewEvidenceTestimonyExpertsAdmissibility



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4.23 Motions In Limine Are Excepted From Prohibition Against Local Rules Governing Motions.

The prohibition against local rules relating to motions [*Cal Rules Court, Rule 3.20(a)*] specifically excepts local court rules governing motions in limine [*Cal Rules Court, Rule 3.20(b)(1)*].



Strategic Point:

Counsel must consult the local rules of court for specific requirements on motions in limine.

The Trial Court Delay Reduction Act requires all superior courts to implement delay reduction programs [*see Gov Code §§ 68605.5, 68620*]. Local rules enacted to implement the Act may affect the procedure for motions in limine.



Cross References:

Discussion of case management under the Trial Court Delay Reduction Act, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 23.02 et seq.*

California Forms of Pleading and Practice, Ch. 552, Trial Court Delay Reduction (Matthew Bender).

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewGovernmentsCourtsRule Application & Interpretation



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4.24 Timing of Filing of Motion In Limine.

4.24[1] Judicial Council Rules Allow Trial Judge Discretion. The timing and place of filing of a motion in limine are within the discretion of the trial judge under the California Rules of Court [*Cal Rules Ct, Rule 3.1112(f)*]. Accordingly, such a motion generally is brought at the beginning of trial, although it also may be brought during trial [*Mardirossian & Associates, Inc. v. Ersoff (2007) 153 CA4th 257, 269, 62 CR3d 665*].

Exception:

Local rules may limit the individual judge's discretion with respect to when motions in limine may be filed [*see 4.24[2]*].

4.24[2] Local Rules May Set Limits on Timing and Place for Filing of Motion In Limine or on Judge's Discretion to Accept Filing. In accordance with the authority of superior courts to set rules concerning motions in limine, local rules of court may set a general rule on the timing and place for filing a motion in limine, subject to the court's discretion.

Example--San Diego County:

Motions in limine must be filed five court days before the trial call unless otherwise directed by the court [*San Diego Super Ct Rules, Rule 2.1.18*].

Local rules may instead set a hard and fast rule that appears to limit the judge's discretion to accept motions in limine after that limit.

Example--Alameda County:

Motions in limine must be filed with the trial department clerk on the day of trial in the Alameda County Superior Court [*Alameda Super Ct Rules, Rule 4.6(6)*].

Example--Contra Costa County:

Motions in limine must be filed with the Contra Costa County Superior Court at least five days before the issue conference [*Contra Costa Super Ct Rules, Rule 5(j)(1)*].

Example--San Francisco County:

Motions in limine must be filed in the San Francisco County Superior Court at least 10 days before trial if by mail, or at least five days before trial if served personally [San Francisco Super Ct Rules, Rule 6.2]. This rule specifically provides that the failure to do so in limited jurisdiction cases *may* result in the unavailability of motion in limine at trial [see San Francisco Super Ct Rules, Rule 6.2].



Strategic Point:

Rarely will counsel find trial judges who will not consider an in limine motion presented after the deadlines have passed for doing so, particularly when the circumstances giving rise to the motion did not become apparent until the deadline passed. If the deadline for filing a motion in limine has passed, the judge may still be receptive to a motion directed to the evidence if it will streamline the trial and eliminate the need for a sidebar to resolve an evidentiary issue.



Judge's Perspective:

Practices of individual judges vary widely on limiting or encouraging the use of in limine motions. Some judges strictly construe any limitation on the filing of in limine motions and would rather defer ruling until the issue arises at trial. Other judges prefer to make as many evidentiary rulings as possible before the jury is selected to minimize inconvenience to the jury brought about by lengthy sidebar arguments and perhaps to encourage settlement of the case before the jury is empaneled.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersMotions in LimineGeneral OverviewGovernmentsCourtsRule Application & Interpretation



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4.25 Filing Motions In Limine.

4.25[1] Motion In Limine May Have to Be in Writing. Local rules of court may require the motion to be in writing in some or all circumstances.

Examples--Alameda, Contra Costa, and San Francisco Counties:

All motions in limine filed with the Alameda, Contra Costa, or San Francisco County Superior Courts must be in writing [Alameda Super Ct Rules, Rule 4.6(6); Contra Costa Super Ct Rules, Rule 5(j)(1); San Francisco Super Ct Rules, Rule 6.2].



Strategic Point:

A motion in limine that is not otherwise required to be in writing should nonetheless be made in writing when feasible. Doing so eliminates the chance that the terms of the order will not be properly recorded in the minutes of the court. Furthermore, judges are able more easily and effectively to address the issue if it is presented in writing, and an appellate record is enhanced if the motions are set forth in writing with appropriate legal authorities.



Cross Reference:

Form of motion in limine, see 4.34.

Local rules may also exempt motions in limine on certain grounds from being in writing.

Example--San Diego County:

Motions in limine filed with the San Diego County Superior Courts do not have to be in writing if they fall within one of the following categories [San Diego Super Ct Rules, Rule 2.1.18 (motion "should not be submitted" in writing)]:

- Motion excluding evidence of collateral source.

- Motion excluding evidence of or mention of insurance coverage.
- Motion excluding experts not designated pursuant to *CCP* § 2034.
- Motion excluding offers to settle and/or settlement discussions.

4.25[2] File Motion With Supporting Memorandum. A motion in limine must be accompanied by a memorandum [see *Cal Rules Ct, Rule 3.1113*], which generally should itself be supported by declarations [see *Cal Rules Ct, Rule 3.1115*] and/or depositions [see *Cal Rules Ct, Rule 3.1116*], describing the nature of the case [*Cal Rules Ct, Rule 3.1112*], and stating facts showing why the matter at issue is irrelevant or inadmissible and potentially prejudicial [*Kelly v. New W. Fed. Sav. (1996) 49 CA4th 659, 670, 56 CR2d 803*] .

Prerequisite:

Some courts may require a motion in limine to be presented in writing with a proposed order. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial [see *Kelly v. New W. Fed. Sav. (1996) 49 CA4th 659, 669, 56 CR2d 803*] .

Example--Los Angeles County:

A motion in limine filed with the Los Angeles County Superior Court must be accompanied by a declaration [Los Angeles Super Ct Rules, Rule 8.92(a)]. The declaration must state:

- A clear identification of the specific matter alleged to be inadmissible and prejudicial [Los Angeles Super Ct Rules, Rule 8.92(a)(1)].
- A representation to the court that the subject of the motion has been discussed with opposing counsel, and that opposing counsel has either indicated that the matter will be mentioned or displayed in the presence of the jury before it is admitted in evidence or that counsel has refused to stipulate that the matter will not be mentioned or displayed in the presence of the jury unless and until it is admitted in evidence [Los Angeles Super Ct Rules, Rule 8.92(a)(2)].
- A statement of the specific prejudice that will be suffered by the moving party if the motion is not granted [Los Angeles Super Ct Rules, Rule 8.92(a)(3)].
- If the motion seeks to make binding an answer given in response to discovery, the declaration must set forth the question and the answer and state why the use of the answer for impeachment will not adequately protect the moving party against prejudice in the event that evidence inconsistent with the answer is offered [Los Angeles Super Ct Rules, Rule 8.92(a)(4)].



Strategic Point:

Even if the court does not require it, counsel should give the judge and opposing counsel a proposed order along with the written motion in limine and supporting memorandum. If the judge signs the order, it should then be filed and served on all parties.



Cross References:

Form of motion in limine, see 4.34.
Form of order in limine, see 4.35.

Points and authorities in support of various motions in limine, see California Points and Authorities (Matthew Bender).

Legal Topics:

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

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4.26 Give Notice of Motion When Required or Desired.

4.26[1] Necessity for Notice of Motion In Limine Depends on Applicable Rules.

4.26[1][a] Judicial Council Rules of Court Do Not Require Notice of Motion. The California Rules of Court except motions in limine from the general requirement of a notice of motion, whether filed before or during trial [*Cal Rules Ct, Rule 3.1112(f)*].

4.26[1][b] Local Rules May Require Statutory Notice of Motion In Limine. Local rules of court may require statutory notice of a motion in limine.

Example--Los Angeles County:

In an I/C case brought before the Los Angeles County Superior Court, the parties give timely statutory notice for hearing on the day of the final status conference. In M/C cases, the parties must give notice of motions in limine at least five days before the final status conference, and they shall be set for hearing on the first day of trial [*Los Angeles Super Ct Rules, Rule 7.9(h)*].

Consider:

In certain instances, a motion might be made on ex parte application. For example, a motion for continuance may be made ex parte when, for good cause, notice cannot be given [*see Cal Rules Ct, Rule 3.1332(a)*]. An order, however, based on an ex parte application is granted only in the plainest and most certain of cases when it appears that the rights of the adverse party will not be affected [*Consolidated Const. Co. v. Pacific E. Ry. Co. (1920) 184 C 244, 246, 193 P 238*] . Therefore, under normal circumstances the granting of an ex parte motion in limine would probably be inappropriate because the in limine motion, by its nature, raises factual questions and affects the rights of the adverse party.

 Cross Reference:

Form of notice of motion and motion in limine, see 4.34.

4.26[2] Service of Motion In Limine.

4.26[2][a] Judicial Council Rules of Court Allow Trial Judge Discretion. Under the California Rules of Court, the timing and place of serving a motion in limine is at the discretion of the trial judge, both before and during trial [Cal Rules Ct, Rule 3.112(f)].

4.26[2][b] Local Rules May Fix Timing of Service of Motion In Limine. Local rules may fix the timing of service of motions in limine.

Example--Alameda County:

Motions in limine filed with the Alameda County Superior Court must be served at least one day before the day of trial [Alameda Super Ct Rules, Rule 4.6(6)].

Example--Contra Costa County:

Motions in limine filed in Contra Costa County Superior Court must be served at least five days before the issue conference [Contra Costa Super Ct Rules, Rule 5(k)(1)].

Example--San Diego County:

Motions in limine filed with the San Diego County Superior Court must be served five court days before the trial call unless otherwise directed by the court [San Diego Super Ct Rules, Rule 2.1.18].

Example--San Francisco County:

Motions in limine filed with the San Francisco County Superior Court must be served at least 10 days before trial if by mail, or at least five days before trial if served personally [San Francisco Super Ct Rules, Rule 6.2].

Local rules may fix the timing of service of a motion in limine based on whether they are individual calendar (I/C) cases or master calendar (M/C) cases.

Example--Los Angeles County:

In an I/C case brought before the Los Angeles County Superior Court, the parties must serve motions in limine with timely statutory notice so as to be heard on the day of the final status conference. In M/C cases, the parties must serve motions in limine at least five days before the final status conference [Los Angeles Super Ct Rules, Rule 7.9(h)].

Local rules may also require providing the trial judge courtesy copies of the motion in limine.

Example--San Francisco County:

Courtesy copies of motions in limine must be provided in the San Francisco County Superior Court if the identity of the judge is known [San Francisco Super Ct Rules, Rule 6.2].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersMotions in LimineGeneral OverviewGovernmentsCourtsRule Application & Interpretation



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4.27 Opposing Motions In Limine.

4.27[1] File Opposition to Motion In Limine. Counsel should oppose a motion in limine by advancing evidence and argument showing that:

- The motion in limine was improperly filed [*see 4.25*].
- The motion in limine was not timely under local court rules [*see 4.24*].
- The notice of motion in limine or service of the notice was inadequate [*see 4.26*].
- There is an evidentiary foundation for the admission of the evidence subject to the motion in limine [*see 4.28*].
- A judge other than the trial judge is acting on the motion [*see 4.29[1]*].
- There is not proper grounds for granting the motion [*see 4.22*].
- The judge should delay a ruling pending hearing of other relevant evidence [*see 4.29[2]*].
- The court should only grant the motion subject to an offer of proof [*see 4.29[3]*].

If the court grants or denies the motion, the non-prevailing party may consider whether to:

- Seek reconsideration or other ruling on the same evidentiary question later at trial [*see 4.30*].
- Seek review of the order granting the motion in limine [*see 4.32*].

4.27[2] Timing of Filing and Service of Opposition to Motion In Limine May Be Set by Local Rules. Local court rules may specify when papers opposing a motion in limine must be filed. Counsel should always consult local court rules for rules concerning the filing deadline.

Example--San Diego County:

Papers opposing motions in limine to be considered by the San Diego County Superior Court must be filed and served two court days before the trial call unless otherwise directed by the court [San Diego Super Ct Rules, Rule 2.1.18].

Legal Topics:

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

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4.28 Court May Hold Hearing on Preliminary Fact in Determining Motion In Limine.

The trial court may hold a hearing on a preliminary fact necessary to the admission of evidence subject to the motion in limine [*see, e.g., Geffcken v. D'Andrea* (2006) 137 CA4th 1298, 1310, 41 CR3d 80 (court held *Evid Code* § 402 hearing to test validity under *Kelly* doctrine on scientific evidence of laboratory test, result of which was offered as evidence and ultimately excluded)].

► **Cross References:**

Discussion of *Evid Code* § 402 hearings, *see Ch. 11, Questioning Witnesses and Objections, 11.14[5]*.

Law Revision Commission comments and case authority interpreting *Evid Code* § 402, *see* Cotchett, *California Courtroom Evidence, 10.03* (Matthew Bender).

Legal Topics:

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

Civil Procedure
Pretrial Matters
Motions in Limine
General Overview
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Preliminary Questions
Admissibility of Evidence
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4.29 Trial Judge Has Discretion in Ruling on Motion In Limine.

4.29[1] Only Trial Judge May Rule on Motion In Limine. In master calendar courts, only the trial judge may rule on a motion in limine [*Law Offices of Dixon R. Howell v. Valley (2005) 129 CA4th 1076, 1091 n.11, 29 CR3d 499* (ruling on motion in limine by law and motion judge not authorized)].

4.29[2] Court May Have Discretion to Delay Ruling on Motion In Limine. Local rules of court may permit the trial court to delay ruling on a motion in limine.

Example--Los Angeles County:

The Los Angeles County Superior Court may defer ruling on a motion in limine. In so doing, it may order that no mention or display of the matter that is the subject of the motion is to be made in the presence of the jury unless and until the court orders otherwise. If the court so orders, or if the motion is granted, it is the duty of counsel to instruct associates, clients, witnesses, and other persons under their control, that no mention or display be made in presence of the jury of the matter that is the subject of the motion [Los Angeles Super Ct Rules, Rule 8.92(d)].



Strategic Points:

- If the court has delayed ruling, counsel should also prepare an evidentiary brief in support of objections for use when the evidence is marked or introduced. Counsel should also be ready to move for a mistrial when objectionable evidence introduced since the court delayed ruling on a proper motion in limine. Counsel using the evidence, which has been the subject of a motion in limine ruling that has been delayed, should pay particular attention to overcoming the objections before the evidence is marked for use at the trial.
- The court may defer ruling on a motion in limine when the matter is based on other evidence, particularly if the motion is brought on the issue of relevance. The court may wait until the other

evidence is admitted a trial before issuing a ruling. This may have a significant impact on the contents of the opening statement.



Strategic Point--Tentative Ruling:

When the trial judge makes a ruling adverse to a party's case, objecting counsel should establish on the record that the ruling is final, not just tentative depending on the state of the evidence actually adduced at trial, i.e. that the ruling is not subject to change. Out of an abundance of caution, counsel may make an offer of proof to remove any doubt on the scope and effect of the in limine ruling so as to ensure there will be no bar to appellate review.

4.29[3] Court May Grant Motion Subject to Offer of Proof. A trial court may conditionally grant a motion in limine to prevent mention of prejudicial matter subject to offers of proof at trial. If facts adduced at trial have probative value that may outweigh their prejudicial impact, the trial court may reconsider its ruling on the motion in limine and change it, if appropriate [see, e.g., *Lemer v. Boise Cascade, Inc.* (1980) 107 CA3d 1, 9-12, 165 CR 555] .

4.29[4] Court May Have Discretion to Dismiss Entire Action If Court Finds Plaintiff Failed to State a Cause of Action. The court's inherent equity, supervisory, and administrative powers, as well as its inherent power to control litigation and conserve judicial resources allow the court to entertain a motion in limine to dismiss the entire action when the court finds that even if the plaintiff's allegations are proved, the plaintiff has failed to state a cause of action [*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 CA4th 939, 951-952, 90 CR 3d 247] . No separate motion for judgment on the pleadings is necessary for the court to do so [*Clemens v. American Warranty Corp.* (1987) 193 CA3d 444, 451, 238 CR 339] .



Trap:

Even if the rulings on motions in limine make it look like the case in chief cannot succeed, counsel for the plaintiff must not invite the court to dismiss the action. Doing precludes review of the trial court's action under the doctrine of "invited error" [*Geffcken v. D'Andrea* (2006) 137 CA4th 1298, 1312, 41 CR3d 80 (plaintiff estopped from contending invited dismissal erroneously granted)].

Exception--Los Angeles County:

A motion in limine filed with the Los Angeles County Superior Court must not be used for the purpose of seeking summary judgment or the summary adjudication of an issue or issues. Motions for summary judgment may only be made in that court in compliance with CCP § 437c and court rules pertaining to them [Los Angeles Super Ct Rules, Rule 8.92[b]].



Strategic Point:

The parties may also stipulate that a motion in limine be treated by the court as a motion to dismiss [see, e.g., *Davis v. Newmar Corp.* (2006) 136 CA4th 275, 277, 38 CR3d 690] .

When it is otherwise permitted, neither the requirement for a motion for judgment on the pleadings that there be a material change in law or statute [see CCP § 438(g)(1)] nor the requirements for a motion for reconsideration when an earlier motion for summary judgment has previously been denied [see CCP § 1008] preclude the court's dismissal under these conditions [*Lucas v. County of Los Angeles* (1996) 47 CA4th 277, 284, 54 CR2d 655] .

4.29[5] Motions In Limine to Exclude Certain Types of Evidence May Be Deemed Granted at a Specified Time. Local court rules may provide that motions in limine to exclude particular types of evidence are deemed granted at a specified time.

Example--San Diego County:

Motions in limine filed with the San Diego County Superior Courts are deemed granted at the time of the trial readiness conference, if applicable, if they fall within one of the following categories [San Diego Super Ct Rules, Rule 2.1.18]:

- Motion excluding evidence of collateral source.
- Motion excluding evidence of or mention of insurance coverage.
- Motion excluding experts not designated pursuant to *CCP* § 2034.
- Motion excluding offers to settle and/or settlement discussions.

4.29[6] Statement of Decision Ordinarily Not Required on Motion In Limine. The trial court is ordinarily not required to issue a statement of decision on demand under *CCP* § 632 after a ruling on a motion in limine, unless the motion was in the nature of a "trial of fact issues." Whether a statement of decision is required in such a case depends upon the importance of the issues at stake, the significance of rights affected, and magnitude of the potential adverse effect on these rights, as well as whether appellate review can effectively be accomplished even in the absence of express findings [*City of San Diego v. Rancho Penasquitos P'ship* (2003) 105 CA4th 1013, 1044-1045, 130 CR2d 108 (no trial of fact involved)].

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview



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4.30 Trial Judge May Reconsider or Modify Ruling on Motion In Limine.

An order in limine is necessarily tentative, because subsequent evidentiary developments may change the context, in which case the court may reconsider or modify its evidentiary ruling that was the subject of the order [*Coshov v. City of Escondido* (2005) 132 CA4th 687, 702, 34 CR3d 19 (modification was proper); *Rufo v. Simpson* (2001) 86 CA4th 573, 608, 103 CR2d 492] .

Legal Topics:

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

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4.31 Order In Limine May Be Enforced With Order of Contempt, or Motion for New Trial or to Vacate Judgment.

An attorney who violates an in limine order by mentioning prohibited matter within the hearing of the jury may be cited for contempt [*Charbonneau v. Superior Court* (1974) 42 CA3d 505, 507, 116 CR 153 (under CCP § 1209(a)(5))].

► **Cross Reference:**

Discussion of contempt, see Ch. 23, Contempt.

Moreover, a motion to vacate judgment and for a new trial may be granted on the ground that violation of the order in limine constitutes an irregularity in the proceedings of the adverse party [see CCP § 657(1)]. A mistrial may be declared when the attorney's misconduct has seriously prejudiced an adverse party's claim or defense [see CCP § 663; *Grimshaw v. Ford Motor Co.* (1981) 119 CA3d 757, 793-795, 174 CR 348 (declining to reverse trial court's denial of motion for mistrial under former CCP § 616, in which court impliedly found that misconduct did not result in prejudice)].

Distinguish:

In the absence of prejudice, a violation of an order in limine is not grounds for reversal [*Hernandez v. Paicius* (2003) 109 CA4th 452, 463, 134 CR2d 756].

► **Cross Reference:**

Discussion of motions for new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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4.32 Review of Orders In Limine.

4.32[1] Interlocutory Review Is Generally Not Available.

4.32[1][a] Decision on Motion Is Not Appealable. An order granting or denying a motion in limine is not listed as an appealable order [see *CCP* §§ 904.1, 904.2].

4.32[1][b] Writ of Mandate May Compel Court to Hear Motion, and Other Writ Relief May Be Available. If the trial court refuses to entertain the motion in limine on the ground that the court has no power to issue an in limine order, a writ of mandate may issue to compel it to hear the motion [see *Nadler v. Superior Court (1967) 255 CA2d 523, 525, 63 CR 352* (writ of mandate was proper to compel an exercise of discretion when trial court refuses to do so on the mistaken belief that it is without authority)].



Warning:

Counsel should consider possible prejudice to the client's case that could result from taking action for writ of mandate against a judge to compel a hearing on a motion in limine.



Cross Reference:

Discussion of and forms for motions for writ of mandate generally, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender); or California Points and Authorities, Ch. 150, Mandate and Prohibition (Matthew Bender).

The trial court's decision on a motion in limine in a civil action might be reviewable by a writ of mandate to correct other types of errors of law [see *CCP* § 1085] or by a writ of prohibition to arrest proceedings that are without or in excess of jurisdiction or that involve an error of constitutional dimension [see *CCP* § 1103]. Either writ requires a showing that there is no plain, speedy, and adequate remedy in the ordinary course of law [see *CCP* §§ 1086, 1103].



Cross Reference:

Discussion of writs of mandamus and prohibition, see California Forms of Practice and Procedure, Ch. 358, Mandate and Prohibition (Matthew Bender).

4.32[2] Review of Order After Judgment Is Treated As Review of Decision on Admissibility.

4.32[2][a] Motion In Limine Must Properly Preserve Right to Appeal Admission of Evidence After Denial of Motion. When the error claimed is the erroneous admission of evidence, such as after the denial of a motion in limine, the verdict of the trial court may not be set aside on appeal unless the motion to exclude is timely and the specific ground of the motion is clear [*Evid Code* § 353]. A proper motion must [*Evid Code* § 353]:

- State a specific legal ground for exclusion that is the ground subsequently raised on appeal.
- Request to exclude a particular, identifiable body of evidence.
- Be made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context

If the motion in limine does not meet these requirements, a motion to exclude must be made under *Evid Code* § 353 at trial [*People v. Morris* (1991) 53 C3d 152, 189-190, 279 CR 720, 807 P2d 949 (review denied because motion in limine did not meet requirements of *Evid Code* § 353 and no other motion to exclude was made)].

**Strategic Point:**

The better practice in handling motions in limine is for the parties to stipulate to the effect of the court's rulings or for the trial judge to make it clear to counsel at the end of in limine arguments not only what the ruling on the motion is, but whether further objection or argument is desired when the evidence is presented. If this is done, the stipulation or order of the trial court will be respected in the appellate court's determination whether error has been properly preserved [see *People v. Morris* (1991) 53 C3d 152, 190-191, 279 CR 720, 807 P2d 949] .

**Cross Reference:**

Discussion of appeal of evidentiary rulings, see Cotchett, *California Courtroom Evidence*, 8.01, 8.02 (Matthew Bender).

4.32[2][b] Preservation of Right to Appeal Exclusion After Granting of Motion Requires Offer of Proof Unless Offer Would Be Futile. Before a judgment will be reversed on appeal because of the erroneous exclusion of evidence, such as after the granting of a motion in limine, an objection and an offer of proof are necessary [*Evid Code* § 354(a)].

Exception:

An offer of proof is not necessary to preserve appeal of the exclusion of evidence unless the rulings of the court make compliance with this requirement futile [*Evid Code* § 354(b)]. When the trial court has ruled or clearly intimated that it will receive no evidence of a particular type or class, or on a particular issue, the prejudicial nature of the exclusion of the evidence may be argued on appeal regardless of whether or not an offer of proof was made [see *Lawless v. Calaway* (1944) 24 C2d 81, 91, 147 P2d 604] . Therefore, it appears that an offer of proof is not necessary for appeal when exclusion of evidence was based on an order granting a motion in limine.

Consider:

The presentation of the substance, purpose, and relevance of the evidence in question to the court by means of counter affidavits or declarations at a pretrial hearing on the motion may itself constitute an offer of proof sufficient for preserving right of appeal [see *Evid Code* § 354 (offers of proof); *CCP* § 2009 (affidavits); *CCP* § 2015.5 (declarations)].



Strategic Point--Opponent of Motion:

Evid Code § 354 does not specify when an offer of proof is to be made. Although offers of proof have invariably been made at trial, there would seem to be no objection to allowing an offer of proof at a pretrial hearing when both parties are present and prepared to argue the evidence question [see, e.g., *Delta Dynamics, Inc. v. Arioto* (1968) 69 C2d 525, 527 n1, 72 CR 785, 446 P2d 785 (appeal was allowed when attempted offer of proof at trial, taken alone, was too general to provide ground for appeal but court had been sufficiently apprised of substance, purpose, and relevance of evidence at pretrial conference)]. Counsel could save time at trial by making the equivalent of an offer of proof after denial of motion in limine at the relevant hearing and, later after objecting at trial, request that the court rule on whether the presentation on the motion in limine suffices as an offer of proof. Of course, counsel must be prepared in the event the court desires an offer of proof at trial.



Strategic Point--Tentative Ruling:

When the trial judge makes a ruling adverse to a party's case, objecting counsel should establish on the record that the ruling is final, not just tentative depending on the state of the evidence actually adduced at trial, i.e., that the ruling is not subject to change. Out of an abundance of caution, counsel may make an offer of proof to remove any doubt on the scope and effect of the in limine ruling to ensure there will be no bar to appellate review.



Cross Reference:

Discussion of appeal of evidentiary rulings, see Cotchett, *California Courtroom Evidence*, 8.01, 8.02 (Matthew Bender).

4.32[2][c] Standard of Review Is Abuse of Discretion. The appellate court reviews the trial court's ruling on a motion in limine under the standard of abuse of discretion [*Piedra v. Dugan* (2004) 123 CA4th 1483, 1493, 21 CR3d 36 (no abuse of discretion in granting of motion in limine)]. However, if a trial court disposes of an entire cause of action based on a motion in limine, the appellate court may treat the motion in limine as a motion for nonsuit or for summary judgment, and review the motion de novo [*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 CA4th 1396, 1402-1403, 106 CR3d 691] .

Legal Topics:

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

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4.33 Joint Trial Readiness Conference Report--San Diego County Superior Court Rules Appendix B

Joint Trial Readiness Conference Report--San Diego County Superior Court Rules Appendix B

[Click here to view image.](#)

NOTES:

Authority:

San Diego Super Ct Rules, Rule 2.1.15

Timing:

See 4.24



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1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.34

4.34 Notice of Motion and Motion In Limine.

Notice of Motion and Motion In Limine.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION IN LIMINE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Trial Date: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	
	)	

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) _____ (name of department or division)] of this court, located at _____ [street address], _____ [city], _____ [specify moving party, e.g., Plaintiff], _____ [name of moving party] will, and hereby does, moves this court for an order _____ [specify, e.g., instructing defendant and his/her counsel not to refer to, interrogate any witness concerning, comment on, or attempt to

suggest to the jury in any way the fact that plaintiff received compensation for his/her medical expenses from a collateral source, and to inform his/her witnesses of these instructions and direct them not to make any reference to collateral source payments].

This motion is made on the grounds that _____ [*specify, e.g., the fact that plaintiff received compensation for his/her medical expenses from a collateral source is irrelevant and any attempt to convey this information to the jury would be highly improper and prejudicial to plaintiff, even if the court were to sustain an objection and instruct the jury not to consider such facts*].

The motion is based on this notice of motion, [the declaration(s) of _____ (*name*) and] the supporting memorandum accompanying this motion, on the papers and records on file 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 _____
[*party's status and name*]

NOTES:

Authority:

See *Wayne v. Staples, Inc. (2006) 135 CA4th 466, 473, 37 CR3d 544*



Timing:

See 4.24

Discussion:

See 4.20 et seq.

Related Form of Order:

See 4.35

Standard Motion Procedure:

See Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure



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Cathcart Durie McGee Prather

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Chapter 4 Final Pretrial Conference
V. FORMS

1-4 MB Practice Guide: Trial & Post-Trial Civil Proc 4.35

4.35 Order Granting Motion In Limine--With Findings.

Order Granting Motion In Limine--With Findings.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	NO. _____
Plaintiff,	)	ORDER IN LIMINE
vs.	)	Date: _____
_____ [name],	)	Time: _____
Defendant.	)	Dept.: _____
	)	Trial Date: _____
	)	

The motion of _____ [specify moving party, e.g., plaintiff], _____ [name], for an order _____ [specify nature of order, e.g., instructing defendant and his/her attorney not to mention in the hearing of the jury that plaintiff _____ (name) received compensation for his/her medical expenses from a collateral source] was heard by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]; defendant appeared by counsel _____ [name].

The court, having considered the documents before it, having heard the arguments of counsel, and being fully advised, finds as follows: _____ [specify findings, e.g., the fact that plaintiff _____ (name) received compensation for his/her medical expenses from a collateral source is irrelevant to the action pending before this court, and any mention thereof would be highly improper and prejudicial to plaintiff].

IT IS ORDERED that the motion be and it hereby is granted and _____ [specify, e.g., defendant and his/her attorney are instructed not to refer to, interrogate concerning, comment on, or attempt to suggest to the jury in

any way the fact that plaintiff _____ (*name*) received compensation for his/her medical expenses from a collateral source and to inform his/her witnesses of these instructions and direct them not to make any reference to collateral source payments].

Dated: _____

Judge of the Superior Court [signature]

NOTES:

Authority:

See *Wayne v. Staples, Inc.* (2006) 135 CA4th 466, 473, 37 CR3d 544

Related Form of Motion:

See 4.34



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Chapter 5 Non-Jury Trials

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.syn

§ 5.syn Synopsis to Chapter 5: Non-Jury Trials

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5.43[3] Statement Need Only Include Ultimate, Not Evidentiary, Facts.

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Chapter 5 Non-Jury Trials
I. STRATEGY

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.01

5.01 Scope.

This chapter covers:

- Objectives and strategy for non-jury trials [see 5.02].
- Determining whether to choose a non-jury trial or a jury trial [see 5.03 -5.11].
- Requesting a non-jury trial and waiving jury trial rights [see 5.12 -5.18].
- Conducting a non-jury trial [see 5.19 -5.27].
- Requesting and obtaining a statement of decision from the court [see 5.28 -5.43].

Core Statutes:

CCP §§ 631-634

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Bench Trials



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Chapter 5 Non-Jury Trials
I. STRATEGY

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.02

5.02 Objective and Strategy.

The California constitution guarantees that the right to trial by jury is inviolate, and "shall be secured to all" [*Cal Const, art I, § 16*]. This right applies only in legal, not equitable, actions [*see, e.g., Benach v. County of Los Angeles (2007) 149 CA4th 836, 845-846, 57 CR3d 363*]. Thus, all actions in equity are non-jury trials, and are subject to the procedures associated with this type of trial. The judge, however, retains the power to order that any issue be tried by a jury [*CCP § 592*].

Consider:

California has generally abandoned the traditional distinction between courts of equity and courts of law [*AIU Ins. Co. v. Superior Court (1990) 51 C3d 807, 825, 274 CR 820, 799 P2d 1253 ; see CCP §§ 24, 30*].

In many circumstances, an action may involve both legal and equitable issues. In those situations, the parties generally must determine whether to exercise the right to jury as to the legal issues, or to conduct the entire trial before the judge [*Robinson v. Puls (1946) 28 C2d 664, 665-667, 171 P2d 430*]. Even in purely legal actions, parties may determine that a non-jury trial is preferable [*see 5.03 -5.11*].

Before a court will conduct a non-jury trial in a legal action, all parties must waive the jury trial right [*see Taylor v. Union P. R. Corp. (1976) 16 C3d 893, 899, 130 CR 23, 549 P2d 855 ; see also 5.14*]. If a party's attorney determines that a non-jury trial would be advantageous to a client, the attorney should waive the right and consider discussing waiver with the other parties to attempt to secure their waivers as well [*see 5.13, 5.16*].

The procedure for conducting a non-jury trial generally tracks that for a jury trial, with some important exceptions [*see 5.19 -5.27[3]*]. For example, a judge may exclude closing arguments in a non-jury trial, though courts are reluctant to do so without the consent of the parties [*see 5.22*]. The decision-making process also is markedly different in a non-jury trial, in that the trier of fact is also the person who decides which evidence to consider in deciding the facts [*see 5.06*]. The attorneys must be particularly prudent in avoiding alienating the judge in pretrial procedures and during the trial in a non-jury trial. In addition, in place of a verdict, the parties may obtain a statement of decision from the judge upon timely request [*see 5.28 -5.43*]. Parties should request one when an appeal is likely.

Other considerations in deciding on the type of trial include the finality of the trial, because a non-jury trial cannot result

in a "hung" jury. On the other hand, a non-jury trial may result in a more relaxed attitude by the judge to the proffer of inadmissible testimony, such as hearsay. The court may "hear" the evidence, and then nominally decline to consider it.

Considerations to keep in mind in deciding whether to waive a jury trial include the greater expense of a jury trial, i.e. jury fees, additional attorney time for drafting voir dire, jury instructions, and conducting voir dire. The parties should determine whether these, and other costs, outweigh the benefit of having a jury trial instead of a non-jury trial. Another factor to keep in mind is whether complexity of issues are better decided by a judge rather than a jury.

Finally, in choosing what type of trial, counsel should consider the probable makeup of the jury, and the particular judges involved.

Judge's Perspective:

Judges often have a more interactive role with counsel during a court trial because there is no danger of prejudicing the jury with questions to counsel or witnesses. There is often more latitude in discussion without a jury present, and this may even lead into settlement talks during trial.

Consider:

In one case, the court was able to state that it considered only the relevant and competent evidence on motion, and that it did not consider other evidence. In this situation, no record would indicate what evidence was specifically excluded unless objections were made and preserved [*Biljac Assoc. v. First Interstate Bank* (1990) 218 CA3d 1410, 1419-1420, 267 CR 819] . If *Biljac* applies to trials (which is open to question), close considerations of evidentiary issues is important in considering whether to seek a jury or non-jury trial.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

California Points and Authorities, Ch. 215, Statement of Decision (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 ProcedureTrialsBench TrialsCivil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions



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Chapter 5 Non-Jury Trials

II. DECIDING WHETHER TO CHOOSE NON-JURY TRIAL OR JURY TRIAL

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.03

5.03 CHECKLIST: Deciding Whether to Choose Non-Jury Trial or Jury Trial.

☐ Determine if jury trial is available:

- ☐ If action involves traditionally equitable questions, there is no jury trial right.
- ☐ If action involves equitable and legal questions, jury may try legal issues.
- ☐ If action involves purely legal questions, jury may try entire case.

Authority:

CCP § 592; Robinson v. Rules (1946) 28 C2d 664, 665, 667, 171 P2d 430; Estate of Cazaurang (1946) 75 CA2d 217, 225, 170 P2d 694

Discussion:

See 5.05

☐ If jury trial is available, review evidentiary considerations favoring jury trial or non-jury trial:

- ☐ If client is personally sympathetic, jury trial may be preferable.
- ☐ If client is personally unsympathetic, non-jury trial may be preferable.
- ☐ If opposing party is personally sympathetic, non-jury trial may be preferable.
- ☐ If opposing party is personally unsympathetic, jury trial may be preferable.

- ☐ If inflammatory evidence is admissible and would harm client, non-jury trial may be preferable.
- ☐ If inflammatory evidence would likely be excluded by motion, jury trial may be preferable.
- ☐ If much of the evidence is particularly complicated, non-jury trial may be preferable.
- ☐ If case involves predominantly legal issues, non-jury trial may be preferable.

Authority:

CCP § 591; Evid Code §§ 352, 353; Hoffman v. Brandt (1966) 65 C2d 549, 554-555, 55 CR 417, 421 P2d 425

Discussion:

See 5.06, 5.07

☐ If right to jury is available, determine whether potential benefits of jury trial outweigh additional cost of jury trial, considering following expenses associated with jury trial:

- ☐ Jury fees for each day of trial.
- ☐ Attorney's fees associated with preparation of questions for voir dire.
- ☐ Attorney's fees associated with conducting voir dire.
- ☐ Attorney's fees for preparing jury instructions.
- ☐ Attorney's fees associated with the additional length of trial in giving jury instructions.
- ☐ Attorney's fees associated with bringing or defending motion for directed verdict and/or motion for judgment notwithstanding verdict, which are not available in non-jury trials.

Authority:

CCP §§ 222.5, 607a, 608, 629, 630, 631(b), (d)(6)

Discussion:

See 5.08

☐ If closing arguments are particularly important to client's case, non-jury trial may be detrimental because of risk that judge may disallow closing arguments.

Authority:

Gillette v. Gillette (1960) 180 CA2d 777, 781, 4 CR 700 ; Mediterranean Constr. Co. v. State Farm Fire & Cas. Co. (1998) 66 CA4th 257, 77 CR2d 781

Discussion:

See 5.10

☐ If appeal is likely regardless of who wins, consider advantages of having a statement of decision, as opposed to a general or special verdict, in preparing appeal.

Authority:

CCP §§ 624, 632

Discussion:

See 5.11

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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Chapter 5 Non-Jury Trials

II. DECIDING WHETHER TO CHOOSE NON-JURY TRIAL OR JURY TRIAL

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.04

5.04 Options and Strategy.

From a practical standpoint, non-jury trials are generally less time consuming and costly. Time is saved by avoiding jury selection and deliberation, or jury instructions or verdict forms. Delays incident to jury trials are often caused by conflicts and scheduling of jurors. Time is also saved by not having to give limiting and cautionary instructions to the jury during trial. It is often the case that time for presentation of the evidence is less. There is less danger for a mistrial. Other benefits to the client of a non-jury trial include the lower costs of not having to pay jury fees, or attorney's fees associated with the additional time it takes to select the jury and prepare jury instructions.

The nature of the case also influences the decision for a bench trial. Examples of cases that may be too complicated for juries are antitrust cases that involve arcane, non-intuitive laws, and complicated intellectual property cases. Nevertheless, in such situations, one side may believe normal human sympathies may provide a tactical advantage. In cases of serious personal injury, such as burn or paralysis cases, jury sympathy is a significant consideration for the plaintiff and will impact distribution of fault between the parties.

In actions that involve legal issues, counsel must consider additional issues to determine whether or not to waive the jury trial right. Because the judge, not a jury, determines facts in a non-jury trial, the lawyer must consider whether the judge would be more likely than a jury to view the facts favorably to the client [*see* 5.06]. In addition, the lawyer must consider whether a judge might become prejudiced during a motion to exclude inflammatory evidence. In such a situation, the judge would be aware of the evidence even if it were excluded, whereas a jury would not see the same evidence if it were excluded by the court [*see* 5.07]. When evidence is particularly complicated, both parties may prefer a non-jury trial.



Strategic Point:

A key consideration is who the attorney wants as the decisionmaker in the case: the judge or the jury. Anecdotally, if the attorney has good law and bad facts, a court trial may be best. If the case is less strong, especially on the facts, a jury trial may be preferable.

Counsel should also consider possible extra-judicial considerations in making this determination. For example, if a case involves particularly sensitive information, such as trade secrets or personally embarrassing matters, a party may decide that it would be preferable to have a non-jury trial, in conjunction with a possible motion to seal the record and to limit

the number of people who have access to the evidence presented at trial.

A bench trial is probably better for a case in which there is a technical legal defense or if the finder of fact must be able to distinguish among multiple related entities like a corporation and its executives. Juries may be more likely to hold a senior executive liable for the acts of others at a company. Other complex issues may be technical issues in a trade secret case, damages analysis if there are difficult economics issues (such as in antitrust cases) and a "case within a case," such as with legal malpractice.

Consider:

One difficulty with the "cost" argument for a non-jury trial is that, although there is not the problem of a retrial or mistrial because of a hung jury or of potential jury-related misconduct, there are sometimes other considerations that increase the cost. For example, increased expenses of briefing, both before and after trial, post-trial proceedings such as the two-part statement of decision process [see *CCP* § 632; *Cal Rules Ct, Rules 3.1590, 3.1591*] may increase the level of briefing and argument. These procedures make it easier to clarify the issues, the facts decided and reasons for them if the matter is likely to be resolved in the court of appeal rather than at trial. An evaluation of whether to try the case to a jury or to the court necessarily must include whether the matter will be likely, irrespective of the outcome, to go to appeal and therefore require a better record.

 Cross Reference:

Discussion of comparative court costs, see 5.08.

Because all parties to the legal action have a right to trial by jury, all parties must waive the right before a non-jury trial can be held [see *Taylor v. Union P. R. Corp. (1976) 16 C3d 893, 899, 130 CR 23, 549 P2d 855*]. If any party entitled to a jury trial demands one, and complies with the requirements to have one, a jury trial will be held [see *Robinson v. Puls (1946) 28 C2d 664, 665-667, 171 P2d 430*].

 Cross Reference:

Requirement that all parties waive right, see 5.14.

The specific judge appointed to hear the case (especially in counties where there is no master calendar), whether the judge has made pretrial rulings that demonstrate a direction the court is headed, and other considerations relating to the judge may lead to a determination that a particular judge should or should not try the case. On the other hand, the particular jury pool in the jurisdiction may be important as well. A geographic area whose jury pool has high commercial sophistication, such as Santa Clara County, may lead to a different evaluation from, for example, the kind of jury one would have in a long, complex matter requiring severe hardship considerations in a rural agricultural community.

 Cross References:

Discussion of procedures uniquely associated with jury trials, see Ch. 6, Jury Selection; Ch. 14, Motion for Directed Verdict; Ch. 16, Jury Instructions; Ch. 17, Dealing With the Jury; Ch. 18, Jury Verdicts; Ch. 20, Motion for Judgment Notwithstanding the Verdict.

Discussion of motions to seal records, see Ch. 2, *Public Access to Trials and Records*, 2.11 et seq.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewTrade Secrets LawCivil

ActionsSealed Records



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Chapter 5 Non-Jury Trials

II. DECIDING WHETHER TO CHOOSE NON-JURY TRIAL OR JURY TRIAL

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.05

5.05 Court Conducts Non-Jury Trials in Cases in Equity, but Parties Have Jury Trial Right on Legal Issues.

5.05[1] Parties Have No Jury Trial Right in Equitable Cases. Traditionally, the right to a jury trial applied only to legal actions and did not extend to actions in equity [see, e.g., *Franchise Tax Board v. Superior Court* (2009) 177 CA4th 36, 41-42, 99 CR3d 73]. Although the court retains the power to order any issue tried before a jury, even on equitable issues [see CCP § 592], a judge sitting in equity must ultimately decide the equitable issues, treating any jury verdict on those issues as only advisory [see *Posey v. Leavitt* (1991) 229 CA3d 1236, 1244, 280 CR 568].

Consider:

Because California has generally abandoned the distinction between courts of equity and courts of law, this is less important than in the past [*AIU Ins. Co. v. Superior Court* (1990) 51 C3d 807, 825, 274 CR 820, 799 P2d 1253]. Even in traditional equity cases, a jury may be warranted or available to hear disputed factual issues, and legal issues would be tried to the court.

5.05[2] Parties Have Jury Trial Right in Legal Actions, and on Legal Issues in Cases With Equitable and Legal Issues. Parties to a legal action, including actions for recovery of specific real or personal property, for money due on a contract, or as damages for breach of contract or injuries, have a right to trial by jury [CCP § 592]. When legal issues are present in cases also involving equitable issues, a jury trial must be held on the legal issues, unless the right is waived [see *Metropolitan Water District of Southern California v. Campus Crusade for Christ, Inc.* (2007) 41 C4th 954, 965, 62 CR3d 623, 161 P3d 1175 (eminent domain case)].



Strategic Point:

Keep in mind the order of proof when there are both legal and equitable issues. Courts will often try the equitable issues first, and the disposition of those issues can effectively moot the legal issues, and thus effectively moot the jury trial. This can be an effective way to avoid a jury trial. The issues can be bifurcated on a request to the trial judge. However, a jury may determine the legal issues first, and a judge must not ignore the jury's verdict and grant inconsistent equitable relief [*Hoopes v. Dolan* (2009) 168 CA4th 146, 158-161, 85 CR3d 337].

 Cross Reference:

Discussion of determining whether case involves legal issues suitable for jury trial, see 5.03 et seq.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions



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Chapter 5 Non-Jury Trials

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1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.06

5.06 Judge in Non-Jury Trial Decides Both Facts and Law, Whereas Judge in Jury Trial Determines Only Law.

5.06[1] Judge in Non-Jury Trial Determines Witness Credibility and Sufficiency of Evidence, Whereas Jury Determines These Issues in Jury Trial. In a non-jury trial, the judge is the trier of fact and, as such, determines the weight and sufficiency of evidence and the credibility of witnesses [*Biren v. Equality Emergency Med. Group, Inc.* (2002) 102 CA4th 125, 143, 125 CR2d 325] . In a jury trial, the jury is the trier of fact and determines witness credibility and sufficiency of evidence, as long as there is substantial evidence sufficient to defeat an opposing party's motion for directed verdict or motion for judgment notwithstanding the verdict [see *Heacock v. Ivorette-Texas, Inc.* (1993) 20 CA4th 815, 826-827, 26 CR2d 257] .

Cross Reference:

Discussion of motion for directed verdict and motion for judgment notwithstanding the verdict, see 5.09[2].

5.06[2] Judge in Both Jury and Non-Jury Trials Determines Questions of Law. Whether the trial is by court or jury, the judge decides issues of law [CCP § 591]. Counsel therefore need not consider this aspect of decision making in deciding whether to waive the jury trial right.

Example--Distinguishing Question of Law From Question of Fact:

In a contract dispute, the parties dispute (1) the terms of the agreement, (2) whether they ever reached a mutual understanding, and (3) whether there was a breach. The questions involving contract interpretation will be for the court, although, there may be a preliminary hearing on whether there are ambiguities, a factual determination of the evidence, extrinsic or otherwise bearing on interpretation, and then a legal determination on the question of meaning [*Pacific Gas & Elec. v. G.W. Thomas Drayage & Rigging Co., Inc.* (1968) 69 C2d 33, 37-39, 69 CR 561, 442 P2d 641] . The issues of whether the parties reached an accord is factual; those might be tried first in order to determine what the parties agreed to, before the *Thomas Drayage* proceedings determine the meaning. Finally, there is separate factual determination on whether the contract, as interpreted, was breached.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury
TrialsProvince of Court & Jury



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5.07 Judge's Knowledge of Potentially Excludable Evidence May Militate Against Non-Jury Trial.

5.07[1] Trier of Fact in Non-Jury Trial Rules on Motions to Exclude Evidence. Whether the trier of fact is a judge or a jury, the judge is the one who decides whether or not to grant motions to exclude evidence and sustain or overrule objections to evidence [see, e.g., *Evid Code* §§ 352, 353]. Accordingly, since the judge in a non-jury trial determines the facts as well as evidentiary motions, he or she will likely be exposed to inadmissible evidence, whereas a jury would not.



Warning:

Although the judge as a trier of fact is supposed to ignore inadmissible evidence in deciding the case, the judge's knowledge of that evidence may lead to concern over the possibility that exposure to or awareness of such evidence may consciously or unconsciously influence the judge.



Strategic Point:

When the case involves inflammatory evidence, whether to seek a nonjury trial may involve balancing two factors. First, the party against whom the evidence would be used would prefer that it not reach the trier of fact (whether judge or jury), while the party favored by the evidence wants the trier of fact to hear it. Second, it is generally believed that a jury is more likely to be swayed by inflammatory evidence, while a judge is likely to be logical and less influenced by emotion. The interplay of these two factors should be considered, and whether it is best to waive a jury trial in this situation may depend, in some cases, on the probable admissibility of the evidence. If the inflammatory evidence clearly is admissible, the party against whom it would be used may be unable to avoid a jury trial, because the other party--who is seeking to get the evidence before a sympathetic jury--usually will be unwilling to waive that right. However, if the inflammatory evidence is potentially excludable, a jury may never hear it, while the judge will be aware of it whether it is ultimately excluded or not. In this situation, the party against whom the evidence would be used may actually benefit from seeking a jury trial because, if the evidence ultimately is excluded, the trier of fact will be unaware of its existence. Also, there might also be good evidence that is excludable but shows your client in a better light; that might be a reason for a

bench trial [see *Biljac Assoc. v. First Interstate Bank* (1990) 218 CA3d 1410, 1419-1420, 267 CR 819 (court can provisionally admit evidence in non-jury trial and then conclusorily state that it only considered relevant and competent evidence in reaching its decision)].

Consider:

In many jury trials, judges are inclined to overrule close evidentiary objections, in favor of allowing jurors to hear as much evidence as presented. Trial judges often justify this approach on various grounds, including their belief that if inappropriate evidence is considered, various remedies are available to the party against whom such evidence was offered, including a motion for directed verdict or motion JNOV. An additional reason for this approach is that a verdict in favor of the party against whom such evidence is offered is less likely to be reversed on appeal. In a non-jury trial, on the other hand, this same judicial reasoning does not apply because the trial judge is less likely to disrupt his or her own decision for having considered inappropriate, inflammatory evidence. Consequently, a judge sitting as the trier of fact may be less inclined to consider evidence subject to the "close call" ruling particularly when a statement of decision following a non-jury trial will need to focus on the evidence supporting the decision.

5.07[2] Judge in Non-Jury Trial Is More Likely to Allow Party to Conditionally Present Evidence. When a party objects to evidence in a non-jury trial, the judge may conditionally admit the evidence subject to a subsequent motion to strike [see *Gribaldo, Jacobs, Jones & Assoc. v. Aggripina Versicherungen* (1970) 3 C3d 434, 443, n6, 91 CR 6, 476 P2d 406]. Once evidence is conditionally admitted, it may be hard for the trier of fact--whether judge or jury--to pretend it does not exist.



Strategic Point:

The issue is whether the court can provisionally do this. Under *Biljac* it seems to be able to do that on motions, and not divulge what evidence is relied on for a ruling [see *Biljac Assoc. v. First Interstate Bank* (1990) 218 CA3d 1410, 1419-1420, 267 CR 819]. At trial, this is particularly important if the matter is one likely to be decided on appeal. But, even if the court is able to "provisionally admit" evidence over the objection of a party, counsel needs to think through whether he or she wants to be in that position; there is the danger of alienating the trier of fact. Also, a favorable judge at the outset of a trial can become an adverse judge during a trial, based on his or her reaction to the evidence as it unfolds.



Cross References:

Discussion of offer of proof, see 5.07[3].

Detailed discussion of offer of proof, see *California Forms of Pleading and Practice*, § 551.77 (Matthew Bender).

5.07[3] Judge in Jury Trial Is More Likely to Require Offer of Proof Before Potentially Excludable Evidence Is Presented to Jury. When a party objects to another party's proposed evidence in a jury trial, the judge is likely to require an offer of proof outside the presence of the jury before allowing the evidence to be presented, because of the danger of exposing jurors to inadmissible evidence [see *Evid Code* § 354(a); Los Angeles Super Ct Rules, Rule 8.42].



Strategic Point:

In a jury trial a judge can hear issues concerning admissibility of evidence that depends for its relevance on the existence of other, foundational facts outside the presence of the jury [see *Evid Code* §§ 400-405]. This offers an opportunity to challenge facts, and have them heard and argued, without letting the trier of

fact hear the evidence. That is lost in a non-jury trial.

Cross References:

Discussion of conditional admission of evidence, see 5.07[2].

Detailed discussion of conditional admission of evidence subject to motion to strike and mistrials, see *California Forms of Pleading and Practice*, § 551.77 (Matthew Bender).

Discussion of *Evid Code* § 400 *et seq.*, see Cotchett, *California Courtroom Evidence*, Ch. 10, Preliminary Determination of Admissibility (Matthew Bender).

5.07[4] Judge in Non-Jury Trial, Unlike Jury in Jury Trial, May Review Inadmissible Evidence As Long As Verdict Does Not Rest on That Evidence. The judge in a non-jury trial may review evidence that is not admitted in trial as long as the judge does not rely on that evidence in deciding the case [*Paulin v. Paulin* (1940) 39 CA2d 180, 184, 102 P2d 809] . In contrast, while a jury may be exposed to inadmissible matters on occasion without repercussion, excessive exposure may require a mistrial or reversal on appeal [see, e.g., *Hoffman v. Brandt* (1966) 65 C2d 549, 554-555, 55 CR 417, 421 P2d 425] .

Example:

An appellate court held that a trial judge did not err by reading a deposition transcript to himself, even though he later excluded portions of it from being read into the record [*Paulin v. Paulin* (1940) 39 CA2d 180, 184, 102 P2d 809] .



Strategic Point:

The practitioner must be careful to make sure that the record reflects the evidence that was relied on, and rulings on other evidence, if an appeal turns on such questions.

Cross Reference:

Discussion of consequences for exposing inappropriate or inadmissible matters before jury, see *Ch. 22, Mistrial*, 22.05; *Ch. 23, Contempt*, 23.03 *et seq.*

Legal Topics:

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

Civil Procedure Trials Bench Trials Evidence Procedural Considerations Objections & Offers of Proof Offers of Proof Evidence Procedural Considerations Preliminary Questions Admissibility of Evidence General Overview



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5.08 Court Costs and Attorney's Fees Are Less in Non-Jury Trials.

5.08[1] Client Need Not Pay Statutory Jury Fees in Non-Jury Trial. To secure a jury trial a party must deposit jury fees with the court at least 25 days before the initial date set for trial and at the beginning of the second and each succeeding day of trial [*CCP* § 631(b), (c)(6)]. Failure to pay these fees waives the jury trial right and results in a non-jury trial [*CCP* § 631(c)(5), (d)(6)]. Thus, a party who opts for a non-jury party is relieved of jury fees.

Consider:

There is a question as to whether the party that does not want the jury, in the face of a jury demand, needs to pay statutorily mandated jury fees in a jury trial.



Cross Reference:

Discussion of requirements to ensure non-jury trial, see 5.12 -5.18.

5.08[2] Client Incurs No Attorney's Fees Associated With Jury Selection in Non-Jury Trial. Counsel for each party is entitled to examine each potential juror by oral and direct questioning [*CCP* § 222.5]. To properly prepare for the jury trial, counsel must spend time preparing appropriate questions for voir dire and posing the questions to the prospective jurors. Because this process takes time, a client can save attorney's fees by trying the case without a jury.



Strategic Point--Jury Trial May Not Be Cost-Effective in Small Cases:

In a typical case, voir dire may consume a half day; in a more complex case, a full day. A routine personal injury case that may take two days to present during a court trial will often require an extra day or two for a jury trial, thus doubling the trial time. When the amount of damages sought are relatively small, the amount of time that an attorney must spend preparing for and conducting jury selection may cut substantially into the value of the case to the plaintiff. Particularly in cases of nominal value, attorneys are well advised to discuss with their clients the potential costs and benefits of having a matter tried to a jury instead of a non-jury trial. Further, the time needed to select a jury depends in large part on the judge. If the judge limits questions, limits peremptory challenges, and conducts largely his or her own voir dire, the time can be cut substantially in any case. If the judge allows questionnaires,

particularly in longer cases, the time can be shortened. The time element is not always an important consideration, because only in a long, complex commercial case is the time going to be substantial. Any savings in jury selection time by waiving the jury will likely be eaten up in time spent in briefing and post-trial motions, review of transcripts, and hearings on the case.

Judge's Perspective:

Preparation and review of jury instructions may add significant time, particularly if CACI instructions are not available for the issues. If competing jury instructions are an issue, this can add more than a day to the total time. In a non-jury, these matters may be more quickly resolved by trial briefs and motions during trial as issues come up, and there is no time delay involved with excusing the jury to immediately address the matter.

Cross Reference:

Discussion of process of jury selection, see *Ch. 6, Jury Selection*, 6.05.

5.08[3] Client Incurs No Attorney's Fees Associated With Preparation of Special Jury Instructions in Non-Jury Trial. Before a jury trial begins, counsel for each party must submit jury instructions to the court [*CCP* § 607a]. After termination of closing arguments, the judge then instructs the jury on the points of law [*CCP* § 608].

To properly prepare for the jury trial, counsel must spend time on proposed jury instructions, especially special jury instructions, when no Judicial Council jury instructions pertain to the particular point of law at issue. In addition, reading jury instructions prolongs the length of trial by varying degrees. The client can save attorney's fees associated with this process by trying the case before a judge, although this amount is probably negligible in most cases.



Strategic Point:

In many cases, there is not a significant percentage of time that would be saved over the course of the case. The added expense and time in preparing pretrial briefs and post-trial briefs, which would then result in a post-trial hearing on the briefs, offsets the time that would be spent in preparing jury instructions. In addition, counsel must research the law in any case for a non-jury trial, and CACI's jury instructions are often a good starting point, so the difference is not significant. Also, in a court trial, counsel may have to prepare draft findings of fact and conclusions of law. Typically, however, a bench trial is shorter than a jury trial.

Cross References:

Discussion of preparation of jury instructions, see *Ch. 16, Jury Instructions*, 16.03 et seq.

Resource for jury instructions, see Judicial Council of California Civil Jury Instructions (CACI) (LexisNexis Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview



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5.09 Dispositive Motions Following Presentation of Cases Differ Depending on Whether Trial Is Before Judge or Jury.

5.09[1] In Non-Jury Trial Party Moves for Judgment, Not Nonsuit, When Opposing Party Presents Insufficient Evidence. In a non-jury trial, either party may move for judgment when the opposing party completes presentation of its evidence, without waiving its right to offer evidence in support of a defense or rebuttal [*CCP* § 631.8]. In making its decision on this motion, the court must weigh the evidence presented to determine whether to render a judgment in favor of the moving party [*CCP* § 631.8].

In contrast, only a defendant in a jury trial may move for nonsuit at the close of the plaintiff's presentation of evidence [*CCP* § 581c]. Unlike the motion for judgment, the motion for nonsuit does not permit the judge to weigh the evidence, but only to determine whether the evidence, accepted as true, is sufficient to sustain the plaintiff's case [*Stein-Brief Group, Inc. v. Home Indem. Co.* (1998) 65 CA4th 364, 369, 76 CR2d 3] .

Cross References:

Discussion of motions for nonsuit, see Ch. 12, Motion for Nonsuit and Other Motions During Trial.

Discussion of motions for judgment, see Ch. 13, Motion for Judgment.

5.09[2] Motions for Directed Verdict or for Judgment Notwithstanding Verdict Are Inapplicable in Non-Jury Trials. In jury trials a party may move for directed verdict after the close of evidence but before the case is submitted to the jury [*CCP* § 630]. On this motion the court determines whether there is substantial evidence to support the non-moving party's claim or defense [*Sweatman v. Department of Veterans Affairs* (2001) 25 C4th 62, 68, 18 P3d 29, 104 CR2d 602]. This motion is neither available, nor relevant, in a non-jury trial, because the judge in that type of trial weighs all the evidence in rendering the decision [*see CCP* § 632].

Similarly, a party may move for judgment notwithstanding the verdict after the verdict is returned in a jury trial, but before the period of time for filing a motion for new trial has expired [*CCP* § 629]. The court must grant this motion "whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made" [*CCP* § 629]. This type of motion is unavailable in and irrelevant in a non-jury trial because the judge weighs the

evidence.



Strategic Point:

These post-trial motions are not common, and when used, are not often granted. Consequently, the availability of these motions alone should not be the determining factor whether to waive the right to jury trial. But in cases in which there are substantial reasons to make such a motion post-trial--because the evidence is conclusive on an issue being submitted to the jury so that the jury should be directed, to protect against an adverse verdict, or in anticipation of a large verdict that would be subject to a remittitur--the availability of these motions should not lightly be discarded in favor of a non-jury trial.



Cross References:

Discussion of motions for directed verdict, see Ch. 14, Motion for Directed Verdict.

Discussion of motions notwithstanding the verdict, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsInvoluntary NonsuitsCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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5.10 Parties Have Right to Make Closing Arguments in Jury Trial, but Not in Non-Jury Trial.

At the close of evidence in a jury trial, the plaintiff has the right to commence closing argument, and may conclude with a rebuttal argument [CCP § 607(7)]. The defendants also have the opportunity to make closing arguments [see CCP § 607(8)]. In contrast, a party has no statutory right to make closing arguments in a non-jury trial [*Gillette v. Gillette* (1960) 180 CA2d 777, 781, 4 CR 700 ; but see *Mediterranean Constr. Co. v. State Farm Fire & Cas. Co.* (1998) 66 CA4th 257, 266, 77 CR2d 781 (questioning validity of older cases denying the right to argue)].

Strategic Point:

In a non-jury trial, it is easier to convince the court to have an opening statement that would have more "argument" to permit the court to hear the direction the case will take before it starts. Whether that militates in favor of a non-jury trial or a jury trial depends on many considerations, not the least of which is the ability and experience of opposing counsel, the complexity of the case, and whether the court will entertain such "help." Also, there is often no real need to make a standard closing argument, as long as the court will entertain a post-trial briefing. That is necessary, either in a brief or closing argument, because even in a non-jury trial, it is good to ensure that the "meaning" of the evidence is collected in one place and explained clearly. Evidence comes in disjointedly, and putting it in perspective is important.

Particularly when legal and/or factual issues are complex, parties, particularly plaintiffs, will rarely want to forego closing argument. Defendants may gain a slight advantage if neither party is permitted to present closing arguments as, with the exception of rebuttal evidence, if any, defendants will usually have had the last word on the presentation of evidence.

Judge's Perspective:

In practice, it is rare for judges to deny or disallow closing arguments in non-jury trials. Rarely, if ever, should counsel waive closing arguments. Closing arguments offer counsel the opportunity to summarize the evidence and raise critical points. Final arguments allow counsel to interact with the court and clarify issues.

Cross References:

Discussion of privilege of making closing argument during non-jury trial, see 5.22.

Discussion of closing arguments at trial, see Ch. 15, Closing Argument.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral Overview



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5.11 Statement of Decision Is Available in Non-Jury Trial, Whereas General or Special Verdict Is Available in Jury Trial.

In a non-jury trial a party may obtain, on request, a statement of decision, stating the basis for the court's decision [*CCP* § 632]. This statement is unavailable when a jury decides the facts [*CCP* § 632]. In contrast, a jury returns either a general or special verdict, in which the jury either pronounces its decision as to all issues, or the particular conclusions of fact for the judge to draw from them conclusions of law [*CCP* § 624].



Strategic Point:

A statement of decision allows the appellate court to see whether the judge's decision was well reasoned and supported by the evidence, and any error of law by the court will be more easily identified and attacked on appeal. There is less risk of an inconsistent verdict with a statement of decision than a jury verdict. In a bench trial, there is no risk of a hung jury. In a difficult case, this can be a significant cost consideration if the client can't afford to retry the case. An appeal from a judgment supported by a statement of decision, particularly in view of the procedure for issuing it (tentative, hearing with or without submission of objections, and the issuance of the statement of decision), depends on whether the appellant was able to influence the form of the statement of decision. Often, a court will issue a statement of decision that buttons up the case and insulates it from appeal. With a verdict, the appellant is able to argue the infirmities more easily. On the other hand, the appellate court will uphold verdicts unless the appeal demonstrates clear error, and the verdict will be upheld if there is any permissible basis of affirming the verdict. Without a statement of decision, for example, jury instructions that cover the question, however imperfectly, are often sufficient to support a verdict. However, an erroneous statement of law in a statement of decision will be fatal to the judgment. Therefore, if a case is particularly difficult, with substantial legal questions that are bound to result in an appeal, the benefits of a non-jury trial and a better legal record for the appeal may militate in favor of the non-jury trial. If counsel believes that the case will turn on factual issues and is a strong case, a jury trial and general verdict form may be more effective and provide better insulation from an appeal.



Cross References:

Discussion of statement of decision, see 5.28 -5.45.

Discussion of general and special verdicts, see *Ch. 18, Jury Verdicts, 18.03 -18.22*.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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III. REQUESTING NON-JURY TRIAL AND WAIVING JURY TRIAL RIGHTS

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5.12 CHECKLIST: Requesting Non-Jury Trial and Waiving Jury Trial Rights.

☐ Determine if all other parties are willing to have a non-jury trial.

☐ Contact opposing counsel to determine whether or not their clients are willing to waive jury trial rights.

☐ Negotiations may be required to secure waiver.

Authority:
Cal Const, art I, § 16

Discussion:
See 5.14

☐ Inform court of non-jury trial selection by either of following methods:

☐ Indicating on at-issue memorandum and status conference statement that party does not demand jury trial; or

Authority:
CCP § 631(d)(2); Cal Rules Ct, Rules 3.727(13), 3.728(4)

Discussion:
See 5.16[1], [2]

☐ Indicating in open court and having recorded in minutes that party does not demand jury trial.

Authority:

CCP § 631(d)(3); Cal Rules Ct, Rules 3.727(13), 3.728(4)

Discussion:

See 5.16[3]

☐ If non-jury trial is desired but another party refuses to voluntarily waive jury trial right, determine whether that party has involuntarily waived right by doing any of following:

☐ Failing to announce to court that jury is required at time cause is first set for trial, or within five days thereafter if trial is set without notice or stipulation.

Authority:

CCP § 631(d)(4)

Discussion:

See 5.17[1]

☐ Failing to appear at trial.

Authority:

CCP § 631(d)(1)

Discussion:

See 5.17[2]

☐ Failing to make timely deposit of advance jury fees.

Authority:

CCP § 631(b), (d)(5)

Discussion:

See 5.17[3]

☐ Failing to make daily payments of jury fees at commencement of second day and each successive day of trial.

Authority:

CCP § 631(c), (d)(6)

Discussion:

See 5.17[4]

☐ If opposing party requested jury trial but later waived right to jury, demand jury trial if it would be advantageous to client, even if client also previously waived that right.

Authority:

Cohill v. Nationwide Auto Serv. (1993) 16 CA4th 696, 701, 19 CR2d 924

Discussion:

See 5.18[1]

☐ If client waived right to jury, but later determines that jury would be advantageous, file request for relief from waiver, including facts supporting following points, as appropriate:

- ☐ Party inadvertently waived right.
- ☐ Opposing party would suffer no serious hardship from relief from waiver.
- ☐ Court would suffer no prejudice from relief from waiver.
- ☐ Other circumstances exist that should excuse previous waiver or waivers.

Authority:*Massie v. AAR W. Skyways, Inc. (1992) 4 CA4th 405, 411, 5 CR2d 654***Discussion:**

See 5.18[2], [3]

☐ If opposing party seeks relief from waiver and client prefers non-jury trial, oppose relief from the waiver with facts establishing the following:

- ☐ Client would suffer serious hardship from relief due to reliance on opposing party's waiver.
- ☐ Intentional nature of opposing party's waiver.
- ☐ Prejudice to court and/or client, such as inconvenience from rescheduling jury trial, difficulties associated with lack of funds, and prejudice from untimeliness of request.

Authority:*Gann v. Williams Bros. Realty, Inc. (1991) 231 CA3d 1698, 1704, 283 CR 128***Discussion:**

See 5.18[2], [3]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial



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III. REQUESTING NON-JURY TRIAL AND WAIVING JURY TRIAL RIGHTS

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5.13 Options and Strategy.

A party who prefers a non-jury trial may either advise the court of this preference or simply waive the right by failing to satisfy the requirements necessary to obtain a jury trial [CCP § 631(b)-(d)]. These methods of waiving jury trial are exclusive; there is no waiver by implication [*DiPirro v. Bondo Corporation (2007) 153 CA4th 150, 176-178, 62 CR3d 722*].

If a party wants a non-jury trial, that party's counsel should contact opposing counsel and determine whether or not the opposing party is also willing to have a non-jury trial. Should opposing counsel agree to a non-jury trial, each party's attorney may indicate the agreement to waive jury trial in their respective at-issue memoranda or case management statements [see CCP § 631(d)(2)]. Normally, when the parties prepare their at-issue memoranda, they indicate on the form whether or not a jury trial is required [*Simmons v. Prudential Ins. Co. of Am. (1981) 123 CA3d 833, 836, 177 CR 37* ; see also *Cal Rules Ct, Rules 3.727(13), 3.728(4)*].

Alternatively, the parties may wait for the trial setting conference and advise the court at that time that both parties waive the right to jury trial, as long as the oral waiver is entered in the minutes [see CCP § 631(d)(3)]. If both parties indicate that no jury is required, a non-jury trial normally will be conducted.

Waiver of the jury trial right is not necessarily irrevocable. A party who has waived a jury trial may later request the court to grant relief from the waiver and allow a jury trial [CCP § 631(e)]. The court has discretion to grant this request when neither the opposing party nor the court will suffer prejudice from granting the relief [*Massie v. AAR W. Skyways, Inc. (1992) 4 CA4th 405, 411, 5 CR2d 654* ; see 5.18].

Judge's Perspective:

Even though most courts will allow a party that has waived a jury trial to reinstate a jury trial, the better practice is to retain the right to jury trial. It is always possible to waive a jury trial, but it is not always possible to reinstate a jury trial right once it has been waived.



Strategic Point:

It is risky to waive the right to a jury trial at the beginning of a case, because it is not possible to know what evidence might come along that will be subject to a motion to exclude, and that the judge would

hear.



Warning:

An attorney for a party who has previously demanded a jury and before trial intends to waive trial by jury is well advised to reach a clear understanding with the client before doing so.



Cross Reference:

Sample form for request for relief from jury waiver and supporting declaration, see 5.46, 5.47.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial



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5.14 Jury Trial Cannot Be Waived Unless All Parties Waive Right.

Since the right to trial by jury in common law civil actions is constitutionally guaranteed to all [*Cal Const, art I, § 16*], it is self-evident that a jury trial cannot be waived unless all parties who are entitled to a jury trial waive their right to it. Although it is possible for a party to waive the jury trial right unintentionally by its conduct [*see 5.17*], most waivers occur by mutual agreement of all the parties. Thus, once a party has decided to seek a non-jury trial, that party should contact counsel for all other parties to the suit to find out whether or not those parties have any interest in having a non-jury trial.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions



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5.15 Pre-Dispute Agreement to Waive Jury Is Generally Unenforceable.

A contractual provision waiving the right to a jury trial is unenforceable [*Grafton Partners, L.P. v. Superior Court* (2005) 36 C4th 944, 967, 32 CR3d 5, 116 P3d 479 ; see also *Woodside Homes of California, Inc. v. Superior Court* (2006) 142 CA4th 99, 101-104, 47 CR3d 683 (*Grafton* does not preclude enforcement of predispute contract to use referee)]. An exception to this is when binding arbitration provides that the parties waive the right to a jury trial [see, e.g., *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 C4th 495, 499-500, 30 CR3d 787, 115 P3d 68] . However, the waiver must be knowing and voluntary [*Rodriguez v. Superior Court* (2009) 176 CA4th 1461, 1467, 98 CR3d 728] .

Example:

A company contracted with an accounting firm to audit certain accounts. The accounting firm sent an engagement letter to the company confirming the terms of the agreement and including a statement that the parties "agree not to demand a trial by jury" in a claim arising out of the agreement. The court held that the purported waiver was not enforceable because the methods of waiver specified by statute are exclusive and the statute does not provide for waiver by contract [*Grafton Partners, L.P. v. Superior Court* (2005) 36 C4th 944, 967, 32 CR3d 5, 116 P3d 479] .

Legal Topics:

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

Civil Procedure
Alternative Dispute Resolution
Arbitrations
General Overview
Civil Procedure
Trials
Jury Trials
Jury Demands
Civil Procedure
Trials
Jury Trials
Right to Jury Trial
Constitutional Law
Bill of Rights
Fundamental Rights
Trial by Jury in Civil Actions



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5.16 Party May Expressly Waive Right to Jury Trial.

5.16[1] Waiver May Be Made by Written Consent. A party may submit a written consent to waive the jury trial, and file the consent with the clerk or judge [CCP § 631(d)(2)]. For example, if a party provides a negative response to a question in an at-issue memorandum or a trial-setting conference statement asking whether the party demands a jury trial, the negative response constitutes "written consent filed with the clerk or judge" sufficient to constitute a waiver [*Simmons v. Prudential Ins. Co. of Am.* (1981) 123 CA3d 833, 836, 177 CR 37, see also *Cal Rules Ct, Rules 3.727(13), 3.728(4)*].

5.16[2] Waiver May Be Made in Mandatory Case Management Statement. Each party must file a case management statement with the court, and serve it on all parties to the case, not later than 15 days before the date set for the case management conference or case management review [*Cal Rules Ct, Rule 3.725(a)*]. This statement must be submitted in the form of Judicial Council Form CM-110. The use of Form CM-110 is mandatory, and all applicable items on the form must be completed [*Cal Rules Ct, Rule 3.725(c)*]. Item 5 of Form CM-110 requires the party or parties filing the form to state whether or not a jury or a nonjury trial is being requested.

➡ Cross Reference:

Sample form for case management statement containing indicator for waiver of jury trial, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure*, 23.58.

5.16[3] Waiver May Be Made Orally in Open Court. A party may request a non-jury trial by orally stating in the minutes in open court that it consents to a non-jury trial [CCP § 631(d)(3)]. A convenient time to make this request is at the case management conference, when the court seeks to determine whether the case will be tried before a jury [see *Cal Rules Ct, Rules 3.727(13), 3.728(4)*].



Strategic Point:

A party wishing to have a non-jury trial should confirm that the request is recorded in the minutes.

➡ Cross References:

Discussion of revocations of waiver of jury trial, see 5.15.

Discussion of court's discretion to re-instate jury trial right, see 5.18.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureTrialsJury TrialsJury DemandsCivil
ProcedureTrialsJury TrialsRight to Jury Trial



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5.17 Party's Conduct May Waive Party's Right to Jury Trial.

5.17[1] Failure to Make Timely Announcement That Party Requires Jury Waives Jury Trial Right. To obtain a jury trial, a party must announce to the court that a jury is required [CCP § 631(d)(4)]. Failure to do so waives the right to a jury.

The request may be made when the case is first set for trial by notice of trial setting or by stipulation [CCP § 631(d)(4)].



Timing:

If the court sets the trial date without advance notice or stipulation, each party has five days to inform the court that a jury is required [CCP § 631(d)(4)].



Cross Reference:

Requesting a jury trial, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.37 *et seq.*

5.17[2] Failure to Appear at Trial Waives Jury Trial Right. A party who fails to appear at trial waives the right to a jury [CCP § 631(d)(1)].

5.17[3] Failure to Make Timely Deposit of Jury Fees Waives Jury Trial Right. Each party who demands a jury trial must deposit jury fees with the clerk or judge at least 25 calendar days before the date initially set for trial [CCP § 631(b)]. For unlawful detainer actions, the fees must be deposited at least five days before the date set for trial [CCP § 631(b)]. The total amount of the advance fees may not exceed \$150 for each party [CCP § 631(b)]. Failure to deposit these fees as required waives that party's right to a jury [CCP § 631(d)(5)].

Example:

In San Diego county as of 2006, where each side requests a jury trial, both parties may expect to pay \$150/day for jury fees involving twelve jurors and two alternates.

Distinguish:

Waiver by one party, whether intentional or inadvertent, does not necessarily mean that a jury trial will not be held. A jury trial may be still be held if another party has not waived its own rights to a jury trial and wants such a trial held [see 5.14].

 Cross Reference:

Procedure for making deposit of jury fees, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.45.

5.17[4] Failure to Make Timely Payment of Daily Jury Fees Waives Jury Trial Right. In addition to making the advance deposit of jury fees, a party who demands a jury trial must deposit with the clerk or judge a sum equal to that day's fees and mileage of the jury at the beginning of the second and each succeeding day of trial [CCP § 631(c), (d)(6)]. The deposit must include the fees and mileage for the trial jury panel even if the trial jury has not yet been selected and sworn [CCP § 631(c)].

Consider:

How much this may cost depends on the length of trial. Advance fees are not to exceed \$150 per party [see CCP § 631(b)], but fees are deposited each day of the trial equal to that day's fees and mileage for the trial jury panel. If one party does not demand a jury trial, it does not need to deposit fees. However, if no fees are deposited by the party demanding the jury, and the other party does not deposit the fees, under the current statute--which is silent on the issue--it seems that the party not demanding the jury and not depositing the fees, has waived a jury [see CCP § 631].

 Cross Reference:

Procedure for payment of daily jury fees, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 23.45 *et seq.*

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial



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5.18 Court Has Discretion to Grant Jury Trial If Party Revokes Prior Waiver of Jury Trial Right

5.18[1] Party May Revoke Its Own Waiver of Right to Jury Trial When Opposing Party Withdraws

Previous Demand for Jury. If one party demands a jury, that party may rely on the other party's demand without waiving its own right to a jury trial [*Cohill v. Nationwide Auto Serv. (1993) 16 CA4th 696, 701, 19 CR2d 924*]. Thus, if the party who originally demanded a jury later waives the right, the other party may then announce its demand for a jury trial [*Cohill v. Nationwide Auto Serv. (1993) 16 CA4th 696, 701, 19 CR2d 924*].



Warning:

The right to demand a jury at this point is not an absolute right, but rather one that is subject to the court's discretion [*March v. Pettis (1977) 66 CA3d 473, 478, 136 CR 3* ; see 5.18[2]].

It appears that under the current statute, if one party demands a jury and the other party does not, and if the party demanding the jury does not deposit fees, there would be no jury [see CCP § 631]. If a party waives a jury, the party is unlikely to be able to revive that right after the other party withdraws.



Cross Reference:

Discussion of court's discretion to reinstate jury trial, see 5.18.

5.18[2] Court May Grant Relief From Waiver "Upon Just Terms." Despite a party's waiver of a jury trial, the court retains discretion to reinstate a jury trial "upon just terms" [CCP § 631(e)]. If the court is unsure of the propriety of granting relief, the court should resolve the matter in favor of granting relief, since the jury trial is a constitutional right, favored by public policy [*Massie v. AAR W. Skyways, Inc. (1992) 4 CA4th 405, 411, 5 CR2d 654*].



Cross Reference:

Sample form for request for relief from jury waiver and supporting declaration, see 5.46, 5.47.

5.18[3] Court Should Grant Relief Unless Objecting Party or Court Would Suffer Prejudice. In determining whether to grant relief from the waiver, the court considers whether the objecting party suffered prejudice or would suffer serious hardship if relief is granted [*Massie v. AAR W. Skyways, Inc. (1992) 4 CA4th 405, 411, 5 CR2d 654*].

The prejudice sufficient to bar relief from the waiver must constitute prejudice from relief, not prejudice from the jury trial [*Massie v. AAR W. Skyways, Inc. (1992) 4 CA4th 405, 411, 5 CR2d 654*] . Prejudice may result from delay in rescheduling a jury trial, lack of funds, timeliness of request and prejudice to the opposing party [*Gann v. Williams Bros. Realty, Inc. (1991) 231 CA3d 1698, 1704, 283 CR 128*] . The court may deny relief when any reasonable factor supporting denial is present [*Gann v. Williams Bros. Realty, Inc. (1991) 231 CA3d 1698, 1704, 283 CR 128*] .

Example--Denial of Relief From Waiver:

A plaintiff requested a jury trial in an at-issue memorandum, but waived the right in court three times, once for each continuance that was set. The defendant failed to deposit jury fees, but subsequently asked for a jury. The appellate court sustained the lower court's denial of the request, noting that granting the request would have resulted in yet another continuance of the trial, additional cost and inconvenience to witnesses, and additional delay would have pressed the plaintiff up against the five-year limit to bring the case to trial [*McIntosh v. Bowman (1984) 151 CA3d 357, 363, 198 CR 533*] .

Example--Grant of Relief From Waiver:

Plaintiffs had indicated in a joint at-issue memorandum that they wanted a jury trial, and prepared jury instructions, but plaintiffs' counsel failed to deposit advance jury fees because of counsel's unfamiliarity with local rules. The appellate court held that defendant suffered no prejudice from the inadvertent waiver, and reversed the lower court's denial of the request for relief from waiver [*Massie v. AAR W. Skyways, Inc. (1992) 4 CA4th 405, 412, 5 CR2d 654*] .



Cross Reference:

Discussion of court's discretion to reinstate jury trial, see California Points and Authorities, § 322.94 (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial



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5.19 CHECKLIST: Conducting Non-Jury Trial.

- ☐ Prepare trial presentation according to the following order:
- ☐ If representing plaintiff, prepare to present first opening statement.
 - ☐ If representing defendant, prepare to present second opening statement.
 - ☐ Plaintiff's counsel presents evidence.
 - ☐ If representing defendant, consider moving for judgment on grounds that plaintiff did not present sufficient evidence to support a claim.
 - ☐ If representing plaintiff, prepare to oppose motion for judgment.
 - ☐ If court denies motion, defendant's counsel should present rebuttal evidence and evidence supporting affirmative defenses.
 - ☐ If representing plaintiff, consider moving for judgment.
 - ☐ If representing defendant, prepare to oppose motion for judgment;
 - ☐ If court denies motion, parties may present rebuttal evidence, beginning with plaintiff's rebuttal evidence.

- ☐ If case requires presentation of additional non-rebuttal evidence, request permission from court to present it.
- ☐ Plaintiff normally commences closing argument.
- ☐ Defendant follows plaintiff in presenting closing argument.
- ☐ Plaintiff may conclude closing argument.

Authority:

CCP §§ 607, 631.7

Discussion:

See 5.21

- ☐ If closing argument is particularly important, prepare to explain its importance to judge, since judge has discretion to allow closing argument in non-jury trial.

Authority:

Gillette v. Gillette (1960) 180 CA2d 777, 4 CR 700

Discussion:

See 5.22

- ☐ Prepare to present case in order other than that specified in *CCP § 607*, since judge has discretion to direct different order of proceeding.

Authority:

CCP § 631.7

Discussion:

See 5.23

- ☐ Following court's issuance of tentative ruling, determine whether to request and prepare proposed statement of decision.

Authority:

CCP § 632

Discussion:

See 5.26

- ☐ Make sure that court renders formal judgment or order.

Authority:

CCP § 635

Discussion:

See 5.27

☐ If trial judge becomes unavailable before rendering formal judgment or order, assess circumstances to determine the appropriate action:

☐ If trial judge issued final decision in minutes, presiding judge of court or a judge designated by presiding judge may sign formal judgment or order.

☐ If trial judge did not issue final decision in the minutes, request that court declare mistrial and conduct another trial.

Authority:

CCP § 635

Discussion:

See 5.27[3]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Bench Trials



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5.20 Options and Strategy.

The steps to follow for presentation of a non-jury trial basically track those for a jury trial [see 5.21].



Strategic Point--All Parties:

The judge has discretion to disallow closing arguments in a non-jury trial, so counsel should make sure that the trial brief thoroughly addresses the legal issues that the party intends to raise or wishes to defend against, and that the opening statement thoroughly highlights the evidence that supports the existence of each element that the party must prove [see 5.22], in case the trial judge later chooses to proceed without closing arguments.

The trial court also has discretion to determine the order in which a case is presented, so the parties should be prepared to be flexible in their presentation of the case [see 5.23].

While the process of a non-jury trial is nearly identical to that of a jury trial, the manner in which counsel presents a case should be different. Counsel should be conscious that a judge is less likely to be swayed by emotional and inflammatory language, and may well discredit a party's position when the lawyer's presentation focuses on the emotional over the legal and factual.

Once both parties have put on their cases and closing arguments, if any, are complete, the judge issues a tentative ruling [see 5.24]. A party then may ask for a statement of decision containing the judge's findings of fact and conclusions of law [see 5.26]. Unless the case involves a special proceeding, the court must then prepare this statement. Once the parties receive the statement of decision, the parties may advise the court of omissions or ambiguities [see 5.44]. The court then renders a final judgment or order [see 5.27].

If the trial judge becomes unavailable before signing the final judgment, but included its decision in the minutes, the presiding judge or a designee may sign the final judgment [see 5.27[3]]. If the trial judge did not include the final decision in the minutes, a judgment signed by another judge is not enforceable [see 5.27[3]].

**Strategic Point:**

In a non-jury trial, material such as testimony offered by deposition and other items may be submitted to the court as exhibits for reference later. This is important in shortening the time for trial. The practice raises an issue of whether the court will pay sufficient attention to testimony that is submitted as a transcript exhibit, or whether the opportunity is lost to have the trier of fact observe the witness, for credibility purposes. Also, the judge may ask that direct testimony be submitted in written form, and permit only live cross-examination. A judge may also ask for post-trial briefing and draft findings of fact and conclusions of law.

**Cross References:**

Discussion of opening statements, see Ch. 10, Opening Statement.

Discussion of presentation of witness evidence, see *Ch. 11, Questioning Witnesses and Objections, 11.20 et seq.*

Discussion of presentation of non-witness evidence, see *Ch. 11, Questioning Witnesses and Objections, 11.113 -11.117.*

Discussion of motions for judgment, see Ch. 13, Motion for Judgment.

Discussion of closing arguments, see Ch. 15, Closing Argument.

Discussion of statement of decision, see 5.28 -5.32.

Discussion of judgment, see Ch. 26, Entry of Judgment.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsClosing ArgumentsGeneral Overview



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5.21 Non-Jury Trial Ordinarily Proceeds in Same Order As Jury Trial.

A non-jury trial normally proceeds in the following order, which is the same order as that specified for a jury trial [CCP §§ 607, 631.7]:

- Trial begins with plaintiff's opening statement.
- Defendant's opening statement follows plaintiff's opening statement.
- Plaintiff must present evidence to support case.
- Defendant may move for judgment after plaintiff's presentation of evidence.
- Defendant presents evidence to refute plaintiff's case and to support affirmative defenses.
- Plaintiff may move for judgment after defendant's presentation of evidence.
- Parties may present rebuttal evidence after opposing party's presentation
- Parties may present additional non-rebuttal evidence only if court allows it.
- Plaintiff normally may commence and conclude closing arguments.

Consider:

The conduct of a non-jury trial is more about maintaining credibility with the judge on issues of law and propriety than it is in front of a jury. In general, a bench trial should be more succinct. Graphics will look different, and counsel should be less argumentative in a bench trial. There is probably less technical concern about the order of proof, especially if seeking a post-trial briefing. The emphasis on burden of proof can be lessened or eliminated, whereas legal issues that might be difficult for a typical juror to grasp can be emphasized to the sophisticated trial judge.

 Cross References:

Discussion of opening statements, see Ch. 10, Opening Statement.

Discussion of presentation of witness evidence, see *Ch. 11, Questioning Witnesses and Objections, 11.20 et seq.*

Discussion of presentation of non-witness evidence, see *Ch. 11, Questioning Witnesses and Objections, 11.113 -11.117.*

Discussion of motions for judgment, see Ch. 13, Motion for Judgment.

Discussion of closing arguments, see Ch. 15, Closing Argument.

Legal Topics:

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



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5.22 Judge in Non-Jury Trial May Allow or Disallow Closing Arguments.

In a non-jury trial, the parties generally do not have a right to present closing arguments [*Dam v. Bond (1926) 80 CA 342, 346-347, 251 P 818*] . Instead, closing arguments is a matter of the court's discretion [*Gillette v. Gillette (1960) 180 CA2d 777, 781, 4 CR 700*] .

⚖️ Judge's Perspective:

Most judges will allow closing arguments at a non-jury trial. To be safe, if you know the assigned trial judge at the time of making the decision to waive a jury, determine that judge's common practice.

⚠️ Warning:

Be sure to include all arguments in the trial brief to ensure that the judge receives all arguments supporting the client's case, in case the judge disallows closing arguments. For the same reason, be sure also to underscore all evidence vital to supporting the client's claims during presentation of the opening statement.

The trial brief will enable the attorney to present the case more fully and completely, and lay the framework for the trier of fact's consideration of evidence that will come in disjointedly from different witnesses. It is important to have an understanding, in advance, of what is going to unfold before the trier of fact. The trial brief presents an opportunity that, in a jury trial, is limited by the nature of opening statements. Even more important, the trier of fact in a non-jury trial may foreclose closing argument. To ensure against that eventuality, the trial brief will lay out the arguments and provide the chronological and issue-oriented facts that witnesses will then present in the order in which they testify. Counsel should also ask for post-trial briefing and to be allowed to submit proposed findings of fact and conclusions of law.

In a non-jury trial, courts are more likely to allow witnesses to testify in the order more convenient to them. Non-jury trials may be scheduled at the convenience of the court and take place over long periods of days with separations between court sessions. A trial brief is indispensable in providing a reference and road map to the court over such periods of time.

Counsel should consider submitting a trial brief, no matter how short or succinct, for every trial no matter how long or complex. Even in a jury trial, a court will often find a pretrial brief helps to clarify issues that arise on whether certain evidence is relevant or a question is objectionable.

Legal Topics:

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



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5.23 Court May Direct Different Order of Proceeding.

The judge in a non-jury trial may direct that the trial should proceed in an order different from that specified in *CCP* § 607 [*CCP* § 631.7].

Example:

In a divorce proceeding, the plaintiff wife sued for divorce and the defendant husband filed a cross-complaint for divorce. After the plaintiff put on her evidence and before the defendant put on any evidence, she moved for a finding that she was entitled to the divorce. Over the defendant's objection that he had not had a chance to put on his case in chief, the court granted the motion, noting that the defendant had neither rebuttal evidence nor affirmative defenses. The appellate court affirmed the lower court's proceeding, citing the trial court's authority to direct the order of proceedings [*McLellan v. McLellan* (1972) 23 CA3d 343, 353, 100 CR 258] .



Cross Reference:

Order of trial in trials generally, see *Ch. 11, Questioning Witnesses and Objections, 11.16 et seq.*

Legal Topics:

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



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5.24 Court Renders Tentative Decision After Close of Arguments, If Any.

On the trial of a question of fact by the court, the court must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk [*Cal Rules Ct, Rule 3.1590(a)*; see *CCP § 632*]. Unless the announcement is made in open court in the presence of all parties that appeared at the trial, the clerk must immediately serve on all parties that appeared at the trial a copy of the minute entry or written tentative decision [*Cal Rules Ct, Rule 3.1590(a)*].

When a trial is completed within one day or in less than eight hours over more than one day, a request for statement of decision must be made before the matter is submitted for decision and the statement of decision may be made orally on the record in the presence of the parties [*Cal Rules Ct, Rule 3.1590(n)*].



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Chapter 5 Non-Jury Trials
IV. CONDUCTING NON-JURY TRIAL

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.25

5.25 Tentative Decision Is Not Binding on Court.

A tentative decision is not a judgment and is not binding on the court [*Cal Rules Ct, Rule 3.1590(b)*]. If the court changes or modifies the announced tentative decision, the clerk must serve a copy of the modification or change on all parties who appear at trial [*Cal Rules Ct, Rule 3.1590(b)*].

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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5.26 Court Will Issue Statement of Decision on Request.

Any party may request that the court issue a statement of decision [CCP § 632]. A statement of decision is the judge's findings of fact and conclusions of law explaining the judgment. Ordinarily, statements of decision are in writing and are used in connection with any appeal. The request for a statement of decision must specify the controverted issues as to which the party is requesting the statement of decision [CCP § 632; *see* 5.35].

⚖️ Judge's Perspective:

Parties may agree that the judge's oral decision may be transcribed and made the statement of decision.

➡️ Cross References:

Deciding whether or not to request statement of decision, *see* 5.29.

When court is required to issue statement of decision, *see* 5.30.

Procedures for requesting statement of decision, *see* 5.31 -5.39.

Content and sufficiency of statement of decision, *see* 5.40 -5.43.

Objections to statement of decision, *see* 5.44.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureTrialsBench Trials



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5.27 Court Issues Formal Judgment or Order.

5.27[1] Proposed Judgment Must Be Prepared.

5.27[1][a] Court or Party Must Prepare and Mail Proposed Judgment. If no party requests or is ordered to prepare a statement of decision and a written judgment is required, the court must prepare and serve a proposed judgment on all parties that appeared at the trial [*Cal Rules Ct, Rule 3.1590(h)*].



Timing:

The court must prepare and mail the proposed judgment within 20 days after the announcement or service of the tentative decision [*Cal Rules Ct, Rule 3.1590(h)*].

Alternatively, the court may order a party to prepare, serve, and submit the proposed judgment to the court within 10 days after the date of the order [*Cal Rules Ct, Rule 3.1590(h)*].

5.27[1][b] Parties Have 10 Days to File Objections to Proposed Judgment. Any party may, within 10 days after service of the proposed judgment, serve and file objections to it [*Cal Rules Ct, Rule 3.1590(j)*].

5.27[1][c] Court May Hold Hearing on Objections to Proposed Judgment. *Cal Rules Ct, Rule 3.1590(k)* indirectly authorizes the court to conduct a hearing on objections to a proposed judgment, but does not require that a hearing be held.

5.27[2] Court Will Render Judgment. After the court issues its tentative decision, if any, and statement of decision if so requested, the court renders a formal judgment or order [*see CCP § 635*].



Timing:

If a written judgment is required, the court must sign and file the judgment within 50 days after the announcement or service of the tentative decision, whichever is later, or, if a hearing was held under *Cal Rules Ct, Rule 3.1590(k)* [*see 5.27[1][c]*], within 10 days after the hearing [*Cal Rules Ct, Rule 3.1590(l)*].

 Cross Reference:

Discussion of entry of judgment, see Ch. 26, Entry of Judgment.

5.27[3] Presiding or Designated Judge May Sign Judgment or Order When Decision Was in Minutes and Trial Judge Is Unavailable. When the court has entered its decision in the minutes and the judge who tried the case is unavailable, the presiding judge of the court or a judge designated by the presiding judge may sign the formal judgment or order [*CCP* § 635].

The presiding judge or designee judge may only sign the judgment or order if the judge who tried the case issued a statement of decision before becoming unavailable [*CCP* § 632; *Raville v. Singh* (1994) 25 CA4th 1127, 1129, 31 CR2d 58] . A tentative decision recorded in the minutes does *not* constitute a "decision" under this statute [*Raville v. Singh* (1994) 25 CA4th 1127, 1132-1133, 31 CR2d 58] .

 Cross Reference:

Discussion of entry of judgment, see Ch. 26, Entry of Judgment.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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5.28 CHECKLIST: Requesting And Obtaining Statement of Decision.

☐ Before court renders decision in proceeding, determine whether or not it would be advantageous to request statement of decision if proceeding is decided adversely to client.

☐ If court decides matter adversely to client, is client prepared to appeal?

☐ Are there controverted issues that would present grounds for possible appeal?

☐ Would appeal be furthered by statement of exact grounds on which court made decision?

Authority:

See *In re Marriage of Davis* (1983) 141 CA3d 71, 74-75, 190 CR 104

Discussion:

See 5.29

☐ Determine if court is required to issue a statement of decision on request.

☐ Statement will be issued only if requested.

Authority:

CCP § 632

Discussion:

See 5.30[1]

- ☐ If availability of statement is in doubt, request statement anyway.

Discussion:

See 5.30[1]

- ☐ Action in question must be in superior court.

Authority:

CCP § 632

Discussion:

See 5.30[2]

- ☐ Court must issue statement on request in ordinary non-jury trials.

Authority:

CCP § 632

Discussion:

See 5.30[3]

- ☐ Court ordinarily is not required to issue statement of decision in "special proceeding" unless specifically required to do so by statute.

Authority:

CCP § 632

Discussion:

See 5.30[4]

- ☐ Court need not issue statement of decision in proceeding not involving trial, such as:

- ☐ Disposition of a motion.
- ☐ Motion to enforce a settlement.
- ☐ Grant or denial of a preliminary injunction

Authority:

In re Marriage of Baltins (1989) 212 CA3d 66, 79-80, 260 CR 403 ; *Malouf Bros. v. Dixon* (1991) 230 CA3d 280, 284, 281 CR 235 ; *People v. Landlords Profl Servs., Inc.* (1986) 178 CA3d 68, 72, 223 CR 483

Discussion:

See 5.30[5]

- ☐ Court must issue statement of decision on request in some types of special proceedings, including:

- ☐ Custody-of-minor and adoption cases.
- ☐ Marital dissolution proceedings involving a spousal support order.
- ☐ Probate proceedings.
- ☐ Declaratory relief actions, when facts are in issue.
- ☐ Mandamus proceedings.

Authority:

In re Marriage of S. (1985) 171 CA3d 738, 747, 217 CR 561 ; *In re Rose G.* (1976) 57 CA3d 406, 418, 129 CR 338 ; *In re Marriage of Davis* (1983) 141 CA3d 71, 76, 190 CR 104 ; *In re Guardianship of Pankey* (1974) 38 CA3d 919, 928, 113 CR 858 ; *People v. Superior Court of San Francisco* (1937) 24 CA2d 8, 9, 74 P2d 326 ; *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 CA3d 48, 57, 146 CR 155

Discussion:

See 5.30[6]

- ☐ Court need not issue statement of decision when no fact issues exist and case is decided as matter of law.

Authority:

Earp v. Earp (1991) 231 CA3d 1008, 1012, 283 CR 43

Discussion:

See 5.30[7]

- ☐ Court need not issue statement of decision in interlocutory proceedings.

Authority:

CCP § 632; *City of Los Altos v. Barnes* (1992) 3 CA4th 1193, 1198, 5 CR2d 77

Discussion:

See 5.30[8]

- ☐ Court need not issue statement of decision to support nonsuit or dismissal.

Authority:

Mosk v. Scheinberg (1942) 52 CA2d 154, 157, 125 P2d 872

Discussion:

See 5.30[9]

- ☐ Court need not issue statement of decision when granting anti-SLAPP motion.

Authority:

Lien v. Lucky United Properties Investment, Inc. (2008) 163 CA4th 620, 623-625, 77 CR3d 707

Discussion:

See 5.30[10]

☐ If client would benefit from having statement of decision, request that court issue statement.

☐ Request may be oral or written, but best practice is to make written request.

☐ Request must be explicit.

Authority:

Whittington v. McKinney (1991) 234 CA3d 123, 126, 285 CR 586 ; Martinez v. Tulane County (1987) 190 CA3d 1430, 1434-1435, 235 CR 851

Discussion:

See 5.34

☐ Specify those controverted issues on which party is requesting statement of decision.

Authority:

CCP § 632

Discussion:

See 5.35

☐ Make request in timely manner.

☐ If trial lasts less than one day or less than eight hours over multiple days, make request before matter is submitted for decision.

Authority:

CCP § 632; Cal Rules Ct, Rule 3.1590(n)

Discussion:

See 5.36[1]

☐ If trial lasts more than one day or eight total hours, make request within 10 days from the date court announces its tentative decision.

Authority:

CCP § 632; Cal Rules Ct, Rule 3.1590(d)

Discussion:

See 5.36[2]

- ☐ If judge suggests and parties agree to alternative procedure to statutory requirements for issuing a statement of decision, make sure that record discloses that parties expressly waived their statutory rights.

Authority:

Bay World Trading, LTD v. Nebraska Beef, Inc. (2002) 101 CA4th 135, 137, 123 CR2d 632

Discussion:

See 5.32

- ☐ If another party requests statement of decision, make proposals as to content of statement if desired.
- ☐ Proposals must be made within 10 days from date request for statement was made.

Authority:

CCP § 632; Cal Rules Ct, Rule 3.1590(e)

Discussion:

See 5.37

- ☐ Determine if proposed statement of decision will be prepared.
- ☐ Proposed statement of decision is mandatory if party requests one.
- ☐ Court must, within 30 days of announcement or service of tentative decision, prepare and serve a proposed statement of decision and a proposed judgment on all parties that appeared at the trial; or
- ☐ Court may order a party to prepare statement within 30 days after announcement or service of tentative decision.
- ☐ If proposed statement of decision and judgment are not served and submitted within that time, any other party that appeared at the trial may within 10 days thereafter prepare, serve, and submit to the court a proposed statement of decision and judgment or serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived.

Authority:

Cal Rules Ct, Rule 3.1590(f)

Discussion:

See 5.38[1]

- ☐ Serve and file objections to the proposed statement of decision or judgment within 15 days after the proposed statement of decision and judgment have been served.

Authority:*Cal Rules Ct, Rule 3.1590(g)***Discussion:**

See 5.38[1][d]

☐ If preparing proposed statement of decision:

☐ Include all material facts--that is, all facts that are relevant and necessary to judgment.

Authority:*Kuffel v. Seaside Oil Co. (1977) 69 CA3d 555, 565, 138 CR 575***Discussion:**

See 5.43[1]

☐ Make sure findings are certain, clear and intelligible.

Authority:*May v. May (1969) 275 CA2d 264, 271, 79 CR 622***Discussion:**

See 5.43[2]

☐ Include findings on all intermediate evidentiary facts necessary to sustain ultimate facts, but not all evidentiary facts.

Authority:*Angelier v. State Bd. of Pharmacy (1997) 58 CA4th 592, 597, 68 CR2d 213***Discussion:**

See 5.43[3]

☐ Specify method of determining attorney's fees, if any are allocated, such as "lodestar" or "touchstone."

Authority:*Rebney v. Wells Fargo Bank (1991) 232 CA3d 1344, 1349, 284 CR 113***Discussion:**

See 5.43[5]

☐ Avoid argumentative language.

Authority:*Mammoth Gold Dredging Co. v. Forbes (1940) 39 CA2d 739, 753, 104 P2d 131***Discussion:**

See 5.38[3]

☐ Court will issue statement of decision.

☐ If tentative statement of decision was prepared, court may adopt it entirely, reject portions of it, or reject it all.

Authority:

McAdams v. McElroy (1976) 62 CA3d 985, 992, 133 CR 637

Discussion:

See 5.39

☐ In trials lasting longer than one day or eight hours, statement must be written unless parties agree otherwise.

Authority:

CCP § 632

Discussion:

See 5.40[1]

☐ Court may issue oral statement if trial lasted less than one day or eight hours.

Authority:

CCP § 632

Discussion:

See 5.40[2]

☐ Court cannot simply endorse trial transcript as statement of decision, but may issue statement as recitals in judgment or decree.

Authority:

Whittington v. McKinney (1991) 234 CA3d 123, 127-128, 285 CR 586 ; *In re Estate of Exterstein* (1934) 2 C2d 13, 15, 38 P2d 151 ; *D'Andrea v. Pringle* (1966) 243 CA2d 689, 695-696, 52 CR 606

Discussion:

See 5.41, 5.42

☐ Review statement of decision to make sure it does all of following:

- ☐ Include findings on all material issues.
- ☐ States findings in definite, certain, clear, and intelligible manner.
- ☐ Does not consist of mere conclusions of law.

Authority:

CCP § 632; *May v. May* (1969) 275 CA2d 264, 271, 79 CR 622

Discussion:

See 5.43

☐ If statement of decision contains omissions or ambiguities, file objections to statement either:

☐ Before entry of judgment or in conjunction with a motion for new trial; or

☐ In conjunction with motion to set aside judgment.

Authority:

CCP § 634; *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 CA4th 42, 59-60, 58 CR3d 225

Discussion:

See 5.44

☐ Verify that statement of decision is signed by judge who heard trial.

Authority:

CCP § 635; *Reimer v. Firpo* (1942) 94 CA2d 798, 800-801, 212 P2d 23

Discussion:

See 5.45

☐ If judge who heard case becomes unavailable before signing statement of decision, either:

☐ Waive request for statement of decision; or

☐ Make sure court declares a mistrial and conducts another trial.

Authority:

Swift v. Daniels (1980) 103 CA3d 263, 265, 162 CR 863

Discussion:

See 5.45

Legal Topics:

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



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5.29 Options and Strategy.

At the close of a non-jury trial counsel must decide whether or not to request a statement of decision, which is the judge's written findings of fact and conclusions of law explaining the judgment [see 5.30]. The benefit of having a statement of decision is that it makes the case more easily reviewable by exhibiting the exact grounds on which the decision rests [see *In re Marriage of Davis* (1983) 141 CA3d 71, 74-75, 190 CR 104]. The statement of decision allows the judge to explain the reasons for his or her decision. If the statement of decision is well-reasoned, that makes it less vulnerable on appeal. But if the statement of decisions is poorly reasoned, it exposes those flaws and makes reversal more likely.



Strategic Point--All Parties:

If neither party intends to seek review of the outcome regardless of what happens, there is no need to request a statement of decision. However, the language of a statement of decision may suggest grounds for appeal that may not have been apparent during the proceeding itself.



Warning:

Do not wait until the last minute to decide whether to request a statement. Counsel should begin to consider whether or not a statement of decision is required even before the conclusion of proceedings. This is especially important in short trials lasting less than one day or eight hours total over multiple days, since in these short trials the party must make the request before the matter is submitted for decision or the right to request a statement of decision will be deemed waived [CCP § 632; *Cal Rules Ct, Rule 3.1590(n)*; see 5.36[1], [4]]. In longer trials, more time is available [see 5.36[2]].

If no statement of decision is requested, the court is not required to issue one [see 5.30[1]]. Furthermore, with some important exceptions, the court generally is not required to issue a statement of decision in "special proceedings," or in proceedings other than the actual trial [see 5.30[4], [5]]. The exceptions to the rule exempting statements of decision in special proceedings exist either by statute or case law. These exceptions include mandamus proceedings, marital dissolutions when spousal support is ordered, probate proceedings, and child custody cases [see 5.30[6]]. Counsel should review the exceptions to the general rule to determine if a statement of decision is available.

If a party requests a statement of decision, the request must specify the controverted issues to be included in the statement [see 5.35]. Once a request is made, the judge may either draft a proposed statement or designate a party to draft it [see 5.37, 5.38]. In either event, all parties may submit proposed statements, and the court is free to adopt, reject or amend the proposals to reflect its own determinations [see 5.39].

When the court issues its statement of decision, any party may file objections to any material controverted matter omitted from the statement or any ambiguity in the statement [see 5.44]. A party intending to challenge the decision would strongly benefit from identifying all such deficiencies. Identification of deficiencies removes the inference on appeal that the lower court decided the deficiencies in favor of the prevailing party [see 5.44[1]].

Finally, the judge who tried the case must sign the statement of decision, unless the parties waive the right to the statement [see 5.45]. If the judge becomes unavailable before signing the statement of decision, the court must order a mistrial and conduct another trial [see 5.45].

A party seeking to use a statement of decision on an appeal should be careful to ensure that the proposed statement submitted is even-handed, objective, and correct. Both the proposed and adopted statements of decision, as well as any modifications to an adopted statement of decision, will be fair game on the appeal and may provide additional grounds to demonstrate that the court is either correct or incorrect. Attention to form and substance can aid in the appeal or response to an appeal.



Strategic Point--Alternative Procedures:

Some judges may suggest alternatives to the statutory procedures. Alternative procedures are allowed, but parties should make sure that the alternative procedures are clear and that the record reflects that the parties agree to waive any statutory rights [see 5.32].



Cross References:

Sample form for request for statement of decision, see 5.48.

Sample form for proposals for statement of decision, see 5.49.

Discussion of mistrials, see Ch. 22, Mistrial.

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

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

Civil Procedure Trials Bench Trials Civil Procedure Appeals Records on Appeal



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5.30 When Court Must Issue Statement of Decision.

5.30[1] Statement of Decision Is Not Required Absent Request. The trial judge must issue written findings of fact and conclusions of law only if a party appearing at trial requests them [*CCP* § 632].



Strategic Point:

If counsel believes that a statement of decision is important, but no case law or statutory language makes clear the availability of a statement, consider whether an argument to the court can reasonably be made that the type of proceeding is sufficiently important to warrant the need for a statement of decision [*see In re Rose G. (1976) 57 CA3d 406, 418, 129 CR 338*]. Moreover, even absent statutory rights to a statement of decision, it never hurts to ask for one. A judge may very well sign a proposed statement prepared by counsel.



Strategic Point--Prevailing Party:

For a prevailing party, if a statement of decision is waived, there is less opportunity to attack a legal error that might have been included in the statement, and the judgment is more likely to be upheld on appeal because the appellate court will affirm if there is any legal basis for supporting the decision. However, having a statement of decision benefits the prevailing party in certain circumstances where the trial court is given discretion and the court has made clear that it is exercising its discretion in a particular way.

5.30[2] Statement of Decision Is Available Only in Superior Court. Only parties to a case in superior court have the right to request and obtain a statement of decision [*CCP* § 632].

5.30[3] Statement Must Be Issued on Request in Ordinary Non-Jury Trials. In a non-jury trial, the court must issue a statement of decision in ordinary proceedings on a trial of a question of fact, at the request of any party [*CCP* § 632].

An ordinary proceeding is one in which "one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense" [CCP § 22]. In contrast, a special proceeding is one seeking every other remedy [CCP § 23].

5.30[4] Court Need Not Issue Statement of Decision in Special Proceedings Unless Statement Is Required by Statute. In a special proceeding, the court has no obligation to prepare a statement of decision, whether requested or not, unless the statute creating the special proceeding specifically allows a statement of decision [*Malouf Bros. v. Dixon* (1991) 230 CA3d 280, 284, 281 CR 235 ; *Taliaferro v. Hoogs* (1965) 236 CA2d 521, 529, 46 CR 147] .



Strategic Point--All Parties:

Counsel should determine whether the proceeding is "special" under the definition provided in the Code of Civil Procedure. The Code defines "special proceeding" according to what it is not--i.e., an ordinary proceeding [CCP § 23]. An ordinary proceeding is one in which "one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense" [CCP § 22].

Examples--Statement of Decision Not Required:

- **Eminent domain proceedings.** Because the statutory scheme for setting aside an abandonment of an eminent domain proceeding includes the term "determination," not "finding," the court is not required to issue a statement of decision on request of a party [*Community Dev. Comm'n of the City of Los Angeles v. Shuffler* (1988) 198 CA3d 450, 460, 243 CR 719] .



Strategic Point:

It is to advisable ask that the court voluntarily issue a statement of decision on any issue that a prevailing party believes will be the subject of an appeal. Most courts will agree to do so to support the result, particularly if the requesting party volunteers to submit a proposed statement of decision.

- **Liquidation or rehabilitation of insurance plans.** A proceeding brought by the Insurance Commissioner to liquidate or rehabilitate an insurance company is a special proceeding in which a court need not issue a statement of decision [*Carpenter v. Pacific Mut. Life Ins. Co. of Cal.* (1937) 10 C2d 307, 327-328, 74 P2d 761 , *aff'd* 305 US 297 (1938)] .

- **Mortgage Moratorium Act.** Proceedings to postpone a sale under the Mortgage Moratorium Act are special proceedings in which the court has no obligation to prepare a statement of decision [*Boggs v. North Am. Bond & Mortg. Co.* (1937) 20 CA2d 316, 318-319, 66 P2d 1253 (Mortgage and Trust Deed Moratorium Act of 1935)].

5.30[5] Court Need Not Issue Statement of Decision in Proceeding Not Involving Trial.

5.30[5][a] Court Need Not Issue Statement on Disposition of a Motion. The court has no obligation to issue a statement of decision to resolve a motion [*In re Marriage of Baltins* (1989) 212 CA3d 66, 79-80, 260 CR 403] . For example, no statement of decision is necessary on an order after a motion for equitable relief from judgment [*In re Marriage of Baltins* (1989) 212 CA3d 66, 79-80, 260 CR 403] .

5.30[5][b] Court Need Not Issue Statement on Motion to Enforce Settlement. When parties resolve a case

through a settlement agreement and one party defaults on the agreement, the other party may bring a motion in court to enforce the settlement [see CCP § 664.6; *Osumi v. Sutton* (2007) 151 CA4th 1355, 1360, 60 CR3d 693] . Since the statute creating this motion procedure does not provide for a statement of decision, a court deciding such a motion need not prepare one [*Malouf Bros. v. Dixon* (1991) 230 CA3d 280, 284, 281 CR 235] .

5.30[5][c] Court Need Not Issue Statement on Grant of Preliminary Injunction. A court is not required to prepare a statement of decision to support the grant or denial of a preliminary injunction [*People v. Landlords Profl Servs., Inc.* (1986) 178 CA3d 68, 72, 223 CR 483] .

Examples:

- A district attorney filed suit for injunctive relief and civil penalties against an eviction firm on the grounds of unauthorized practice of law. The lower court conducted an evidentiary hearing with witness testimony over several days. Although the appellate court recognized the finality of the preliminary injunction and the difficulty in appellate review absent a statement of decision, the appellate court held that no statement of decision was required [*People v. Landlords Profl Servs., Inc.* (1986) 178 CA3d 68, 70-72, 223 CR 483] .

- A city sought to enjoin a resident from engaging in certain business practices at her home. The court issued an injunction, but included only a cursory summary of its decision. The appellate court held that the trial court had no obligation to prepare a statement of decision supporting a preliminary injunction [*City of Los Altos v. Barnes* (1992) 3 CA4th 1193, 1198, 5 CR2d 77] .

5.30[6] Court Must Issue Statement of Decision on Request in Some Types of Special Proceedings.

5.30[6][a] Court Must Issue Statement on Request in Custody-of-Minor and Adoption Cases. The court must issue a statement of decision in a child custody case on request of a party [*In re Marriage of S.* (1985) 171 CA3d 738, 747, 217 CR 561] . Similarly, if requested, the court must issue a statement of decision in a proceeding to terminate parental rights [*In re Rose G.* (1976) 57 CA3d 406, 418, 129 CR 338] .

5.30[6][b] Court Must Issue Statement on Request in Marriage Dissolution Action and Spousal Support Order Proceeding. On request of a party, the court must issue a statement of decision in a marital dissolution action providing for spousal support and after any order modifying or revoking a previous order for spousal support [*In re Marriage of Davis* (1983) 141 CA3d 71, 76, 190 CR 104] .

5.30[6][c] Court Must Issue Statement on Request in Probate Proceeding. The requirement that a court issue a statement of decision on request is applicable to probate proceedings [*In re Guardianship of Pankey* (1974) 38 CA3d 919, 928, 113 CR 858] .

5.30[6][d] Court Must Issue Statement of Decision on Request in Action for Declaratory Relief, When Facts Are at Issue. When issues of fact are in dispute in a declaratory relief action, the court must issue a statement of decision on request of a party [*People v. Superior Court of San Francisco* (1937) 24 CA2d 8, 9, 74 P2d 326] .

5.30[6][e] Court Must Issue Statement on Request in Mandamus Proceeding. A court must issue a statement of decision on request in a mandamus proceeding [see *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 CA3d 48, 57, 146 CR 155] . On appeal, however, the trial court's statement of decision receives no deference, since the role of the appellate court is the same as that of the trial court [*Carrancho v. California Air Res. Bd.* (2003) 111 CA4th 1255, 1275, 4 CR3d 536] .

Consider:

- If the mandamus proceeding is from an erroneous ruling, the court's ruling and reasons set forth in a statement of decision will demonstrate the error when measured against the facts of the case. However, if the statement of decision is issued after a trial, there would be an appeal and not a mandamus proceeding.

- A statement of decision is a vehicle for revealing an error of law. Because an important issue in mandamus actions is whether the correct standard of law for review was applied, the statement of decision is helpful in revealing what standard the court applied.

5.30[7] Court Need Not Issue Statement of Decision When No Factual Issues Exist. The court need not issue a statement of decision when the case involves no factual disputes and the court decides the case as a matter of law [*Gallo Cattle Company v. Kawamura* (2008) 159 CA4th 948, 964, n11, 72 CR3d 1 ; see *Cal Rules Ct, Rule 3.1590(a)*]. For example, if resolution of the case depends on the interpretation of a lease, no statement of decision is necessary [*Earp v. Earp* (1991) 231 CA3d 1008, 1012, 283 CR 43] .

Similarly, if the parties stipulate to facts, or a party admits certain facts, the statement of decision need not include resolution of those facts [see *James v. P. C. S. Ginning Co.* (1969) 276 CA2d 19, 24, 80 CR 457] .

5.30[8] Court Need Not Issue Statement of Decision Pursuant to Interlocutory Decisions and Special Proceedings. The court need not make findings of fact in a non-final or interlocutory decision, as such decisions are not final, and are therefore subject to change [*David v. Goodman* (1952) 114 CA2d 571, 575, 250 P2d 704] . The statute requires only a statement of decision on request "upon the trial" [CCP § 632; *City of Los Altos v. Barnes* (1992) 3 CA4th 1193, 1198, 5 CR2d 77] .

5.30[9] Court Need Not Issue Statement to Support Judgment of Nonsuit or Dismissal. If the court disposes of a case on a motion for nonsuit, the court need not issue a statement of decision [*Mosk v. Scheinberg* (1942) 52 CA2d 154, 157, 125 P2d 872] . Even if a court writes a statement of decision accompanying a judgment of nonsuit, the appellate court may disregard it as superfluous [*Mosk v. Scheinberg* (1942) 52 CA2d 154, 157, 125 P2d 872] .

5.30[10] Court Need Not Issue Statement of Decision When Granting Anti-SLAPP Motion. The court need not issue a statement of decision when it grants an anti-SLAPP motion under CCP § 425.16 [*Lien v. Lucky United Properties Investment, Inc.* (2008) 163 CA4th 620, 623-625, 77 CR3d 707] .

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsFamily LawChild CustodyProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures



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5.31 Any Party Who Appeared at Trial May Request Statement of Decision.

Any party who appears at trial may request a statement of decision [CCP § 632].



Strategic Point:

An unsuccessful party benefits from requesting a statement of decision. One benefit is that if the court fails to prepare the statement, or prepares an inadequate statement, the appellate court must reverse the decision [see *In re Marriage of Ananeh-Firempong* (1990) 219 CA3d 272, 282, 268 CR 83]. Further, if the unsuccessful party objects to an omission and/or ambiguity in the statement, the appellate court will not infer that those deficiencies were decided in favor of the prevailing party [CCP § 634]. Requesting a statement of decision thereby gives the appealing party more possible grounds to argue for reversal.

Legal Topics:

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



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5.32 Court May Suggest Waiver of Statutory Procedures, but Parties Must Expressly Waive Their Rights.

A court may suggest to the parties an alternative to the statutory requirements for issuing a statement of decision [*Bay World Trading, LTD v. Nebraska Beef, Inc. (2002) 101 CA4th 135, 137, 123 CR2d 632*] . If the alternative procedure deprives the parties of their statutory rights, the record must disclose that the parties expressly waived those rights [*Bay World Trading, LTD v. Nebraska Beef, Inc. (2002) 101 CA4th 135, 137, 123 CR2d 632*] .

Legal Topics:

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



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5.33 Applicable Procedures for Statement of Decision Depend on Length of Trial.

When a trial is completed within one day or in less than eight hours over more than one day, a request for statement of decision must be made before the matter is submitted for decision and the statement of decision may be made orally on the record in the presence of the parties [*CCP* § 632; *Cal Rules Ct*, *Rule 3.1590(n)*].

 Cross Reference:

Computing time court was in session for purposes of time requirements for requesting statement of decision, see 5.36[3].

Legal Topics:

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



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5.34 Request for Statement of Decision May Be Oral or Written, but Must Be Explicit.

The request for a statement of decision may be oral or written [*Whittington v. McKinney* (1991) 234 CA3d 123, 126, 285 CR 586] . The request also must be explicit. For example, a request in a memorandum of points and authorities that the court find in favor of the party is not a sufficient request for a statement of decision [*Martinez v. Tulare County* (1987) 190 CA3d 1430, 1434-1435, 235 CR 851] .

Legal Topics:

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



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5.35 Requesting Party Must Specify Principal Controverted Issues for Inclusion in Statement of Decision.

A party's request must specify "those controverted issues as to which the party is requesting a statement of decision" [CCP § 632; see *In re Marriage of Balcof* (2006) 141 CA4th 1509, 1530-1531, 47 CR3d 183 (court need not discuss each question listed in request)].



Strategic Points:

- A party should specify all issues that may become the subject of appeal. If the trial court fails to address one of these issues in the statement of decision and the party brings this omission to the attention of the trial court, the reviewing court will not infer that the trial court decided the issue in favor of the prevailing party on the disputed fact or issue [CCP § 634; *McAdams v. McElroy* (1976) 62 CA3d 985, 995, 133 CR 637] .

- Make sure not to include in the request more issues than are necessary for a specific factual finding of the court [see *McAdams v. McElroy* (1976) 62 CA3d 985, 994-995, 133 CR 637] . A long list of redundant or tangential disputed facts may alienate the court against the client.



Cross Reference:

Sample form for request for statement of decision, see 5.48.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Bench Trials



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5.36 Request for Statement of Decision Must Be Timely Made.

5.36[1] Statement Must Be Requested Before Matter Is Submitted in Trials Lasting Less Than One Day or Eight Total Hours. In a trial that lasts less than one day or less than eight hours over multiple days, the party must make the request before the matter is submitted for decision [*CCP* § 632].

A matter is deemed submitted either on the date the court orders the matter submitted or the date the last paper is filed or argument is made, whichever is later [*Cal Rules Ct, Rule 2.900(a); In re Marriage of Gray (2002) 103 CA4th 974, 977, 127 CR2d 271*].

5.36[2] 10-Day Time Limit Applies in Trials Lasting Longer Than One Day or Eight Total Hours. In trials lasting more than one day or eight total hours, a party has 10 days from the date the court announces a tentative decision within which to request a statement of decision [*CCP* § 632].

The court may direct that the tentative decision will become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies the principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision [*Cal Rules Ct, Rule 3.1590(c)(4)*].

5.36[3] Length of Trial Is Measured Based on Time Court Actually Is in Session. For purposes of determining the applicable time limit within which a statement of decision must be requested under *CCP* § 632, the trial time is measured based on the amount of time court is in session [*Gorman v. Tassajara Development Corp. (2009) 178 CA4th 44, 61-63, 100 CR3d 152*]. The time includes ordinary morning and afternoon recesses and other routine recesses, but not time when the judge is off bench and the parties are not present, such as lunchtime [*In re Marriage of Gray (2002) 103 CA4th 974, 979-980, 127 CR2d 271*].

Exception:

In an administrative mandate proceeding, time spent out of session reviewing the administrative record is included in determining whether the trial lasts less than one day or eight hours total [*Bevli v. Brisco (1985) 165 CA3d 812, 822, 212 CR 36*].

5.36[4] Failure to Make Timely Request Waives Right to Statement. A party who fails to make a timely request for a statement of decision waives the right to have the court issue such a statement [*Ciraulo v. City of Newport Beach* (2007) 147 CA4th 838, 851-852, 54 CR3d 515] .

Legal Topics:

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



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5.37 Once Statement of Decision Is Requested, Other Parties May Make Proposals As to Content.

When one party requests a statement of decision, any other party may make proposals as to its content [*CCP* § 632]. Because the applicable statutes and rules do not specify any particular form for proposals as to content [*see CCP* § 632; *Cal Rules Ct, Rule 3.1590*], such matters presumably are within the discretion of the trial court in all cases.



Timing:

Any proposals must be made within 10 days after the date of request for a statement of decision [*Cal Rules Ct, Rule 3.1590(e)*].



Cross Reference:

Sample form for proposal for statement of decision, see 5.49.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Bench Trials



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5.38 Proposed Statement of Decision Must Be Prepared and Served.

5.38[1] Proposed Statement Required.

5.38[1][a] Court Must Prepare and Serve Proposed Statement on Request. If a party requests a statement of decision, the court must prepare and serve a proposed statement of decision and a proposed judgment on all parties that appeared at the trial [*Cal Rules Ct, Rule 3.1590(f)*]. Because the proposed statement of decision must be prepared and served, it must be written.



Timing:

The court must prepare and serve the proposed statement of decision within 30 days of announcement or service of the tentative decision [*Cal Rules Ct, Rule 3.1590(f)*].

5.38[1][b] Court May Order Party to Prepare and Serve Proposed Statement. Alternatively, the court may order a party to prepare the statement [*Cal Rules Ct, Rule 3.1590(f)*]. This designation may be made in the tentative decision [see *Cal Rules Ct, Rule 3.1590(c)(3)*].

A party who has been ordered to prepare the statement must serve and submit to the court a proposed statement of decision and a proposed judgment [*Cal Rules Ct, Rule 3.1590(f)*].



Timing:

The party must serve and submit to the court a proposed statement of decision and a proposed judgment within 30 days after the announcement or service of the tentative decision [*Cal Rules Ct, Rule 3.1590(f)*].



Strategic Point:

In drafting a proposed statement of decision for submission to the court, keep in mind that it should be evenhanded, carefully written, and cover all points important in the litigation. The judge may adopt the language wholesale in the final statement of decision. Lack of completeness may become an issue on

appeal.



Cross Reference:

Sample form for proposed statement of decision, see 5.49.

5.38[1][c] Any Other Party May Prepare and Serve Proposed Statement or Motion to Waive Statement If Court or Ordered Party Do Not File and Serve It Within Specified Time. If the proposed statement of decision and judgment are not served and submitted within the specified time, any other party that appeared at the trial may within 10 days thereafter do either of the following [*Cal Rules Ct, Rule 3.1590(f)*]:

- Prepare, serve, and submit to the court a proposed statement of decision and judgment; or
- Serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived.



Timing:

The other party must serve and submit to the court the proposed statement of decision and proposed judgment or notice of motion within 10 days after the time specified for the originally ordered party to serve and submit the proposed statement of decision and judgment [*Cal Rules Ct, Rule 3.1590(f)*].

5.38[1][d] Any Party May Object to Proposed Statement of Decision. Any party may object to a proposed statement of decision and judgment [*Cal Rules Ct, Rule 3.1590(g)*].



Timing:

A party wishing to object has 15 days after the proposed statement of decision and judgment have been served to serve and file objections [*Cal Rules Ct, Rule 3.1590(g)*].

5.38[1][e] Court May Order Hearing on Proposed Statement of Decision. The court may order a hearing on proposals or objections to the proposed statement of decision or the proposed judgment [*Cal Rules Ct, Rule 3.1590(k)*].

5.38[2] Proposed Statement Should Exclude Argument. Counsel should avoid argumentative language when drafting a proposed statement of decision [*Mammoth Gold Dredging Co. v. Forbes (1940) 39 CA2d 739, 753, 104 P2d 131*] .



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5.39 Court May Adopt Proposed Statement in Its Entirety, Reject Portions, or Reject All of It.

If a party submits proposed findings or proposed counter-findings, the court may adopt it in its entirety, reject portions of it, or reject all of it [*see McAdams v. McElroy* (1976) 62 CA3d 985, 992, 133 CR 637] .

Legal Topics:

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



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5.40 Statement of Decision Must Be Written Except in Short Trials or Unless Parties Agree Otherwise.

5.40[1] In Trials Lasting Longer Than One Day or Eight Hours, Statement Must Be Written Unless Parties Agree Otherwise. In trials lasting more than one calendar day or eight hours over more than one day, the statement of decision must be in writing, unless the parties appearing at trial agree otherwise [*CCP* § 632].

5.40[2] Court May Issue Oral Statement If Trial Lasted Less Than One Day or Eight Hours. When the trial lasts less than one calendar day or eight hours over more than one day, the court may issue the statement orally on the record in the presence of the parties [*CCP* § 632].

Legal Topics:

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



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5.41 Judge's Endorsement of Trial Transcript Does Not Constitute Adequate Statement of Decision.

A judge may not merely endorse a trial transcript to be used as a statement of decision [*Whittington v. McKinney* (1991) 234 CA3d 123, 125-126, 285 CR 586] .



Strategic Point--Prevailing Party:

If a party requests a statement of decision, the prevailing party should make sure that a separate document is prepared and signed by the judge to avoid reversal on appeal [*Whittington v. McKinney* (1991) 234 CA3d 123, 129, 285 CR 586] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsGeneral Overview



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5.42 Court May Issue Statement of Decision As Recitals in Judgment or Decree.

The court may issue its statement of decision as recitals in the judgment or decree, though this is not the norm [*In re Estate of Exterstein* (1934) 2 C2d 13, 15, 38 P2d 151] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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5.43 Court Must Include Explanations of Factual and Legal Bases of Decision.

5.43[1] Statement Must Include Findings on All Material Issues. The statement of decision must include an explanation of the factual and legal basis for the court's decision "as to each of the principal controverted issues at trial" [CCP § 632]. A material fact is one that is "relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case" [*Kuffel v. Seaside Oil Co.* (1977) 69 CA3d 555, 565, 138 CR 575] .

5.43[2] Findings Must Be Definite, Certain, Clear, and Intelligible. The findings in a statement of decision must be certain, clear and intelligible [*May v. May* (1969) 275 CA2d 264, 271, 79 CR 622] . The court should frame the findings in a manner to allow a defeated party to specify in what way the evidence does not support the findings in a motion for new trial or on appeal [*Andrews v. Cunningham* (1951) 105 CA2d 525, 528-529, 233 P2d 563] .

5.43[3] Statement Need Only Include Ultimate, Not Evidentiary, Facts. The statement of decision need only include ultimate facts, not all evidentiary facts [*Peak-Las Positas Partners v. Bollag* (2009) 172 CA4th 101, 112, 90 CR3d 775] . The ultimate facts, however, necessarily include findings on all intermediate evidentiary facts necessary to sustain the ultimate facts [*Angelier v. State Bd. of Pharmacy* (1997) 58 CA4th 592, 597, 68 CR2d 213] .

Example--Ultimate Fact:

In a suit against a nursing home for numerous violations of regulations, the trial court's statement of decision described 10 different categories of acts constituting violations of nursing home regulations and Business and Professions Code violations. The statement further identified the number of acts to have occurred within each category. The appellate court upheld the adequacy of the statement of decision, on the ground that the trial court was not required to make findings regarding detailed evidentiary facts [*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 CA3d 509, 524, 206 CR 164] .

5.43[4] When Party Raises Substantial Evidence on Material Issue, Court Must Make Findings on That Issue. The court must make findings on all material issues raised by the pleading and the evidence [In re Marriage of Balcof (2006) 141 CA4th 1509, 1531, 47 CR3d 183].

Example:

A tenant leased space in a hotel for a beauty salon. The landlord told the tenant that she would have to either pay increased rent or move. The tenant decided to move, but the landlord refused to allow her to remove her equipment. The trial court issued findings that the equipment had to be returned to the tenant. The appellate court held that the trial court improperly failed to make findings on material issues, including whether the tenant paid past due rent, and whether the equipment constituted fixtures which damaged the property on removal [*Beebe v. Richards* (1953) 115 CA2d 589, 591-592, 252 P2d 688] .

5.43[5] Statement May Not Include Merely Conclusions of Law. A statement of decision must include identification of the ultimate facts, not merely conclusions of law. The test to determine the sufficiency of the factual findings is the same as that applied to determine the sufficiency of allegations in a pleading [*D'Andrea v. Pringle* (1966) 243 CA2d 689, 695-696, 52 CR 606] . In particular, if the assertion has no factual support, it is a conclusion of law, and therefore insufficient [*D'Andrea v. Pringle* (1966) 243 CA2d 689, 696, 52 CR 606] .

Example:

A court "found" that the plaintiffs "have not suffered irreparable injury" and that the hardship to defendant "in removing the encroaching building would be greatly disproportionate to the hardship caused by [sic] plaintiffs." The appellate court held that these "findings" were insufficient because they were unsupported by facts, and therefore constituted merely conclusions of law [*D'Andrea v. Pringle* (1966) 243 CA2d 689, 696, 52 CR 606] .

5.43[6] Statement May, but Need Not, Track Language of Pleadings. The statement of decision may track the language of a pleading, such as stating that the allegations in a defendant's answer that conflict with other findings in the statement are untrue [*Cirlincione v. Cirlincione* (1951) 104 CA2d 35, 39-40, 230 P2d 642] .

5.43[7] Statement May Incorporate Matters by Reference. The statement of decision may incorporate pleadings or previous decisions by reference. For example, in review of an administrative proceeding a court may incorporate by reference the findings of the administrative board [see *Webster v. Board of Dental Exam'rs of Cal.* (1941) 17 C2d 534, 543-544, 110 P2d 992] .

5.43[8] Statement Should Identify Method of Determining Attorney's Fees, but Need Not Detail Apportionment of Hours. In allocating attorney's fees, the court may simply specify the method of determining attorney's fees, such as "lodestar" or "touchstone" [*Rebney v. Wells Fargo Bank* (1991) 232 CA3d 1344, 1349, 284 CR 113] .



Strategic Point:

The law is unclear as to whether attorney's fees need be addressed in the statement of decision at all. The court in *Rebney v. Wells Fargo Bank* initially based its decision on the notion that attorney's fees are the subject of a motion, not a trial. As such, an award of attorney's fees is not subject to CCP § 632 [see *Maughan v. Google Technology, Inc.* (2006) 143 CA4th 1242, 1252, 49 CR3d 861]. In the alternative, the court held that even if the strictures of CCP § 632 do apply to the award of attorney's fees, the appellant waived the right to findings on that issue by failing to advise the court of the omission [*Rebney v. Wells Fargo Bank* (1991) 232 CA3d 1344, 1349-1350, 284 CR 113 ; see also 5.44]. It is prudent to ask for findings on this issue. If the court omits to include findings, counsel should advise the court of this omission as provided in CCP § 634.

Certain matters may require judicial findings that will permit attorney's fees. For example, in an insurance bad faith case, attorney's fees are available to the prevailing policyholder under *Brandt* [see *Hoffman v. Brandt* (1966) 65 C2d 549, 554-555, 55 CR 417, 421 P2d 425] . The statement of decision should include all necessary supporting factual and legal findings with respect to such an award.

5.43[9] Court's Failure to Include Factual and Legal Bases of Decision Is Reversible Error. If a party makes a timely and procedurally proper request for a statement of decision, the court's failure to make the required explanation constitutes reversible error provided the party complaining submitted sufficient evidence on the controverted issue [*In re Marriage of Ananeh-Firemong* (1990) 219 CA3d 272, 282, 268 CR 83] . Even if the court issues a statement of decision, but omits a finding on a material issue, the court still commits reversible error [*South Bay Irr. Dist. v. California-American Water Co.* (1976) 61 CA3d 944, 995, 133 CR 166] .

Exception--Implied Finding:

If the omitted finding may be reasonably implied in the other findings, the omission is harmless error [*McAdams v. McElroy* (1976) 62 CA3d 985, 996, 133 CR 637] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureAppealsStandards of ReviewReversible Errors



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5.44 Party Must Notify Court of Omissions and/or Ambiguities in Statement of Decision to Avoid Waiver.

5.44[1] Notice to Court Avoids Inference That Court Decided Inadequacies in Favor of Opponent. When a party receives the court's statement of decision, the party should review it to determine whether it contains any ambiguities or fails to resolve any controverted issue or material subsidiary issue of fact [*see Kuffel v. Seaside Oil Co. (1977) 69 CA3d 555, 565, 138 CR 575*].

If the party brings the identified deficiencies to the court's attention, a reviewing court may not infer that the court decided the omitted or ambiguous matter in favor of the prevailing party [*CCP § 634; In re Marriage of Arceneaux (1990) 51 C3d 1130, 1133-1134, 275 CR 797, 800 P2d 1227*]. If a party fails to advise the trial court of omitted material issues or ambiguities in the statement of decision, a reviewing court will infer that the ambiguity was resolved in favor of the prevailing party [*Fladeboe v. American Isuzu Motors Inc. (2007) 150 CA4th 42, 59-60, 58 CR3d 225*].

5.44[2] Party Who Fails to Notify Court of Omission or Ambiguity Waives Statement's Inadequacy. A party who fails to notify the court that the statement of decision omits a controverted matter or contains an ambiguity waives the right to claim the statement is deficient on appeal [*In re Marriage of Ruelas (2007) 154 CA4th 339, 344, 64 CR3d 600; Fladeboe v. American Isuzu Motors Inc. (2007) 150 CA4th 42, 59-60, 58 CR3d 225*]. The appellate court will then infer that the lower court determined the omitted matter in favor of the prevailing party [*City of Corona v. Naulls (2008) 166 CA4th 418, 426-427, 83 CR3d 1*].

5.44[3] Party's Proposed Statement of Decision Does Not Constitute Notice Regarding Court's Statement of Decision. A party's proposed statement of decision filed before issuance of the court's statement of decision does *not* constitute notice to the court of deficiencies in the statement of decision [*Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 CA4th 1372, 1380, 25 CR2d 242*]. Rather, the objections must be filed after service of the court's statement of decision to pinpoint the location of the alleged deficiencies within the court's statement [*Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 CA4th 1372, 1380, 25 CR2d 242*].

5.44[4] Party Must Advise Court of Inadequacy Either Before Entry of Judgment or in Conjunction With Appropriate Motion. A party wishing to prevent a reviewing court from inferring that the trial court decided omitted or ambiguous matter in favor of the prevailing party must object to the deficiencies either before entry of judgment or in conjunction with a motion for new trial or motion to set aside the judgment [*CCP § 634*].

 Cross References:

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

Discussion of motion to set aside judgment, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureAppealsReviewabilityPreservation for Review



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5.45 Judge Who Heard Trial Must Sign Statement of Decision.

The judge who heard the case must be the judge who signs the statement of decision [CCP § 635; *Reimer v. Firpo* (1942) 94 CA2d 798, 800-801, 212 P2d 23] . If this judge becomes unavailable before the statement of decision is signed, the court must conduct another trial unless the parties waive the request for a statement of decision [*Swift v. Daniels* (1980) 103 CA3d 263, 265, 162 CR 863] .

Distinguish--New Trial:

It is not proper to move for a new trial when the judge who tried the case becomes unavailable, even after a trial was held. A motion for new trial is only available after a trial *and decision* by a judge, jury or referee [CCP § 656; *Reimer v. Firpo* (1942) 94 CA2d 798, 801, 212 P2d 23] .



Cross Reference:

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureTrialsBench Trials



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Chapter 5 Non-Jury Trials
VI. FORMS

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.46

5.46 Motion for Jury Trial After Waiver.

Motion for Jury Trial After Waiver.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	Case No. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR JURY
vs.	)	TRIAL AFTER WAIVER
_____ [name],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

To: Plaintiff/Defendant _____ [or other party] _____ [name] and to
_____ [name], his/her/its/their attorney(s) 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) _____
(number) of] this court, located at _____ [name of building and street address],
_____ [city], California, _____ [moving party, e.g., Defendant] will, and hereby does,
move, under *California Code of Civil Procedure Section 631*, for a trial by jury in this action. This motion is made on
the grounds that _____ [state grounds for motion, e.g., this is an action to recover damages resulting
from earth movement underlying plaintiff's lot and home and thus a proper case for jury trial under *California Code of
Civil Procedure Section 592*]. The interest of justice will be served by a jury trial in this matter.

The motion will be based on this notice of motion, on the attached supporting memorandum, the papers and records on file herein, _____[*either*] and on such supplemental affidavits or declarations and memoranda as may be filed subsequently herein, _____[*or*] and on such oral and documentary evidence as may be presented at the hearing on this motion.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:

CCP § 631(e)

Motion for Jury Trial After Waiver:

See 5.18

Related Form for Declaration in Support of Motion for Jury Trial After Waiver:

See 5.47

Related Form of Memoranda:

See California Points and Authorities, § 155.270 (Matthew Bender)



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VI. FORMS

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.47

5.47 Declaration in Support of Motion for Jury Trial After Waiver.

Declaration in Support of Motion for Jury Trial After Waiver.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	Case No. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR JURY
vs.	)	TRIAL AFTER WAIVER
_____ [name],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

I, _____ [name], declare:

I am _____ [e.g., the attorney for the plaintiff and moving party herein].

This is an action for _____ [state type of action, e.g., damages resulting from earth movement underlying plaintiff's lot and home].

On or about _____ [date], I first learned that this action had been placed on the non-jury calendar of the Superior Court of _____ [county] and was scheduled to be tried by court and not by jury.

_____ [State facts showing moving party did not actually waive jury trial or that the waiver was

through mistake, inadvertence, surprise, or excusable neglect, e.g., Moving party's original counsel failed to demand a jury trial in his/her Memorandum That a Civil Case Is At Issue. The Memorandum was filed before two of the defendants in this action had been served with summons and complaint. Subsequently, the pretrial conference set pursuant to the Memorandum was taken off calendar by stipulation of then plaintiff's counsel and the appearing defendant's counsel. Thereafter, an amended complaint was filed, the additional defendants served, and the case again set for trial. Thus, plaintiff's present counsel did not waive the right to jury trial in the manner shown above].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

Respectfully submitted,

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [party's status and name]

NOTES.

Authority:

CCP § 631(e)

Motion for Jury Trial After Waiver:

See 5.18

Related Form for Notice of Motion and Motion for Jury Trial After Waiver:

See 5.46

Related Form of Memoranda:

See *California Points and Authorities*, § 155.270 (Matthew Bender)



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Chapter 5 Non-Jury Trials
VI. FORMS

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.48

5.48 Request for Statement of Decision.

Request for Statement of Decision.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],)
Plaintiff,)
vs.)
_____, [name],)
Defendant.)
)
)
)

Case No. _____
REQUEST FOR STATEMENT OF DECISION

_____, [Party, e.g., Plaintiff John Smith], who appeared at the trial of the above-entitled action, hereby requests that the court issue a statement of decision explaining the factual and legal bases for its decision regarding the following controverted issues:

1. _____ [Specify controverted issue, e.g., Whether or not defendant breached a duty of care owed to plaintiff].

_____, [Set forth additional controverted issues. State and enumerate each issue separately.]

Dated: _____

Respectfully submitted,

_____ [firm name, if any]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:

CCP § 632

Request for Statement of Decision:

See 5.31 -5.35

Timing of Request for Statement of Decision:

See 5.36

Related Form for Proposed Statement of Decision:

See 5.49

Related Form of Memoranda:

See California Points and Authorities, Ch. 215, Statement of Decision (Matthew Bender)



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Chapter 5 Non-Jury Trials
VI. FORMS

1-5 MB Practice Guide: Trial & Post-Trial Civil Proc 5.49

5.49 Proposals for Statement of Decision.

Proposals for Statement of Decision.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	Case No. _____
_____ [name],	)	PROPOSALS FOR STATEMENT OF DECISION
Defendant.	)	
	)	
	)	

_____ [Specify party, e.g., Plaintiff John Smith] in the above-entitled action hereby makes the following proposals as to the content of the statement of decision:

1. That the factual and legal bases for the court's decision regarding the controverted issue of _____ [specify controverted issue to be included in statement of decision] be explained as follows:

a. The court based its decision on the following facts: _____ [set forth factual determinations explaining court's decision].

b. The legal basis for the court's decision is _____ [set forth legal determinations explaining court's decision].

_____ [Set forth any additional issues to be included. State and enumerate each issue separately.]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:

CCP § 632

Timing:

See 5.44[3]

Proposals for Statement of Decision:

See 5.37

Use of Proposed Statement of Decision:

See 5.38

Related Form for Request for Statement of Decision:

See 5.48

Related Form of Memoranda:

See California Points and Authorities, Ch. 215, Statement of Decision (Matthew Bender)



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Chapter 6 Jury Selection

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.syn

§ 6.syn Synopsis to Chapter 6: Jury Selection

6.01 Scope.

6.02 Objective and Strategy.

6.03 CHECKLIST: Planning for Jury Selection.

6.04 Options and Strategies.

6.05 Understanding Jury Selection Process.

6.05[1] Jury Commissioner Summons Jury Pool.

6.05[2] Jury Commissioner Selects Jury Panel.

6.05[3] Trial Court Completes Jury Selection.

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6.09[1] Court Ordinarily Uses Standard Questionnaire.

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6.12 Parties Have Right to Examine Jurors.

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6.13[3] Objecting Party Must Show That Question's Dominant Purpose Was Improper.

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6.15 Options and Strategies for Party Challenging Jury Panel.

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6.17 Challenge Must Meet Procedural Requirements.

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6.17[3] Serve Challenge to Panel on Parties and Jury Commissioner.

6.18 CHECKLIST: Challenging Individual Jurors for Cause and Rehabilitation of Jurors.

6.18[1] Challenging Party's Checklist.

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6.21 Challenge for Cause Must Specify Permissible Ground.

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6.21[3] Implied Bias.

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6.22 Challenge Must Meet Procedural Requirements.

6.22[1] Make Challenge for Cause Before Jury Is Sworn.

6.22[2] Exercise Challenge for Cause Before Any Peremptory Challenges.

6.22[3] Defendant Takes Any Challenge to Individual Juror for Cause First.

6.22[4] Make Challenge for Cause Orally or in Writing.

6.22[5] Rehabilitating Juror.

6.22[6] Court's Determination of Challenge.

6.23 CHECKLIST: Exercising Peremptory Challenges of Individual Jurors.

6.24 Options and Strategies.

6.25 Number and Apportionment of Peremptory Challenges Are Ordinarily Established by Law.

6.26 No Need to Support Peremptory Challenges With Showing of Cause.

6.27 Factors to Consider in Deciding Whether to Exercise Peremptory Challenge.

6.28 Peremptory Challenges Must Follow Procedural Requirements.

6.28[1] Parties Are Entitled to Full Jury Panel Before Exercising Peremptory Challenge.

6.28[2] Parties Exercise Peremptory Challenges Alternately.

6.28[3] Consecutive Passes Constitute Acceptance of Jury.

6.29 CHECKLIST: Objecting to Discriminatory Use of Peremptory Challenges (Wheeler Motion).

6.29[1] Moving Party's Checklist.

6.29[2] Responding Party's Checklist.

6.30 Options and Strategies for Moving Party.

6.31 Options and Strategies for Responding Party.

6.32 Counsel May Not Exercise Peremptory Challenges for Discriminatory Reason.

6.32[1] Counsel May Not Use Peremptory Challenges to Exclude Cognizable Group.

6.32[2] "Cognizable Group" Defined.

6.33 Party May Make Wheeler Motion to Quash Jury Panel Based on Opponent's Discriminatory Use of Peremptory Challenges.

6.33[1] Party May Object to Discriminatory Use of Peremptory Challenges.

6.33[2] Make Motion Before Jury Is Sworn.

6.33[3] Motion Proceeds in Three Steps.

6.33[4] Moving Party Must Make Prima Facie Case.

6.33[5] Responding Party Must Justify Exercise of Peremptory Challenges.

6.33[6] Court Must Determine Whether Challenges Were Based on Impermissible Group Bias.

6.34 Judicial Council Form MC-001--Juror Questionnaire for Civil Cases.

6.35 Notice of Motion and Motion to Approve Juror Questionnaire.

6.36 Stipulation and Order Regarding Calling Alternative Jurors.

6.37 Jury Selection Chart.



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Chapter 6 Jury Selection
I. STRATEGY

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.01

6.01 Scope.

This chapter covers:

- Planning for jury selection [see 6.03 -6.05].
- Participating in voir dire [see 6.06 -6.13; Forms: see 6.34 -6.37].
- Challenging the jury panel [see 6.14 -6.17].
- Challenging individual jurors for cause [see 6.18 -6.22].
- Rehabilitating a juror in response to a challenge for cause [see 6.20].
- Exercising peremptory challenges of individual jurors [see 6.23 -6.28].
- Objecting to the discriminatory use of peremptory challenges through use of *Wheeler* motion [see 6.29 -6.33].



Cross Reference:

Extensive discussion of voir dire, see California Trial Guide, Unit 10, Voir Dire Examination (Matthew Bender).

Core Statutes:

CCP §§ 190-237

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury

TrialsJurorsSelectionChallenges for CauseCivil ProcedureTrialsJury TrialsJurorsSelectionPeremptory ChallengesCivil

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Chapter 6 Jury Selection
I. STRATEGY

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.02

6.02 Objective and Strategy.

The objective of the jury selection process is to select a fair and impartial jury [see CCP § 222.5; Cal Rules Ct, Rule 3.1540]. In addition, particularly during voir dire, counsel may begin to establish a rapport with the jurors and prepare them to be receptive to the factual contentions and legal arguments that counsel will rely on at trial.

Realistically speaking, the jury selection process is one in which attorneys seek to impanel a jury that will be as predisposed to their side on the material issues as possible. Jury consultants, questioning during voir dire, and effective presentation of the evidence is, in the modern litigation context, dependent on a jury that is either predisposed on major issues towards the party's case or not predisposed to issues favoring the other party.

That said, the goal of jury selection should be to determine the predilections, biases, and beliefs of potential jurors so that the jury is at least a favorable jury. In the context of case law proscribing indoctrination of the jury, that means trying to find out what jurors really think, rather than simply asking whether they can be fair and impartial in spite of their beliefs. Only then will effective challenges for cause be possible, and only then will a truly effective use of peremptory challenges be possible that will level the playing field.

It is important to understand, at the outset, whether the case depends on emotional appeal, strict construction of a contract (and therefore jury instructions that direct attention to the contract), or any other aspect of the case that can be determinative of what kind of juror is desirable.



Warning:

These are heretical thoughts to attorneys and judges who view the process as one in which jurors ought to be impaneled without trying to determine how they will react to a specific case. But that is an idealistic and anachronistic view in today's litigation world. One example: in an insurance coverage trial, an issue is often raised that the policyholder (often a plaintiff) has known about the condition that results in the loss, a defense to coverage. Yet, if the jury is to support the defense, they have to buy into the notion that a corporation can lie, that middle managers know something they are not telling the insurers. In that factual construct, a juror who is in middle management of a corporation is not likely to see the policyholder plaintiff as inherently devious or likely to "hide the truth." So, in trying to determine what juror would be "unbiased," counsel would try to find potential jurors who are in middle management, responsible for decisions of the company, and the like (the insurers would want to exclude them while

policyholders would want them on the jury). The potential juror might not even be aware of these beliefs or biases. This is why in most trials jury consultants are employed, mock trials and focus groups are used, and the process has become more expensive. It is arguable whether the result is any more predictable, as well.

The term "jury selection" is really a misnomer. Trial attorneys do not select jurors. Rather, they engage in a process of excusing those individuals who they believe will be detrimental to their case while endeavoring to protect those prospective jurors they believe will assist their cause. This is done through rehabilitation of prospective jurors who have been challenged for cause and the skilled use of peremptory challenges.

 Cross Reference:

Discussion of permissible scope of voir dire, see 6.13.

 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 ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir Dire



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Chapter 6 Jury Selection
II. PLANNING FOR JURY SELECTION

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.03

6.03 CHECKLIST: Planning for Jury Selection.

☐ Review general procedures for jury selection, including:

☐ Jury commissioner's selection of jury panel for assignment to courtroom.

Authority:

CCP §§ 208, 219(a)

Discussion:

See 6.05

☐ Voir dire.

Discussion:

See 6.06 -6.13

☐ Exercise of challenges for cause.

Discussion:

See 6.14 -6.22

☐ Exercise of peremptory challenges.

Discussion:

See 6.23 -6.28

☐ *Wheeler* motions objecting to discriminatory use of peremptory challenges.

Discussion:

See 6.29 -6.33

☐ Prepare for jury selection.☐ Obtain and review available information about prospective jurors.☐ Prepare for voir dire.**Discussion:**

See 6.06 -6.13

☐ Prepare to exercise challenges for cause.**Discussion:**

See 6.14 -6.22

☐ Prepare to exercise peremptory challenges.**Discussion:**

See 6.23 -6.28

☐ Prepare to monitor other parties' use of peremptory challenges and to make *Wheeler* motion if appropriate.**Discussion:**

See 6.29 -6.33

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury

TrialsJurorsSelectionChallenges for CauseCivil ProcedureTrialsJury TrialsJurorsSelectionPeremptory Challenges



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Chapter 6 Jury Selection
II. PLANNING FOR JURY SELECTION

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.04

6.04 Options and Strategies.

Counsel's preparation for jury selection should include the following:

- Becoming familiar with the general jury selection process.



Cross Reference:

Overview of jury selection process, see 6.05.

- Obtaining and reviewing available information about members of the juror pool or jury panel, including any completed juror questionnaires provided by the jury commissioner.
- Preparing for and attending the court's pre-voir dire conference.
- Preparing to conduct voir dire examination of prospective jurors.



Cross Reference:

Discussion of voir dire, see 6.06 -6.13.

Counsel should become familiar with the particular judge's procedure in giving counsel the list of the panel, drawn randomly, in advance. From that list, counsel will know that the list of the panel drawn in the jury room is sent to the court in the order drawn. Some judges do not permit counsel to see the order, so that they will not know, after the first 12 jurors are seated in the box, which jurors are next and in which order. But that information is on the list, and when information is known about the panel, or in which questionnaires are used to obtain information from the panel members, knowing who will replace a challenged juror is important. Although judges may not want to divulge the order in which panel members will be placed into the jury box, it is arguable that knowing the order may in fact shorten the time to impanel the jury, and thereby help to facilitate judicial economy.



Judge's Perspective:

Mechanics of jury selection vary widely among trial courts. For example, some judges call 12 prospective jurors for examination, examine all 12 then call a new juror when a challenge is exercised. On the other end of the spectrum, some judges allow the party's to examine all prospective jurors in the

courtroom just once. Some judges impose time limits on questioning. These procedures vary widely from court to court, and counsel should gain a firm understanding of the procedure to be used and should clarify this during the pretrial conference.

In addition, counsel should be familiar with the legal principles underlying challenges for cause, both to the jury panel as a whole and to individual jurors, to be able to make and oppose such challenges as appropriate during voir dire.

 Cross Reference:

Discussion of challenges for cause, see 6.14 -6.22.

Finally, counsel should be familiar with the legal principles underlying the prohibition against the discriminatory use of peremptory challenges, so as (1) to avoid the improper use of such challenges, and (2) to be able to make a *Wheeler* motion if appropriate [see CCP § 231.5; *People v. Wheeler* (1978) 22 C3d 258, 148 CR 890, 583 P2d 748] .

 Cross Reference:

Discussion of prohibition against discriminatory use of peremptory challenges, see 6.32.

Keep in mind the use of juror questionnaires to elicit information, particularly in complex cases [see Cal Rules Ct, Stds Jud Admin, Std 3.25(d)]. Judges may be reluctant to add the layer of complexity that questionnaires bring, but parties can often obtain the court's consent, particularly if they are themselves in agreement, to use questionnaires on the ground that it shortens voir dire and elicits more information.

 Cross Reference:

Discussion of juror questionnaire, see 6.09[2].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury

TrialsJurorsSelectionChallenges for CauseCivil ProcedureTrialsJury TrialsJurorsSelectionPeremptory ChallengesCivil ProcedureTrialsJury TrialsJurorsSelectionVoir Dire



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Chapter 6 Jury Selection
II. PLANNING FOR JURY SELECTION

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.05

6.05 Understanding Jury Selection Process.

6.05[1] Jury Commissioner Summons Jury Pool. When jurors are required for the trial courts, the county jury commissioner estimates the number of qualified prospective jurors needed and summons them for service [*CCP* § 208; *see CCP* § 203 (general qualifications for jury service)]. The jury commissioner is authorized to excuse prospective jurors who establish undue hardship [*see CCP* §§ 204(b), 218; *Cal Rules Ct, Rule 2.1008(d)*]. The group of prospective jurors who qualify for assignment to trial jury panels is called the "juror pool" [*CCP* § 194(e)].

► **Cross References:**

Discussion of general qualifications for jury service, *see* 6.21[2].

Discussion of jury section procedures, *see California Trial Guide*, § 10.01 *et seq.* (Matthew Bender).

6.05[2] Jury Commissioner Selects Jury Panel. From the jury pool, the jury commissioner randomly selects a group of prospective jurors to be sent to the courtroom for voir dire [*CCP* § 219(a)]. This group is called the "trial jury panel" [*CCP* § 194(q)].

6.05[3] Trial Court Completes Jury Selection. When a trial jury panel has been assigned to a courtroom, the court presides over the remainder of the process of selecting a trial jury. This process includes the following:

- Voir dire examination of prospective jurors by the court and by counsel [*see CCP* §§ 222, 222.5].

► **Cross Reference:**

Discussion, *see* 6.11 -6.13.

- The determination of any challenge to the jury panel as a whole [*see CCP* § 225(a)].

► **Cross Reference:**

Discussion, *see* 6.16, 6.17.

- Use of questionnaires or other mechanisms to obtain advance knowledge about members of the jury panel.

➡ **Cross Reference:**

Discussion, see 6.09.

- The determination of the judge's standards for determining cause challenges.

➡ **Cross Reference:**

Discussion, see 6.22[6].

- The exercise and determination of parties' challenges to individual jurors for cause [see CCP §§ 225(b), 226-229].

➡ **Cross Reference:**

Discussion, see 6.21, 6.22.

- The exercise of parties' peremptory challenges to individual jurors [see CCP § 231].

➡ **Cross Reference:**

Discussion, see 6.25 -6.28.

- The determination of any *Wheeler* motion objecting to a party's discriminatory exercise of peremptory challenges [see CCP § 231.5; *People v. Wheeler* (1978) 22 C3d 258, 148 CR 890, 583 P2d 748] .

➡ **Cross Reference:**

Discussion, see 6.32, 6.33.

- Swearing of the trial jury [see CCP § 232].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionChallenges for Cause



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Chapter 6 Jury Selection
III. PARTICIPATING IN VOIR DIRE

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.06

6.06 CHECKLIST: Participating in Voir Dire.

☐ Determine whether to seek answers to written questions in addition to questions contained in standard Juror Questionnaire.

☐ Review questions asked in standard Juror Questionnaire [Judicial Council Form MC-001].

Form:

See 6.34

☐ Review issues in case, and parties' factual contentions and legal arguments, to determine whether written answers to additional questions would be useful in voir dire, for example:

☐ By eliminating need to ask repetitive questions during oral voir dire.

☐ By identifying areas for further questioning during oral voir dire.

☐ If jurors' answers to additional written questions are desired, move for approval of juror questionnaire.

Authority:

CCP § 205(c), (d); Cal Rules Ct, Rule 3.1540; Cal Rules Ct, Stds Jud Admin, Std 3.25(a)(1)

Discussion:

See 6.09[2]

☐ Draft proposed questionnaire.

☐ Draft notice of motion, motion, memorandum of points and authorities, and supporting declarations.

Form:

See 6.35

☐ File and serve moving papers at least three court days before pre-voir dire conference.

Authority:

Judicial Council Form MC-001, § 2B

Form:

See 6.34

☐ Determine whether to move in limine for order limiting opponent's voir dire, considering:

Discussion:

See 6.08[5]

☐ Opposing counsel's reputation or prior conduct during voir dire.

☐ Opposing counsel's probable trial strategy as revealed during discovery.

☐ Any aspects of particular case that might tempt any attorney to engage in questionable voir dire practices.

☐ If moving in limine for order limiting opponent's voir dire, prepare motion.

Authority:

See *Cal Rules Ct, Rule 3.1540*

☐ Review any advance information regarding jury panel to determine whether it may be advisable to make in limine motion to conduct voir dire of one or more prospective jurors in chambers, considering matters such as:

☐ Whether questions to particular prospective juror may embarrass that juror.

☐ Whether questions to be asked of particular juror might prejudice other panel members against counsel's client.

Authority:

CCP § 222.5; Cal Rules Ct, Rule 3.1540; Cal Rules Ct, Stds Jud Admin, Std 3.25(b)

Discussion:

See 6.08[6]

- ☐ If fewer than 12 jurors are desired, contact opposing counsel to determine whether stipulation can be reached establishing jury size at some number less than 12.

Authority:

CCP § 220

Discussion:

See 6.08[2]

- ☐ For jury of fewer than 12, what vote is required for a verdict.

Discussion:

See 6.08[2]

- ☐ Determine whether alternate jurors should be impaneled, considering whether trial is likely to be protracted and any other circumstances that might make it desirable to have alternates available.

- ☐ If alternate jurors are desirable:

- ☐ Contact opposing counsel to determine whether stipulation regarding number of alternate jurors can be reached.

Form:

See 6.08[4]

- ☐ If opposing counsel will not stipulate to impanelment of alternates, prepare to ask court at pre-voir dire conference for order to impanel alternates.

Authority:

CCP § 234

Discussion:

See 6.08[4]

- ☐ Prepare to attend pre-voir dire conference.

Discussion:

See 6.08

- ☐ Draft list of witnesses counsel intends to call.

Authority:

Cal Rules Ct, Stds Jud Admin, Std 3.25(b)

- ☐ Draft brief outline of case, including:

Authority:

Cal Rules Ct, Stds Jud Admin, Std 3.25(b)

- ☐ Description of injuries and damages.
- ☐ In eminent domain case:
- ☐ Outline of parties' contentions regarding value of property taken.
- ☐ Outline of any alleged severance damages or special benefits.

- ☐ Attend pre-voir dire conference.

Authority:

Cal Rules Ct, Stds Jud Admin, Std 3.25(b)

Discussion:

See 6.08

- ☐ Present any stipulations reached by counsel, such as:
- ☐ Stipulation for jury of fewer than 12 persons.
- ☐ Stipulation for number of jurors required to reach verdict.
- ☐ Stipulation for impanelment of alternate jurors.
- ☐ Present any in limine motions, such as:
- ☐ Motion for approval of juror questionnaire.
- ☐ Motion to limit opponent's voir dire.
- ☐ Motion to conduct voir dire in chambers.
- ☐ Motion to impanel alternate jurors.
- ☐ Be prepared to discuss and resolve any other matters regarding voir dire procedure, including

allocation of peremptory challenges among multiple parties on any side of case.

Authority:

CCP § 231(c)

☐ At voir dire:

☐ Make accurate notes of prospective jurors' answers to court's questions.

☐ After completion of court's examination, conduct own examination of jurors.

☐ Ask questions designed to elicit information necessary for exercise of peremptory and challenges and challenges for cause.

☐ Keep questioning within reasonable limits prescribed by court.

Authority:

CCP § 222.5

Discussion:

See 6.12

☐ When other parties' counsel conduct their examinations, raise objection to any question whose dominant purpose is improper, such as following:

☐ Attempt to precondition prospective jurors to particular result.

☐ Attempt to indoctrinate jury.

☐ Attempt to question prospective jurors concerning pleadings or applicable law.

Authority:

CCP § 222.5; see Cal Rules Ct, Stds Jud Admin, Std 3.25(f)

Discussion:

See 6.13

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Jury Trials Jurors Selection Voir Dire



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6.07 Options and Strategies.

The voir dire process is important because it collects the information necessary to make crucial decisions in the selection of the jury. The statutorily recognized purposes of voir dire are to select a fair and impartial jury and elicit information relevant to the exercise of challenges for cause and peremptory challenges [see CCP § 222.5].

In preparing for voir dire, and in light of the objectives of voir dire, counsel should attempt to frame open-ended questions designed to permit a dialogue with the juror that will elicit real information, rather than simple "yes" or "no" questions that reveal little.

In addition, the voir dire process affords counsel the first opportunity to interact with members of the jury, and it provides the jurors with their first exposure to the case and their initial impressions of the parties and the attorneys. This opportunity also suggests that open-ended questions, and actually listening to and reacting to the juror's responses, will enhance the connection counsel wants to establish with a prospective juror as well as enhance the opportunity to obtain useful information. Therefore, counsel's participation in voir dire should be planned to accomplish the following objectives:

- Obtaining information for use in exercising challenges for cause.



Cross Reference:

Discussion, see 6.21, 6.22.

- Obtaining information for use in exercising peremptory challenges.



Cross Reference:

Discussion, see 6.26 -6.28.

- Establishing credibility and building rapport with the jurors.
- Informing and educating the jurors about some of the central contentions counsel will be making.



Cross Reference:

Discussion of tactical considerations in voir dire, see *California Trial Guide*, § 10.20 *et seq.* (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionVoir Dire



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6.08 Court Usually Conducts Pre-Voir Dire Conference.

6.08[1] Judge Should Hold Conference Before Voir Dire. Before voir dire questioning begins, the trial judge ordinarily confers with counsel outside the hearing of the prospective jurors and with a court reporter present. During the conference counsel should provide the judge with a list of witnesses counsel intends to call and a brief outline of the case, including any injuries or damages. In an eminent domain case, counsel should outline the contentions of the parties concerning the value of the property taken and any alleged severance damages or special benefits [Cal Rules Ct, Stds Jud Admin, Std 3.25(b)].



Strategic Point:

The witness list and outline of the case may be included in a trial brief, which may be submitted by counsel to familiarize the trial judge with the factual background, the factual and legal basis for claims and defenses asserted by the parties, disputed factual and legal issues, and critical evidentiary questions. Counsel should learn in advance what the court's usual practice is concerning presentation to the jury of the witness list, outline of the case, and the like.



Judge's Perspective:

Counsel should be prepared to discuss the number of peremptory challenges per side and stipulate the matter on the record before starting voir dire to prevent disagreements during the selection process and avoid delay.



Cross Reference:

Discussion of trial brief, see *Ch. 1, Preparing for Trial, 1.37*.

At the conference, the parties may propose specific questions or areas of inquiry for the judge to address in his or her voir dire of the jurors [Cal Rules Ct, Rule 3.1540]. The judge then should advise counsel of the questions or areas of inquiry the judge will ask and will allow during voir dire [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(b)].

Example:

The Standards of Judicial Administration Recommended by the Judicial Council include sample questions for use in civil cases generally [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(c)] and in eminent domain cases [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(d)].

Cross References:

Discussion of motions in limine to limit scope of voir dire questioning, see 6.08[5].

Discussion of parties' right to propose additional questions for court to ask, see 6.11[2].

Other matters that may be covered in the pre-voir dire conference include the following:

- The use of written questionnaires.
- The number of jurors to be impaneled.
- The number of alternate jurors, if any, to be impaneled.
- Any local rules or the judge's standing orders prescribing special procedures for the exercise of challenges for cause or peremptory challenges.
- If there are multiple parties on any side, the allocation of peremptory challenges.

6.08[2] Parties May Agree to Use Fewer Than 12 Jurors. The trial jury generally will consist of 12 persons, but the parties may agree to any number less than 12 in a civil case [CCP § 220].



Strategic Point:

Counsel must also consider, for juries of fewer than 12, what vote will be required for a verdict, because at least three fourths of the jury must agree on the verdict [see CCP § 618].

Consider:

There is less of a chance of a hung jury with a smaller jury, so if the client cannot afford a retrial, it may make sense to stipulate to a smaller jury.

6.08[3] Parties May Stipulate to Question Jurors Outside Judge's Presence. On stipulation of the parties, the court may permit counsel to examine the jurors outside the judge's presence [CCP § 222.5; Cal Rules Ct, Rule 3.1540].

6.08[4] Court May Require Selection of Alternate Jurors. The trial judge may require the selection of additional jurors, called "alternate jurors," if the trial judge believes the trial is likely to be protracted or if the parties stipulate to the selection of alternates [CCP § 234].

Jury Instructions:

Instruction to Alternate Jurors, see *Judicial Council of California Civil Jury Instructions*, CACI Nos. 111, 5015 (LexisNexis Matthew Bender).

Substitution of Alternate Juror, see *Judicial Council of California Civil Jury Instructions*, CACI No. 5014 (LexisNexis Matthew Bender).

Cross Reference:

Form, see 6.36.

The judge will enter the reason for calling alternate jurors in the minutes of the court, and then, immediately after the jury is impaneled and sworn, the court will direct the calling of one or more alternate jurors [CCP § 234]. Alternate jurors are drawn from the same source and in the same manner as regular jurors. They must have the same qualifications as regular jurors and are subject to the same examination [CCP § 234].

Alternate jurors are subject to the same challenges, except that each side [see CCP § 231(c)] is entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called [CCP § 234].

 Cross Reference:

Discussion of peremptory challenges, see 6.23 -6.28.

Alternate jurors take the same oath as regular jurors, and they are seated so that they have equal power and facilities to hear and see the proceedings [CCP § 234].

 Warning:

The court must designate which jurors are alternates at the outset of the trial. It is improper, for example, for a court to empanel 14 jurors to hear the evidence and then, after trial, randomly select 12 of them to deliberate [*People v. Glenn* (1990) 225 CA3d 618, 622-623, 275 CR 276] .

6.08[5] Use Motion In Limine to Limit Opponent's Voir Dire. If there is reason to suspect that opposing counsel's voir dire questioning is likely to exceed the permissible scope, counsel may move the court to exercise its power to prescribe "reasonable limits" on voir dire by counsel [Cal Rules Ct, Rule 3.1540(c)]. Thus, the court may issue an order preventing opposing counsel from exploring certain subject areas, asking certain questions, or using certain examination techniques.

 Cross Reference:

Discussion of permissible scope of voir dire, see 6.13.



Strategic Points:

- The need for an order limiting the scope of voir dire might be suggested by opposing counsel's reputation or prior performance, by opposing counsel's probable trial strategies as revealed in discovery, or by certain aspects of the case that might tempt an attorney to engage in objectionable voir dire practices.
- A motion to limit the scope of voir dire should be made outside the presence of the prospective jurors but with the court reporter present. Although the motion may be made immediately before opposing counsel begins voir dire, the better practice is to make the motion in the pretrial conference or before jury selection begins.

6.08[6] Counsel May Move to Conduct Questioning in Chambers. Counsel may move for an order to allow voir dire of one or more prospective jurors outside the presence of the other jurors. The court may grant the motion pursuant to its power to prescribe voir dire procedure [see Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(b)] and its duty to select a fair and impartial jury [see CCP § 222.5; Cal Rules Ct, Rule 3.1540]. The motion may be based on information counsel already possesses about the juror's background from sources such as the juror questionnaire or on the unique features of the particular case.

Examples:

This motion may be appropriate if counsel has reason to believe that questions to a certain prospective juror may touch on sensitive areas in the juror's background that might cause embarrassment if exposed to the other jurors. Also, if the kind of questions that will be asked of certain prospective jurors might prejudice the remaining jurors against the client, counsel may seek to conduct the questioning in chambers.

Consider:

It is best to begin telling jurors that if they want to answer any question privately, they should say so. If using a questionnaire, tell jurors to note on the questionnaire if they want any questioning conducted privately.

**Cross References:**

Discussion of juror questionnaire, see 6.09[1].
Form, see 6.34.

**Timing:**

A motion to conduct questioning in chambers may be made at the pre-voir dire conference [see Cal Rules Ct, Stds Jud Admin, Std 3.25(b)] or before any questions are asked of the prospective juror involved. In some instances, the motion can be made during voir dire, if during the course of open voir dire information comes to light necessitating that further examination of a particular juror be made outside the presence of the other jurors.

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedureTrialsJury
TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireReal Property
LawEminent Domain ProceedingsProcedure



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6.09 Using Juror Questionnaires.

6.09[1] Court Ordinarily Uses Standard Questionnaire. If the standard Juror Questionnaire for Civil Cases [Judicial Council Form MC-001] has not yet been administered to the prospective jurors, the judge and parties may ask the panel to fill out the questionnaire before the start of voir dire questioning [see Cal Rules Ct, Stds Jud Admin, Std 3.25(a)(1)].

Cross Reference:

Form, see 6.34.



Strategic Point:

Counsel should pay particular attention to whether the standard questionnaire will provide sufficient information to permit a rational evaluation of the juror's personal preferences and biases.

Cross References:

Discussion of supplemental questionnaires, see 6.09[2].

Discussion of use of questionnaires, see *California Trial Guide*, § 10.07 (Matthew Bender).



Timing:

If the judge uses a written questionnaire, it typically is distributed to the jurors in the morning, who answer questions and return the questionnaire in the afternoon. Counsel then have overnight to review and correlate the responses, and oral voir dire begins the following morning.

6.09[2] Parties May Seek Approval of Supplemental Questionnaires. A party may propose additional questions for inclusion in the standard questionnaire or other written questionnaire used by the judge [CCP § 205(c), (d); see *Cal Rules Ct, Rule 3.1540*; Cal Rules Ct, Stds Jud Admin, Std 3.25(a)(1)]. The court has discretion to determine the contents of questionnaires, but the court should not arbitrarily or unreasonably refuse to submit reasonable written questionnaires

submitted by the parties [CCP § 222.5].

Judge's Perspective:

Many judges resist the use of written questionnaires in ordinary cases because they add additional time to what is otherwise a routine case. Questionnaires are more often used for cases involving (1) sensitive issues, or (2) complex cases. For sensitive cases, issues such as race and religion may be more readily answered in a questionnaire whereas the prospective juror may be hesitant to respond in open court. For complex cases, questionnaires that may add a half day to the process of a three month trial cause little impact on timing, but a half day addition for a three day case is less likely to be approved.

Timing:

Proposed supplemental questions should be filed and served at least three court days before the pre-voir dire conference [see Judicial Council Form MC-001, § 2B].

Cross Reference:

Form of motion, see 6.35.

A written questionnaire is a complement to traditional oral voir dire, but in most cases is not a substitute for voir dire. A written questionnaire eliminates the need to ask repetitive questions about basic facts, so counsel can better use the time the judge does allow for oral voir dire.

Consider:

Keep in mind the logistics issues raised by the use of questionnaires. Once the questionnaire is completed by the prospective juror, sufficient copies must be made for the attorneys and the trial judge. The questionnaires must then be reviewed and analyzed before the prospective jurors who completed the questionnaires are examined. Rarely is this a process which can be completed over a lunch break. A well-prepared trial attorney will have pens and pencils handy in case the court clerk runs short.

Counsel's right to conduct oral voir dire is not limited or otherwise affected by counsel's submission of a proposed written questionnaire [see CCP § 222.5].



Strategic Point:

This does not bar counsel from conducting oral voir dire. Nor is counsel precluded from follow-up questions in connection with responses in a questionnaire. For example, in a questionnaire response, a juror may indicate that he or she does not like overly intrusive sales people. A follow-up question might point to that response, and ask, "Tell me about your reaction to such people. What is it that you do not like?" The questionnaire response may open up an area of dialogue that will get the juror talking about the subject. A follow-up question that simply asks whether that belief would interfere with the juror's ability to be fair and impartial will not provide useful information in determining whether the juror's response is material.



Warning:

Be aware that many jurors may believe that the questionnaires are confidential. Questionnaire answers are public records if the potential juror is questioned on voir dire, and any questionnaire should inform potential jurors in the introduction to the questionnaire that their questionnaire answers will become part of the public record of the trial if they are called to the jury box for voir dire [*Copley Press, Inc. v. Superior Court* (1991) 228 CA3d 77, 80-81, 278 CR 443] . Therefore, a questionnaire should not ask for

confidential information such as a juror's home address, telephone number, Social Security number, or driver's license number. The questionnaire should also inform the potential jurors that, if a question calls for information they wish to keep confidential, they should not answer the question but speak to the trial judge and attorneys privately [*Bellas v. Superior Court* (2000) 85 CA4th 636, 639, 644, 102 CR2d 380]



Strategic Point:

A major goal of a questionnaire is to identify the jurors least favorable to the client's position, without revealing to the other side the jurors most favorable to the client's position. One way to achieve this is to state the position least favorable to the client and ask if the jurors agree with it. For example, in a medical-malpractice case, the plaintiff's counsel might propose the following question: "Do you believe that damages awarded in most medical malpractice cases are too high?" A "yes" answer will indicate that the responding juror probably will not be sympathetic to the plaintiff's position, telling the plaintiff that this juror should be stricken. A "no" answer, on the other hand, will not reveal to the defendant which jurors, if any, believe that too little money is awarded in most cases.

Consider:

Jury selection is not so much jury *selection* as jury *deselection*. In general, on a questionnaire or oral voir dire, frame questions to identify only the jurors to challenge, the worst 20 percent. Counsel does not want to reveal which jurors are best for the client's position, who the other side would want to challenge. In general, good questions are those to which 80 percent of the prospective jurors respond in a way that is neutral or good for the client's position; bad prospective jurors will respond the other way. This is the "80/20 rule" for jury selection.



Strategic Point:

If questionnaires of any sophistication are contemplated, which depends on the matter in controversy and the client's willingness to incur costs, a professional jury consultant may be helpful in fashioning the questions. A useful questionnaire will elicit information concerning a juror's predilections and beliefs that the juror might not recognize exist. Professional help in that effort is useful and may be necessary.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoir Dire



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6.10 Jurors Are Seated Randomly for Voir Dire.

When an action is called for trial by jury, the clerk or judge usually selects the names of the jurors randomly for voir dire, until the jury is selected or the panel is exhausted [*CCP* § 222(a)]. However, if the jury commissioner has provided the court with a list of the jury panel in random order, the court must seat prospective jurors for voir dire in the order provided by the list [*CCP* § 222(b)].

Record Keeping:

Once the prospective jurors are seated, counsel should have a ready means to keep track of the information that is learned about each prospective juror during voir dire. An efficient way to record this information during voir dire and have it readily available for the exercise of challenges is to maintain a jury selection chart. A typical chart lists the seated prospective jurors and has space for counsel to write in relevant information as it becomes known. For example, a jury selection chart can consist of a grid of squares, each providing sufficient spaces for the name, address, marital status, number and ages of children, and occupation of each prospective juror, as well as notes of any other salient characteristics counsel has observed, and counsel's impression of each person as a potential juror. In addition, the attorney should provide space in the chart to keep a record of challenges taken by each side. Entries in the chart should be made in pencil so that they can be easily adjusted to accommodate changes in the seated group of prospective jurors. Another useful method is to size the jury selection chart to accommodate stick-on notes that can be replaced as prospective jurors are excused.



Cross Reference:

Form, see 6.37.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Jury Trials Jurors Selection Voir Dire



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6.11 Court Examines Prospective Jurors.

6.11[1] Court Must Examine Jurors. To select a fair and impartial jury, the trial judge must examine the prospective jurors orally, by written questionnaire, or by both methods [*CCP § 222.5; Cal Rules Ct, Rule 3.1540(b)*].

Prerequisite:

Before the court's examination, the prospective jurors take an oath, under which they agree to answer questions accurately and truthfully under penalty of perjury [*CCP § 232(a)*].

6.11[2] Parties May Submit Questions for Court's Examination. Counsel may submit additional questions for the judge's oral questioning of the jurors [*Cal Rules Ct, Rule 3.1540(c)*].

In exercising its discretion to decide which questions to ask, the court has a responsibility to assure that voir dire is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors [*People v. Wilborn (1999) 70 CA4th 339, 343, 82 CR2d 583*] .

Example:

In a criminal case in which the defense rested entirely on a black defendant's challenge to the credibility of white police officers, it was error for the trial court to refuse to ask any questions regarding racial bias [*People v. Wilborn (1999) 70 CA4th 339, 343, 82 CR2d 583*] .

To determine the existence of grounds for a challenge for cause, the judge may examine prospective jurors by asking about hypothetical situations based on the issues to be tried [*Kelly v. Trans Globe Travel Bureau, Inc. (1976) 60 CA3d 195, 209, 131 CR 488*] .



Strategic Point:

It may be preferable to have the court, rather than counsel, ask certain questions. For example, a question that deals with a sensitive issue might antagonize or embarrass one or more jurors [*see, e.g., People v. Wilborn (1999) 70 CA4th 339, 347-348, 82 CR2d 583* (questions regarding possible racial bias)]. By

having the court ask the questions, counsel and client can avoid becoming targets of the jurors' antagonism or resentment. It may also be preferable to ask these questions privately, out of the presence of other potential jurors. Most judges will understand and agree to conduct sensitive voir dire in chambers or at a sidebar.

**Timing:**

Counsel should submit proposed additional questions to the court in writing, with a copy to opposing counsel, at a pretrial conference or before voir dire [see Cal Rules Ct, Stds Jud Admin, Std 3.25(b)]. Waiting until the court has completed its preliminary questioning of the prospective jurors to submit additional questions can result in a delay of voir dire while opposing counsel and the court review the proposed questions.

Legal Topics:

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

Civil Procedure Trials Jury Trials Jurors Selection Voir Dire



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6.12 Parties Have Right to Examine Jurors.

On completion of the judge's initial examination, counsel for each party has the right, by oral and direct questioning, to examine any of the prospective jurors to enable counsel to intelligently exercise both peremptory challenges and challenges for cause [*CCP* § 222.5; *Cal Rules Ct, Rule 3.1540(c)*].

Distinguish:

In federal district court, judges typically conduct voir dire without counsel's participation [*see, e.g.*, ED Cal LR 47-162].

➡ **Cross Reference:**

Discussion of voir dire in federal court, *see*.

On stipulation by counsel for all the parties, the judge may permit counsel to examine the prospective jurors outside the judge's presence [*CCP* § 222.5; *Cal Rules Ct, Rule 3.1540(d)*].

➡ **Cross Reference:**

Sample voir dire questions, *see* California Trial Guide, Unit 10, Voir Dire Examination (Matthew Bender).

Legal Topics:

For related research and practice materials, *see* the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionVoir Dire



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6.13 Permissible Scope of Examination.

6.13[1] Court May Impose Reasonable Limits on Parties' Examination. The scope of the examination conducted by counsel must be within reasonable limits prescribed by the trial court in its sound discretion. In exercising that discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex legal or factual elements in the case and the individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case [*CCP* § 222.5]. The court must permit questioning about legal doctrines that are material to the trial and controversial in the sense that they are likely to evoke strong feelings and resistance to their application [*People v. Pinholster* (1992) 1 *CA4th* 865, 915, 4 *CR2d* 765, 824 *P2d* 571] .

During any examination conducted by counsel, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case [*CCP* § 222.5]. Merely because a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel [*CCP* § 222.5].

Permissible questions may include questions designed to discover grounds for challenges for cause [*see, e.g., Rousseau v. West Coast House Movers* (1967) 256 *CA2d* 878, 882, 64 *CR* 655] , but also questions reasonably calculated to discover information that may assist in the intelligent exercise of peremptory challenges [*CCP* § 222.5; *see, e.g., Pantos v. City & County of San Francisco* (1984) 151 *CA3d* 258, 263-264, 198 *CR* 489] .

Examples--Permissible Questions:

Permissible questions include:

- Counsel may ask questions designed to detect subtle or unconscious attitudes or biases [*People v. Wells* (1983) 149 *CA3d* 721, 727, 197 *CR* 163] .
- In a personal-injury action, counsel may ask prospective jurors whether they have any interest in a particular insurance company if the question does not necessarily convey the impression that the defendant was insured by that company [*Hart v. Wielt* (1970) 4 *CA3d* 224, 230, 84 *CR* 220] .

- In a defamation action, counsel may ask prospective jurors if they had heard of the plaintiff's prior criminal trial for theft that was the basis for the later civil suit [*Russell v. Geis* (1967) 251 CA2d 560, 569, 59 CR 569] .

The court may not permit counsel to attempt to precondition the prospective jurors to a particular result or allow counsel to comment on the personal lives and families of the parties or their attorneys. Nor should the court allow counsel to question the jurors concerning the pleadings, the applicable law, the meaning of particular words and phrases, or the comfort of the jurors, except in unusual circumstances in which, in the court's sound discretion, such questions become necessary to ensure the selection of a fair and impartial jury [Cal Rules Ct, Stds Jud Admin, Std 3.25(f); *People v. Fierro* (1991) 1 C4th 173, 209, 3 CR2d 426, 821 P2d 1302 (improper on voir dire for party to try to educate jury panel to particular facts of case, compel jurors to commit themselves to vote particular way, prejudice jury for or against particular party, argue case, indoctrinate jury, or instruct jury in matters of law)].

Judge's Perspective:

What is preconditioning and what is legitimate questioning can sometimes be a blurred line. In these instances, what may seem to be preconditioning is not objected to by the opposing party because the opposing party is making the strategic decision that the other party will allow the same latitude in questioning. Judges may be reluctant to object sua sponte in these instances, but the judge will likely object when the party asks to the jury to prejudge the case or clearly goes over the line of proper questioning.



Strategic Point:

Actual practice will vary, but some level of preconditioning the jury is usually tolerated. Counsel may want to use voir dire to start getting out trial themes and seeing how the jurors react, as well as to ferret out bias regarding the basic facts of the case. One way to do this is to refer to the brief summary of the case that the judge typically reads at the start of the trial, or say something about what the evidence will show, and then ask if counsel's client starts out on a level playing field.

Exception:

Although questions about the law are generally prohibited, the court must permit questioning about legal doctrines that are material to the trial and controversial in the sense that they are likely to evoke strong feelings and resistance to their application [*People v. Pinholster* (1992) 1 C4th 865, 915, 4 CR2d 765, 824 P2d 571] .

The court may not impose unreasonable or arbitrary time limits on the parties' questioning of jurors [CCP § 222.5].

6.13[2] Court Generally May Not Require Advance Submission of Parties' Questions. The trial judge should permit counsel to conduct voir dire without requiring the prior submission of questions unless a particular counsel engages in improper questioning [CCP § 222.5]. In this context, an "improper question" is any question that, as its dominant purpose, attempts to precondition or commit the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law [CCP § 222.5; *People v. Fierro* (1991) 1 C4th 173, 209, 3 CR2d 426, 821 P2d 1302 (improper on voir dire for party to try to educate jury panel to particular facts of case, compel jurors to commit themselves to vote particular way, prejudice jury for or against particular party, argue case, indoctrinate jury, or instruct jury in matters of law)]].

6.13[3] Objecting Party Must Show That Question's Dominant Purpose Was Improper. A question asked by counsel on voir dire generally is not objectionable unless an improper objective is the dominant purpose of the question [see CCP § 222.5 ("improper question" that triggers court's power to require advance submission of questions is one

whose dominant purpose is improper)). Thus, any objection to an adverse party's question must emphasize that the dominant purpose of the question is improper.

Counter-Attack:

In response to an objection, a questioner should explain how the question is designed to elicit information that is necessary for counsel to intelligently exercise peremptory challenges and challenges for cause [see *CCP* § 222.5].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionVoir Dire



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IV. CHALLENGING JURY PANEL

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6.14 CHECKLIST: Challenging Jury Panel.

- ☐ Determine whether grounds to challenge entire jury panel exist, such as any of following:

Authority:

CCP § 225(a)

Discussion:

See 6.16

- ☐ Review available information about panel members to ascertain whether cognizable group has been systematically excluded from jury panel.

Authority:

Adams v. Superior Court (1974) 12 C3d 55, 60, 115 CR 247, 524 P2d 375

- ☐ Review proceedings on voir dire to determine whether any potential juror made biased comments that might have infected entire panel.

Authority:

See *People v. Martinez (1991) 228 CA3d 1456, 1466, 279 CR 858*

- ☐ Review proceedings on voir dire to determine whether any potential juror expressed "expert-like" opinion regarding issue in case that might have prejudiced entire panel.

Authority:

Mach v. Stewart (9th Cir 1998) 137 F3d 630, 633

☐ If grounds exist to challenge entire jury panel, prepare formal challenge in writing that plainly and distinctly states facts constituting grounds of challenge.

Authority:

CCP § 225(a)(1)

Discussion:

See 6.17[2]

☐ Before any challenges to individual jurors, and before jury is sworn, serve copy of challenge on:

☐ Each party.

☐ Jury commissioner.

Authority:

CCP §§ 225(a)(1), (2), 227

Discussion:

See 6.17[2]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral Overview



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6.15 Options and Strategies for Party Challenging Jury Panel.

If an error or problem occurs in the course of jury selection that taints the entire jury panel so as to make it unlikely that an impartial and representative jury can be selected, counsel may choose the option of challenging the entire panel [*see CCP § 225(a)*]. Counsel should therefore take note when such an error occurs, for example, when it becomes apparent that a cognizable group has been excluded from the panel, or when a potential juror makes a comment that might taint the entire panel. In such an instance counsel must decide whether to challenge the entire panel before challenging any individual juror and before the trial jury is sworn [*see CCP §§ 225(a)(1), 227*].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsSelectionVoi
Dire



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6.16 Party May Challenge Panel Only for Cause.

An objection to the entire trial jury panel may be exercised by any party to the action on the ground of cause [CCP § 225(a)].

Judge's Perspective:

Objection to a jury panel in civil cases is extremely rare.

Examples:

No specific grounds for such a challenge are specified by statute [see CCP § 225(a)], and it is unlikely to arise in a civil action unless something inadmissible or inflammatory is said in front of the whole panel. In criminal cases entire panels have been disqualified when the circumstances made it unlikely that an impartial and representative jury could be selected. Some examples of the grounds on which an entire jury panel might be challenged are the following:

- The exclusion of a cognizable group from the jury panel [see *Adams v. Superior Court* (1974) 12 C3d 55, 60, 115 CR 247, 524 P2d 375] .

- Panel-wide bias against a party resulting from biased comments made by an excused juror [see *People v. Martinez* (1991) 228 CA3d 1456, 1466, 279 CR 858] .

- The prejudicial effect on the panel of an excused juror's "expert-like" opinion regarding an issue in the case [see, e.g., *Mach v. Stewart* (9th Cir 1997) 137 F3d 630, 633] .

Cross Reference:

Discussion of what constitutes "cognizable group," see 6.32[2].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury

TrialJurorsSelectionChallenges for Cause



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6.17 Challenge Must Meet Procedural Requirements.

6.17[1] Challenge Must Be Timely.

6.17[1][a] Make Challenge to Panel Before Jury Is Sworn. A challenge to a trial jury panel must be made before the jury is sworn [*CCP* § 225(a)(1)].

6.17[1][b] Make Challenge to Panel Before Any Challenges to Individual Jurors for Cause. A challenge to the panel for cause must be made before any challenges to individual jurors for cause [*CCP* § 227].

6.17[2] Make Challenge to Panel in Writing. A challenge to a trial jury panel must be in writing, and it must plainly and distinctly state the facts constituting the ground of the challenge [*CCP* § 225(a)(1)].

6.17[3] Serve Challenge to Panel on Parties and Jury Commissioner. The party making the challenge must give reasonable notice of the jury panel challenge to all parties and to the jury commissioner by service of a copy of the challenge [*CCP* § 225(a)(2); *see CCP* § 225(a)(3) (jury commissioner is permitted services of legal counsel in connection with challenges to jury panel)].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury
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6.18 CHECKLIST: Challenging Individual Jurors for Cause and Rehabilitation of Jurors.

6.18[1] Challenging Party's Checklist.

☐ Determine whether there is cause to challenge any individual juror, based on existence of any of following:

Authority:

CCP § 225(b)(1)

☐ General disqualification, based on any of following:

☐ Juror is not citizen of United States.

☐ Juror is less than 18 years of age.

☐ Juror is not domiciliary of California.

☐ Juror is not a resident of jurisdiction in which summoned to serve.

☐ Juror has been convicted of malfeasance in office or felony, and juror's civil rights have not been restored.

☐ Juror does not have sufficient knowledge of English language.

☐ Juror is currently serving as grand juror or trial juror in any California court.

☐ Juror is subject of conservatorship.

☐ Juror has incapacity that would satisfy court that juror is incapable of performing duties of juror in particular action without prejudice to substantial rights of challenging party.

Authority:

CCP §§ 203(a), 228

Discussion:

See 6.21[2]

☐ Implied bias, based on any of following:

☐ Juror and party have particular relationship specified by statute.

☐ Juror served as trial or grand juror or on jury of inquest in civil or criminal action, or has been witness in previous or pending trial between same parties, or involving same specific offense or cause of action, or has served as trial or grand juror or on jury within one year previously in any criminal or civil action or proceeding in which either party was plaintiff or defendant or in criminal action in which either party was defendant.

☐ Juror has interest in outcome of action, or in main question involved in action, except for interest as member or citizen or taxpayer of county, city and county, incorporated city or town or other political subdivision of county, or municipal water district.

☐ Juror has unqualified opinion or belief as to merits of action founded on knowledge of its material facts or of some of them.

☐ Juror has state of mind evincing enmity against, or bias toward, either party.

☐ Juror is party to action pending in court for which he or she is drawn, and action is set for trial before panel of which juror is member.

Authority:

CCP § 229(a)-(g)

Discussion:

See 6.21[3]

☐ Actual bias, which is state of mind on part of juror in reference to case or to any party that will prevent juror from acting with entire impartiality and without prejudice to substantial rights of party.

Authority:

CCP § 225(b)(1)(C)

Discussion:

See 6.21[4]

- ☐ If cause exists, assert challenge to juror.
- ☐ Ensure that challenge is timely.
- ☐ Assert all challenges for cause before any peremptory challenges.
- ☐ Assert all challenges for cause before jury is sworn.

Authority:

CCP §§ 226(a), (c), 227

Discussion:

See 6.22[1]

- ☐ Assert challenges for cause in following order.



Timing:

All challenges to an individual juror for cause must be taken first by the defendants and then by the plaintiffs [*CCP § 226(d)*].

- ☐ All challenges based on general disqualification.
- ☐ All challenges based on implied bias.
- ☐ All challenges based on actual bias.

Authority:

CCP § 227

Discussion:

See 6.22[2], [3]

- ☐ Assert challenge orally or in writing.

Authority:

CCP § 226(b)

Discussion:

See 6.22[4]

- ☐ At trial of challenge, call and examine witnesses, including challenged juror, as appropriate.

Authority:

CCP § 230

Discussion:

See 6.22[6]

- ☐ If court denies challenge, use peremptory challenge to remove juror.

Authority:

CCP § 231

Discussion:

See 6.23 -6.28

6.18[2] Opposing Party's Checklist.

- ☐ If counsel wants to retain challenged juror or force challenging party to use peremptory challenge to remove juror, assert right to examine juror.

Authority:

CCP § 230

- ☐ Rehabilitate juror by asking questions that will elicit testimony showing that juror can put his or her strong feelings aside and render a fair and impartial decision in accordance with evidence and court's instructions.

Authority:

CCP § 230

Discussion:

See 6.22[5]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionChallenges for Cause



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6.19 Options and Strategies for Party Challenging Juror for Cause.

If a prospective juror's background or initial responses on voir dire indicate a possibility of prejudice or bias against counsel's client or the client's position, counsel may attempt to establish grounds to challenge the juror for cause. Generally, a challenge for cause will not be successful unless counsel can secure from the juror an admission that he or she has an opinion or bias that may affect the ability to be fair and impartial.

In probing for signs of bias, counsel should remain aware of other possible ways of removing an unfavorable juror without using a peremptory challenge. For example, if it appears that an unfavorable juror is reluctant to serve, counsel's questions may help the juror establish a case of undue hardship that would support a request to excuse the juror on hardship grounds or to defer his or her service [see *CCP § 204(b)*; *Cal Rules Ct, Rule 2.1008(d)*].

If counsel is unsuccessful in establishing cause for a challenge or another basis for excusing the juror, a peremptory challenge, if available, may be used to remove the juror.

Judge's Perspective:

A challenge for cause will not be successful without a prospective juror's unequivocal statement that the person cannot be fair to both parties. Most challenges for cause are easily granted when the person unequivocally declares that he or she cannot be fair. More frequently, however, prospective jurors may state they have a particular leaning to one side, but when asked whether they can decide the case based on the evidence and the law, they usually reply they will try their best to do so, but this is insufficient to be a basis for excusing for cause. Given responses like these, without an unequivocal statement of bias, the challenge for cause will be denied. Often these jurors will be excused using a peremptory challenge.

Cross Reference:

Discussion of peremptory challenges, see 6.23 -6.28.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionChallenges for Cause



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6.20 Options and Strategies for Party Rehabilitating Juror.

When an adverse party challenges a juror for cause, counsel may attempt to use voir dire to rehabilitate the juror [see *CCP* § 230]. Rehabilitation generally consists of eliciting testimony showing that the juror can put his or her strong feelings aside and render a fair and impartial decision in accordance with the evidence and the court's instructions. If successful, rehabilitation still may not result in retention of the juror, but it will force the adverse party to use a peremptory challenge to remove the juror.

In a jury trial, likely the defining moment in determining which party will prevail is the jury selection process. The use of peremptory challenges (or forcing the opponent to use them) is often key in this process. "Saving" prospective jurors from cause challenges brings pressure on the opponent to use precious peremptory challenges. Be creative in developing rehabilitation questions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionChallenges for Cause



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6.21 Challenge for Cause Must Specify Permissible Ground.

6.21[1] Permissible Grounds. A challenge to a prospective juror for cause may be made only for reasons of general disqualification, implied bias, or actual bias [*CCP* § 225(b)(1)].

Cross References:

Discussion of general disqualification, see 6.21[2].

Discussion of implied bias, see 6.21[3].

Discussion of actual bias, see 6.21[4].

6.21[2] General Disqualification. A challenge to an individual juror for cause may be exercised on the ground of general disqualification, that is, that the juror is disqualified from serving in the action on any of the following grounds [*CCP* §§ 225(b)(1)(A), 228].

Consider:

Persons who fail to meet the general qualifications for jury service ordinarily will be screened out before the jury panel is sent to the courtroom. Challenges for cause based on general disqualification, therefore, are rare.

- The juror is not a citizen of the United States [*CCP* §§ 203(a)(1), 228(a)].
- The juror is less than 18 years of age [*CCP* §§ 203(a)(2), 228(a)].
- The juror is not a domiciliary of California [*CCP* §§ 203(a)(3), 228(a); see *Elec Code* § 2020 *et seq.* (determination of domicile)].
- The juror is not a resident of the jurisdiction in which he or she was summoned to serve [*CCP* §§

203(a)(4), 228(a)].

- The juror has been convicted of malfeasance in office or a felony, and the juror's civil rights have not been restored [CCP §§ 203(a)(5), 228(a)].
- The juror does not have sufficient knowledge of the English language [CCP §§ 203(a)(6), 228(a)].
- The juror is currently serving as a grand juror or trial juror in any California court [CCP §§ 203(a)(7), 228(a)].
- The juror is the subject of a conservatorship [CCP §§ 203(a)(8), 228(a)].
- The juror has an incapacity that satisfies the court that the juror is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party [CCP § 228(b)].

Distinguish:

Even though an incapacity may be a sufficient ground for a successful challenge for cause in a particular case, it is not an initial ground for disqualification for jury service, because no person may be deemed incompetent to serve on a jury solely because of the loss of sight or hearing in any degree, or because of any other disability that impedes the person's ability to communicate or that impairs or interferes with the person's mobility [CCP § 203(a)(6); see CCP § 224 (special rules concerning sign language interpreters, oral interpreters, deaf-blind interpreters, readers, or speech interpreters for jurors with disabilities)].

6.21[3] Implied Bias. A challenge to an individual juror for cause may be taken on the grounds of implied bias only if one of the following circumstances exists [CCP §§ 225(b)(1)(B), 229(a)-(g)]:

Distinguish:

The following grounds are the only permissible bases for making a challenge for implied bias in a civil case [CCP § 229(a)-(g)]. An additional basis for a finding of implied bias is available in a capital criminal cases [see CCP § 229(h)].

- The juror has a relationship of consanguinity or affinity within the fourth degree to any party, to an officer of a corporation that is a party, or to any alleged witness or victim in the case at bar [see, e.g., *Herrera v. Hernandez* (2008) 164 CA4th 1386, 1391, 80 CR3d 491 (dissolution of juror's marriage to defendant's nephew terminated her affinity to defendant)].

- The juror stands in the relation of, or is the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to any party or to an officer of a corporation that is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation that is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party.

Exception:

A depositor of a bank or a holder of a savings account in a savings and loan association will not be deemed a creditor of that bank or savings and loan association for the purpose of this provision solely by reason of being a depositor or account holder [CCP § 229(b)].

Consider:

Under this provision, an attorney who is a member of the law firm of counsel trying the case may not serve on the jury if a challenge for cause is made.

- The juror served as a trial or grand juror or on a jury of inquest in a civil or criminal action, or has been a witness in a previous or pending trial between the same parties, or involving the same specific offense or cause of action, or has served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action in which either party was the defendant.
- The juror has an interest in the outcome of the action, or in the main question involved in the action, except for an interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town or other political subdivision of a county, or municipal water district.

Prerequisite:

If a challenge for interest is made, some showing of interest must be made beyond simply alleging that an interest exists [*Kimbley v. Kaiser Found. Hosps.* (1985) 164 CA3d 1166, 1170-1171, 211 CR 148 (mere membership in defendant health plan is insufficient to constitute disqualifying interest)].

- The juror has an unqualified opinion or belief as to the merits of the action founded on knowledge of its material facts or of some of them.
- The juror has a state of mind evincing enmity against, or bias toward, either party.
- The juror is a party to an action pending in the court for which he or she is drawn, and the action is set for trial before the panel of which the juror is a member.

6.21[4] Actual Bias. A challenge to an individual juror for cause may be taken on the grounds of actual bias, which is a state of mind on the part of the juror in reference to the case or to any of the parties that prevents the juror from acting with entire impartiality and without prejudice to the substantial rights of any party [CCP § 225(b)(1)(C)].

**Timing:**

If a juror conceals a bias and the concealment comes to counsel's attention during trial, counsel should immediately inform the court [*People v. Price* (1991) 1 C4th 324, 400, 3 CR2d 106, 821 P2d 610] . If the court finds that a prejudicial concealment occurred, it may grant a mistrial, or it may deny a motion for mistrial but entertain a motion for new trial after the verdict is rendered [see *Hilliard v. A.H. Robins Co.* (1983) 148 CA3d 374, 408-409, 196 CR 117] . If a material, prejudicial concealment is not discovered until after the verdict, a new trial must be granted [see *Wiley v. Southern Pac. Transp. Co.* (1990) 220 CA3d 177, 189-190, 269 CR 240] .

**Cross References:**

Discussion of mistrial, see Ch. 22, Mistrial.

Discussion of new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Jury Trials Jurors Selection Challenges for Cause



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6.22 Challenge Must Meet Procedural Requirements.

6.22[1] Make Challenge for Cause Before Jury Is Sworn. A challenge to a juror for cause must be made before the jury is sworn [*CCP* § 226(a)].

6.22[2] Exercise Challenge for Cause Before Any Peremptory Challenges. All challenges for cause must be exercised before any peremptory challenges may be exercised [*CCP* §§ 226(c), 227]. A party's challenges to individual jurors for cause need not be taken all at once, but may be taken separately, in the following order:

- Challenges to individual jurors for general disqualification [*CCP* § 227(b)].



Cross Reference:

Discussion, see 6.21[2].

- Challenges to individual jurors for implied bias [*CCP* § 227(c)].



Cross Reference:

Discussion, see 6.21[3].

- Challenges to individual jurors for actual bias [*CCP* § 227(d)].



Cross Reference:

Discussion, see 6.21[4].

6.22[3] Defendant Takes Any Challenge to Individual Juror for Cause First. All challenges to an individual juror for cause must be taken first by the defendants and then by the plaintiffs [*CCP* § 226(d)].

6.22[4] Make Challenge for Cause Orally or in Writing. A challenge to an individual juror for cause may be made orally or in writing [*CCP* § 226(b)].

6.22[5] Rehabilitating Juror. Before the court rules on a party's challenge to a juror for cause, the opposing party has a right to examine the juror and any other person as witnesses [CCP § 230].



Strategic Point--Opposing Party:

If counsel wants to retain the challenged juror, counsel's examination should be used to rehabilitate the juror. Leading questions may be used to get the juror to say that he or she can put aside the strong feelings about a particular aspect of the case and render a decision solely on the basis of the evidence and the law given by the trial judge. If this kind of rehabilitation is successful, the challenging party will be forced to accept the juror or use a peremptory challenge.



Cross Reference:

Discussion of court's determination of challenge, see 6.22[6].

6.22[6] Court's Determination of Challenge. The court typically decides challenges for cause. Ordinarily, the court makes its determination based on the answers given by the prospective juror during voir dire, although other evidence may be presented [CCP § 230].



Cross Reference:

Discussion of parties' right to examine challenged juror before court makes its decision, see 6.22[5].

To raise a claim on appeal that a juror should have been excused for cause, a party must have exhausted its peremptory challenges or must justify its failure to do so [*People v. Bolin* (1998) 18 C4th 297, 315, 75 CR2d 412, 956 P2d 374] .



Cross Reference:

Discussion of peremptory challenges, see 6.23 -6.28.

Failing to object to the excuse of a prospective juror for cause waives the issue on appeal [*People v. Holt* (1997) 15 C4th 619, 658, 63 CR2d 782, 937 P2d 213] .



Strategic Point:

Counsel must learn the particular judge's procedure for determining cause challenges, including the particular judge's reputation for allowing cause challenges. Some judges will allow cause challenges for minor reasons, such as a common cold, while other judges will deny cause challenges even when jurors will lose their job because of jury service.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionChallenges for Cause



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VI. EXERCISING PEREMPTORY CHALLENGES OF INDIVIDUAL JURORS

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6.23 CHECKLIST: Exercising Peremptory Challenges of Individual Jurors.

☐ Determine how many peremptory challenges will be available:

☐ If only two parties are involved in case, each party has six peremptory challenges.

☐ If there are more than two parties, court will divide parties into two or more sides, with each side entitled to eight peremptory challenges.

☐ If there are several parties on one side, court will divide challenges among them as nearly equally as possible.

Authority:

CCP § 231(c)

Discussion:

See 6.25

☐ If court has divided parties into more than two sides, consider requesting that court grant additional peremptory challenges in interest of justice.

Authority:

CCP § 231(c)

Discussion:

See 6.25

☐ Before exercising any peremptory challenges, verify following:

- ☐ Full jury has been seated.
- ☐ All parties have exercised all of their challenges for cause.

Authority:

CCP §§ 226(c), 231(d)

Discussion:

See 6.28[1]

- ☐ Exercise peremptory challenges, with each side taking or passing challenges in turn, beginning with plaintiff.

Authority:

CCP § 231(d)

Discussion:

See 6.28[2]

- ☐ Before passing on any peremptory challenge, consider that if other side also passes, then jury will be deemed accepted, and any appeal based on jury composition will be barred.

Authority:

CCP § 231(d), (e); People v. Bolin (1998) 18 C4th 297, 315, 75 CR2d 412, 956 P2d 374

Discussion:

See 6.28[3]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionPeremptory Challenges



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6.24 Options and Strategies.

The decision to exercise or pass on a peremptory challenge is largely a matter of counsel's assessment of whether the jury as constituted will render a fair and impartial verdict. Although there are no clear guidelines for making that assessment, careful observation of the jurors during voir dire may yield some insights into individual jurors' predispositions and biases.

Knowing who will replace the challenged juror is of immense value in determining whether to use a peremptory challenge at a given time.

Example:

A trial judge used the "10-pack" method whereby 22 prospective jurors (12 sitting in the jury box and 10 seated in the courtroom) are questioned. Peremptory challenges are made only of the 12 sitting in the box. In this situation, in exercising challenges the trial attorney will know who will take that person's place, because all 22 prospective jurors had been examined.



Cross Reference:

Discussion of factors to consider in exercising peremptory challenges, see 6.27.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionPeremptory Challenges



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6.25 Number and Apportionment of Peremptory Challenges Are Ordinarily Established by Law.

If there are only two parties in a civil case, each party is entitled to six peremptory challenges [CCP § 231(c)].

Judge's Perspective:

Counsel should be prepared to discuss the number of peremptory challenges per side and stipulate the matter on the record before starting voir dire to prevent disagreements during the selection process and avoid delay.

If there are more than two parties, the court must divide the parties into two or more sides according to their respective interests in the issues for the purpose of allotting peremptory challenges, and each side is entitled to eight peremptory challenges. If there are several parties on a side, the court must divide the challenges among them as nearly equally as possible [CCP § 231(c)].

If there are more than two sides, the court must grant such additional peremptory challenges to a side as the interests of justice may require; however, the peremptory challenges of one side must not exceed the aggregate number of peremptory challenges of all other sides. If any party on a side does not use that party's full share of peremptory challenges, the unused challenges may be used by the other party or parties on the same side [CCP § 231(c)].

The number of peremptory challenges remaining with a side is not diminished by the passing of a peremptory challenge, and the fact that a party had initially passed a given juror does not preclude a later challenge [CCP § 231(d); *Buckley v. Chadwick* (1955) 45 C2d 183, 202, 289 P2d 242] .



Strategic Point:

It can be a good strategic move to pass if counsel thinks the opponent has to challenge someone. This saves an "extra" challenge, which can be exercised if needed at the end. Sometimes it is possible to pass several times and then exercise challenges at the end, without opposing counsel have challenges left to respond, if someone bad for them gets moved into the box.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionPeremptory Challenges



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6.26 No Need to Support Peremptory Challenges With Showing of Cause.

A peremptory challenge generally may be exercised by either party without showing any cause, without reason or for no reason, arbitrarily and capriciously, and the court must excuse any juror challenged peremptorily [CCP § 226(b); *Pointer v. United States* (1894) 151 US 396, 408, 14 S Ct 410, 38 L Ed 208 ; *People v. Jones* (1998) 17 C4th 279, 294, 70 CR2d 793, 949 P2d 890 ; *People v. Williams* (1997) 16 C4th 635, 663, 66 CR2d 573, 941 P2d 752] .

Exception:

Peremptory challenges may not be exercised in such a way as to prevent the jury from reflecting a representative cross-section of the community served by the court [CCP § 231.5; *People v. Wheeler* (1978) 22 C3d 258, 280, 148 CR 890, 583 P2d 748] .



Cross Reference:

Discussion of the prohibition against the discriminatory use of peremptory challenges, see 6.29 -6.33.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionPeremptory Challenges



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6.27 Factors to Consider in Deciding Whether to Exercise Peremptory Challenge.

In exercising peremptory challenges, counsel must try to determine whether an individual juror's state of mind is favorable to, or predisposed in favor of, one of the parties. Because the jurors subject to peremptory challenges are not subject to challenges for cause [*see CCP § 226(c)* (all challenges for cause must be exercised before any peremptory challenges)], counsel's determination will be in large part intuitive, based on observation of the jurors during voir dire. Although there can be no precise guidelines for deciding whether to exercise a peremptory challenge against a particular juror, consideration of the following factors can be useful:

- That counsel unsuccessfully challenged the juror for cause, an occurrence that is likely to be viewed by the juror as hostile or insulting.
- Any of the juror's voir dire answers that expressly acknowledge or reveal biases.
- The tone, phrasing, and demeanor of the juror's answers on voir dire.
- The juror's level of rapport with the attorneys and parties during voir dire, as indicated by such things as relaxed communication or guarded and defensive answers, and whether the juror makes eye contact with counsel and parties while giving answers.
- The juror's experiences that might be similar to matters involved in the case and might incline the juror to identify with one party.
- The juror's occupation.
- The juror's background.



Cross Reference:

Detailed discussion of relevant factors, California Trial Guide, Unit 10, Voir Dire Examination (Matthew Bender).



Warning:

Trial lawyers have sometimes associated certain attitudes and values with particular racial, religious, and national groups. Although there may be some type of correlation between racial, religious, and national groups and attitudes toward certain types of litigation, individual members of these groups will be influenced less by their racial, religious, and national backgrounds and more by their occupations, experiences, and other factors. It is unlawful to use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds [*CCP* § 231.5; see *People v. Wheeler* (1978) 22 C3d 258, 148 CR 890, 583 P2d 748]. Keep in mind that attitudes are more important than stereotypes. The goal is to understand how the juror thinks.

Cross Reference:

Discussion of prohibition against discriminatory use of peremptory challenges, see 6.32.

- The possibility that the juror may be influenced by relatives or friends who have had experiences similar to those that are the subject of the case.
- The juror's social position, political affiliations, specialized training or education, hobbies and recreational activities, and prior jury service.
- The manner in which the juror interacts with other jurors, as observed by counsel during breaks and before and after court sessions.

Consider:

The jury will deliberate and arrive at a verdict as a group. Thus, any observations counsel can make about which jurors are leaders, which are followers, and which are likely to cause dissension may be as important as the jurors' individual answers to voir dire questions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionPeremptory Challenges



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6.28 Peremptory Challenges Must Follow Procedural Requirements.

6.28[1] Parties Are Entitled to Full Jury Panel Before Exercising Peremptory Challenge. Each party is entitled to have the jury panel filled before exercising any peremptory challenge [CCP § 231(d)]. When one of the jurors is challenged for cause or peremptorily, the court must immediately call another juror to take the challenged juror's place [*Buckley v. Chadwick* (1955) 45 C2d 183, 202, 289 P2d 242 ; see CCP § 231(d)].

6.28[2] Parties Exercise Peremptory Challenges Alternately. Peremptory challenges must be taken or passed by the sides alternately, beginning with the plaintiff [CCP § 231(d)]. A peremptory challenge may be made orally or in writing [CCP § 226(b)].



Warning:

The exercise of a peremptory challenge should be done in a courteous, nonjudgmental fashion. Counsel should simply "thank and excuse" the juror. Words such as "challenge," "disqualify," or "remove" should not be used, and there should be no explanation or apology to the juror.

If counsel passes a turn, that ordinarily will not reduce the number of peremptory challenges remaining. However, if the other parties also pass (or have passed on the previous turn), the jury will be deemed accepted and no further peremptory challenges will be allowed [CCP § 231(d), (e)].



Strategic Points:

In deciding whether to exercise a challenge or pass, counsel should consider the following:

- If, considering the current composition of the jury, the remainder of the panel, and the number of challenges remaining for each party it is going to be difficult to improve on the jury as it is currently constituted, it is generally advisable to pass. Exercising a peremptory challenge to remove a marginal juror can backfire if that juror is replaced by a clearly unfavorable juror, particularly if only one or two

challenges are left.

- If counsel passes, any remaining challenges will be forfeited if the other parties also pass (or have passed on the preceding turn) [see *CCP* § 231(d), (e)].

- If any peremptory challenges go unused, an appeal based on jury composition will be barred, because exhaustion of peremptory challenges is a condition precedent to such an appeal [*People v. Bolin* (1998) 18 C4th 297, 315, 75 CR2d 412, 956 P2d 374 ; *Burns v. 20th Century Ins. Co.* (1992) 9 CA4th 1666, 1672-1673, 12 CR2d 462] .

6.28[3] Consecutive Passes Constitute Acceptance of Jury. When each side taking peremptory challenges passes consecutively, the jury is deemed accepted and then sworn, unless the court orders otherwise for good cause [*CCP* § 231(d), (e); see *CCP* § 232(b) (swearing of jury)].

Once a jury has been passed for cause and sworn, the time for voir dire and exercising peremptory challenges is over [*Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 CA4th 318, 323-324, 29 CR2d 330] .

Legal Topics:

For related research and practice materials, see the following legal topics:
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6.29 CHECKLIST: Objecting to Discriminatory Use of Peremptory Challenges (*Wheeler* Motion).

6.29[1] Moving Party's Checklist.

☐ Review available information about jurors, proceedings on voir dire, and peremptory challenges used by adverse party to determine whether peremptory challenge has been used to remove juror based on assumption that juror is biased merely because of one of following:

- ☐ Juror's race.
- ☐ Juror's color.
- ☐ Juror's religion.
- ☐ Juror's sex.
- ☐ Juror's national origin.
- ☐ Juror's sexual orientation.
- ☐ Juror's membership in other cognizable group.

Authority:
CCP § 231.5

Discussion:
See 6.32

☐ If counsel suspects that adverse party has used peremptory challenge to remove juror based on impermissible assumption of group bias, assert objection by making *Wheeler* motion to quash jury panel.

☐ Verify that motion is timely, i.e., that jury has not yet been sworn.

☐ Make motion orally in open court.

☐ Ensure that motion establishes moving party's prima facie case, showing both of following:

Discussion:

See 6.33[4]

☐ Excluded jurors are members of cognizable group.

Discussion:

See 6.32[2]

☐ Totality of relevant facts is sufficient to support inference that excluded jurors were challenged because of group association rather than any specific bias.

Authority:

People v. Wheeler (1978) 22 C3d 258, 280, 148 CR 890, 583 P2d 748

Discussion:

See 6.33

☐ If court rules that motion makes prima facie case and responding party offers explanation for exercise of peremptory challenge, make following arguments to court, as appropriate:

☐ Proffered explanation does not constitute valid basis for exercise of peremptory challenge.

☐ Proffered explanation is sham and did not actually prompt exercise of challenge.

☐ If court grants motion, consider asking court to exercise its discretion to reseal improperly challenged jurors, rather than dismissing entire jury panel.

Authority:

People v. Willis (2002) 27 C4th 811, 821, 118 CR2d 301, 43 P3d 130

Discussion:

See 6.33[6]

6.29[2] Responding Party's Checklist.

☐ If court rules that moving party has established prima facie case of improper use of peremptory challenge, present following:

☐ Explanation of reasonably relevant or neutral reason for exercising peremptory challenge, such as following:

☐ Challenged juror gave conflicting and possibly untrue answers to voir dire questions.

☐ Challenged juror had family circumstances similar to those of party.

☐ Challenged juror was acquainted with one of attorneys in case.

☐ Challenging attorney made mistake.

Authority:

People v. Williams (1997) 16 C4th 153, 188, 66 CR2d 123, 940 P2d 710

Discussion:

See 6.33[5]

☐ Proof that legitimate reason given by counsel is not sham and was actual motivating reason for exercise of challenge.

Authority:

People v. Fuentes (1991) 54 C3d 707, 711, 714, 720, 286 CR 792, 818 P2d 75

☐ If court grants motion and moving party asks court to reseal improperly dismissed juror, argue that court should quash entire jury panel and start jury selection with new panel.

Authority:

People v. Willis (2002) 27 C4th 811, 821, 118 CR2d 301, 43 P3d 130

Discussion:

See 6.33[6]

Legal Topics:

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

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6.30 Options and Strategies for Moving Party.

A party who believes an adverse party is using peremptory challenges to exclude potential jurors on the basis of their membership in a cognizable group may make a motion (called a *Wheeler* motion) to require the adverse party to explain the reasons for challenging certain jurors. If the court finds that the adverse party has improperly used peremptory challenges in a discriminatory manner, the court ordinarily will dismiss the jury and remaining panel members, and jury selection will restart with a new panel [*People v. Wheeler (1978) 22 C3d 258, 282, 148 CR 890, 583 P2d 748*] .

To support a *Wheeler* motion, counsel must document (1) the number of group members seated as prospective jurors, (2) the number of those persons excluded by the adverse party through peremptory challenges, and (3) the number of group members remaining on the panel at the time the *Wheeler* motion is made [*People v. Wheeler (1978) 22 C3d 258, 263, 148 CR 890, 583 P2d 748*] . The motion must be made before the jury is sworn [*People v. Johnson (1989) 47 C3d 1194, 1216, 255 CR 569, 767 P2d 1047* ; *Di Donato v. Santini (1991) 232 CA3d 721, 740-741, 283 CR 751*] .

Judge's Perspective:

A *Wheeler* motion is very rare in civil matters.

Cross Reference:

Discussion of procedures for *Wheeler* motion, see 6.33.

Legal Topics:

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

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6.31 Options and Strategies for Responding Party.

When a *Wheeler* motion is made, the responding party should first argue that the moving party has failed to make a prima facie case of discriminatory use of peremptory challenges. At this point the responding party need not provide an explanation for the exercise of the challenges [*People v. Fuentes* (1991) 54 C3d 707, 716-717 n.5, 286 CR 792, 818 P2d 75] . If the responding party's argument is successful, the motion will be denied.

If the court rules that the moving party has made a prima facie case, the responding party has the burden of (1) presenting legitimate reasons for the challenges, and (2) establishing that the legitimate reasons are not a sham and were the bona fide motivation for exercising the challenges [*People v. Fuentes* (1991) 54 C3d 707, 711, 714, 720, 286 CR 792, 818 P2d 75] .

Cross Reference:

Discussion of response to motion, see 6.33[5].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury
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6.32 Counsel May Not Exercise Peremptory Challenges for Discriminatory Reason.

6.32[1] Counsel May Not Use Peremptory Challenges to Exclude Cognizable Group. A peremptory challenge ordinarily may be exercised arbitrarily and capriciously, without any reason, or for no reason [CCP § 226(b)]. However, it may not be used to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds [CCP § 231.5; *People v. Wheeler* (1978) 22 C3d 258, 276-277, 148 CR 890, 583 P2d 748 (use of peremptory challenges to remove prospective jurors on sole ground of assumed group bias violates right to trial by jury drawn from representative cross-section of community under *Cal Const*, art I, § 16); see *Batson v. Kentucky* (1986) 476 US 79, 84, 106 S Ct 1712, 90 L Ed2d 69 (use of peremptory challenges to remove prospective jurors on sole ground of assumed group bias violates federal constitutional guarantee of equal protection); see also *Edmonson v. Leesville Concrete Co.* (1991) 500 US 614, 619, 111 S Ct 2077, 114 L Ed2d 660 (race-based exclusion of jurors in civil case through peremptory challenge violates equal protection rights of the challenged jurors under federal Constitution)].

All cognizable groups in society come within this prohibition against the use of peremptory challenges based on assumed group bias [*Di Donato v. Santini* (1991) 232 CA3d 721, 733, 283 CR 751] .

Cross Reference:

Definition of cognizable group, see 6.32[2].

Consider:

- Although the rule forbidding the use of peremptory challenges based on assumed group bias originated, and has developed almost entirely, in criminal cases [see *People v. Wheeler* (1978) 22 C3d 258, 148 CR 890, 583 P2d 748] , the same principles and procedures apply in civil cases [see *Holley v. J & S Sweeping Co.* (1983) 143 CA3d 588, 592-594, 192 CR 74] . Thus, the body of law developed in criminal cases is fully applicable in the civil context [see *People v. Wheeler* (1978) 22 C3d 258, 280, 148 CR 890, 583 P2d 748 (rejecting conceptual distinction between criminal and civil proceedings in jury selection process)].

■ The prohibition against using peremptory challenges based on assumed group bias violates the federal Constitution as well as California law [see *Montiel v. City of Los Angeles* (9th Cir 1993) 2 F3d 335, 340] , and federal procedures on motions objecting to the discriminatory use of peremptory challenges are similar to California procedures on such motions [*People v. Sanders* (1990) 51 C3d 471, 502 n10, 273 CR 537, 797 P2d 561] . Accordingly, as a general rule federal law may be cited in California as persuasive authority in making or opposing such a motion [see, e.g., *People v. Johnson* (1989) 47 C3d 1194, 1216-1222, 255 CR 569, 767 P2d 1047] .

► **Cross Reference:**

Discussion of use of peremptory challenges generally, see 6.26.

6.32[2] "Cognizable Group" Defined. A "cognizable group" exists if (1) its members share a common perspective arising from their life experience as members of the group, and (2) no other members of the community are capable of adequately representing the perspective of the group [*People v. Harris* (1989) 47 C3d 1047, 1077, 255 CR 352, 767 P2d 619 ; *Rubio v. Superior Court* (1979) 24 C3d 93, 98, 154 CR 734, 593 P2d 595] .

Examples--Cognizable Groups:

The following have been held by California courts to be cognizable groups in this context:

- African-Americans [*People v. Wheeler* (1978) 22 C3d 258, 283, 148 CR 890, 583 P2d 748] .
- African-American women [*People v. Boyette* (2002) 29 C4th 381, 422, 127 CR2d 544, 58 P3d 391] .
- African-American men [*People v. Gray* (2001) 87 CA4th 781, 783, 104 CR2d 848] .
- Chinese persons [*People v. Lopez* (1991) 3 CA4th Supp 11, 16, 5 CR2d 775] .
- Hispanics [*People v. Morales* (1989) 48 C3d 527, 543, 257 CR 64, 770 P2d 244] .
- Homosexuals [*People v. Garcia* (2000) 77 CA4th 1269, 1276, 92 CR2d 339] .
- Men [*People v. Williams* (2000) 78 CA4th 1118, 1125, 93 CR2d 356] .
- Religious groups [*People v. Schmeck* (2005) 37 C4 240, 273-274, 33 CR3d 397, 118 P3d 451] .
- Wage earners [*People v. Turner* (1986) 42 C3d 711, 722, 230 CR 656, 726 P2d 102] .
- White men [*People v. Willis* (2002) 27 C4th 811, 813, 118 CR2d 301, 43 P3d 130] .
- Women [*Di Donato v. Santini* (1991) 232 CA3d 721, 733, 283 CR 751] .

The following have been held by courts outside California to be cognizable groups in this context:

- Italian-Americans [*United States v. Biaggi* (EDNY 1987) 673 F Supp 96, 100 , *aff'd*, 853 F2d 89 (2d Cir 1988)] .

- Jews [*People v. Kagan* (1979) 420 NYS2d 987, 990] .
- Men [*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 US 127, 131-142, 114 S Ct 1419, 128 L Ed2d 89] .
- Native Americans [*United States v. Chalan* (10th Cir 1987) 812 F2d 1302, 1314] .
- Puerto Ricans [*United States v. Davis* (DVI 1953) 115 F Supp 392, 398] .
- Roman Catholics [*Juarez v. State* (Tex Crim 1925) 102 Tex. Crim. 297, 277 SW 1091, 1093] .
- Women [*J.E.B. v. Alabama ex rel. T.B.* (1994) 511 US 127, 131-142, 114 S Ct 1419, 128 L Ed2d 89] .

Examples--Not Cognizable Groups:

The following have been held by California courts not to be cognizable groups in this context:

- Battered women [*People v. Macioce* (1987) 197 CA3d 262, 280, 242 CR 771] .
- Crime victims [*People v. Fields* (1983) 35 C3d 329, 348, 197 CR 803, 673 P2d 680] .
- Elderly adults [*People v. McCoy* (1995) 40 CA4th 778, 785-786, 47 CR2d 599] .
- Ex-felons [*Rubio v. Superior Court* (1979) 24 C3d 93, 100, 154 CR 734, 593 P2d 595] .
- Persons who have been arrested [*People v. Fields* (1983) 35 C3d 329, 348, 197 CR 803, 673 P2d 680] .
- Hearing-impaired persons [*People v. Fauber* (1992) 2 C4th 792, 816-817, 9 CR2d 24, 831 P2d 249] .
- Persons who "believe strongly in law and order" [*People v. Fields* (1983) 35 C3d 329, 348, 197 CR 803, 673 P2d 680] .
- Persons with insufficient knowledge of English [*People v. Lesara* (1988) 206 CA3d 1304, 1309, 254 CR 417] .
- Poor persons [*People v. Burgener* (2003) 29 C4th 833, 856, 129 CR2d 747, 62 P3d 1] .
- Resident aliens [*Rubio v. Superior Court* (1979) 24 C3d 93, 100, 154 CR 734, 593 P2d 595] .
- Uneducated persons [*People v. Henderson* (1990) 225 CA3d 1129, 1152, 275 CR 837] .
- Young adults [*People v. Marbley* (1986) 181 CA3d 45, 48, 225 CR 918] .

Legal Topics:

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

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6.33 Party May Make *Wheeler* Motion to Quash Jury Panel Based on Opponent's Discriminatory Use of Peremptory Challenges.

6.33[1] Party May Object to Discriminatory Use of Peremptory Challenges. A party who believes that another party is using peremptory challenges on grounds of group bias alone may move the court to quash the jury panel. Such a motion is referred to as a *Wheeler* motion, after the case that established the basis and analytical framework for the motion [*People v. Wheeler* (1978) 22 C3d 258, 148 CR 890, 583 P2d 748] .

► Cross Reference:

Discussion of procedures for *Wheeler* motion, see 6.33[2] -[6].

6.33[2] Make Motion Before Jury Is Sworn. A party must make the motion objecting to another party's use of peremptory challenges based on group bias before the jury is sworn, and the trial court may not delay its decision on the motion until after the jury has been sworn [*People v. Johnson* (1989) 47 C3d 1194, 1216, 255 CR 569, 767 P2d 1047] .

Because a *Wheeler* motion is made during the course of voir dire and before the jury is sworn, it is made orally. If time permits, counsel for the moving party may follow up the oral motion with a written motion that incorporates a declaration setting forth the specific facts on which the motion is based, plus a set of points and authorities [see *Di Donato v. Santini* (1991) 232 CA3d 721, 730, 283 CR 751] .

6.33[3] Motion Proceeds in Three Steps. A motion objecting to a party's use of peremptory challenges based on group bias requires the court and parties to engage in a three-step process [*Johnson v. California* (2005) 545 US 162, 125 S Ct 2410, 2416, 162 L Ed2d 129, 138 ; see *People v. Wheeler* (1978) 22 C3d 258, 280-282, 148 CR 890, 583 P2d 748] :

1. The moving party must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.
2. Once the objecting party has made out a prima facie case, the burden shifts to the responding party to

offer permissible reasons for the exercise of the peremptory challenges.

3. If a permissible reason is tendered, the court must decide whether the moving party has proved purposeful discrimination.

Cross References:

Discussion of moving party's prima facie case, see 6.33[4].

Discussion of responding party's explanation of peremptory challenges, see 6.33[5].

Discussion of court's decision, see 6.33[6].

6.33[4] Moving Party Must Make Prima Facie Case. A party exercising a peremptory challenge is rebuttably presumed to be doing so on a constitutionally permissible ground [*People v. Wheeler* (1978) 22 C3d 258, 272, 276, 148 CR 890, 583 P2d 748] . To rebut the presumption, the moving party must begin by making a prima facie case of discrimination [*People v. Wheeler* (1978) 22 C3d 258, 280, 148 CR 890, 583 P2d 748] .

To establish the prima facie case, the moving party must do the following [*Johnson v. California* (2005) 545 US 162, 125 S Ct 2410, 2416-2419, 162 L Ed2d 129, 138-141 ; see *People v. Wheeler* (1978) 22 C3d 258, 280, 148 CR 890, 583 P2d 748] :

- Establish that the persons excluded are members of a cognizable group [see CCP § 231.5]; and

Cross Reference:

Discussion of cognizable groups, see 6.32[2].

- Show that the totality of the relevant facts is sufficient to support an inference that the excluded persons are being challenged because of their group association rather than because of any specific bias.

Trap:

The moving party must take care to put on the record facts as to (1) the number of group members seated as prospective jurors, (2) the number of those persons excluded by the adverse party through peremptory challenges, and (3) the number of group members remaining on the panel at the time the *Wheeler* motion is made. These facts otherwise may not appear from the reporter's transcript, particularly when the excluded group is a racial or ethnic one, and their omission from the record may hinder appellate review [see, e.g., *People v. Wheeler* (1978) 22 C3d 258, 263, 148 CR 890, 583 P2d 748] .

Warning:

In 2005, the United States Supreme Court held unconstitutional California's former requirement that the moving party's prima facie case establish that it is *more likely than not* that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. Rather, the moving party need only show that the circumstances are *sufficient to support an inference* that the peremptory challenges were based on impermissible group bias [*Johnson v. California* (2005) 545 US 162, 125 S Ct 2410, 162 L Ed2d 129, 138-141] . Thus, earlier California decisions applying a "more likely than not" standard, or requiring the moving party to establish a "strong likelihood" that the other party's peremptory strikes were based on impermissible group bias, are no longer good law [see, e.g., *People v. Wheeler* (1978) 22 C3d 258, 280, 148 CR 890, 583 P2d 748] .

Examples:

The following circumstances are relevant to show that peremptory challenges are being exercised on the basis of group bias [*People v. Wheeler* (1978) 22 C3d 258, 280-281, 148 CR 890, 583 P2d 748] :

- Most or all of the members of the identified group were peremptorily challenged [see, e.g., *Holley v. J & S Sweeping Co.* (1983) 143 CA3d 588, 590, 592-593, 192 CR 74 (three of four black jurors peremptorily challenged)].
- A disproportionate number of a party's peremptory challenges were used against members of a single group.
- The challenged jurors in question share only one characteristic-their membership in the group-and, in all other respects, they are as heterogeneous as the community as a whole [see, e.g., *Di Donato v. Santini* (1991) 232 CA3d 721, 742, 283 CR 751] .
- The jurors against whom the peremptory challenges were exercised were not engaged in more than desultory voir dire [see, e.g., *Holley v. J & S Sweeping Co.* (1983) 143 CA3d 588, 590, 592-593, 192 CR 74 (black jurors peremptorily challenged without any preliminary voir dire questioning)].

Distinguish:

A party need not be a member of the excluded group to object to the discriminatory use of peremptory challenges [see *People v. Wheeler* (1978) 22 C3d 258, 281, 148 CR 890, 583 P2d 748 ; see also *Taylor v. Louisiana* (1975) 419 US 522, 535-537, 95 S Ct 692, 42 L Ed2d 690 (reversing state conviction of male defendant on ground that women had been excluded from jury service); *Peters v. Kiff* (1972) 407 US 493, 503-504, 92 S Ct 2163, 33 L Ed2d 83 (reversing state conviction of white defendant on showing that blacks had been arbitrarily excluded from jury service)]. However, the objecting party's membership in the excluded group can be an indicator of discriminatory exclusion [*People v. Turner* (2001) 90 CA4th 413, 417, 109 CR2d 138] .

Counter-Attack:

When a party makes a *Wheeler* motion, the responding party should be given an opportunity to respond to the motion, that is, to argue that no prima facie case has been made. At this point, no explanation for the exercise of the peremptory challenges need be given [*People v. Fuentes* (1991) 54 C3d 707, 716-717 n5, 286 CR 792, 818 P2d 75] .



Strategic Point:

The parties should encourage the court to make an express ruling as to whether a prima facie case has been established so as to avoid confusing the parties about whether the moving party's showing has met the initial burden of supporting an inference of impermissible use of peremptory challenges [see *People v. Fuentes* (1991) 54 C3d 707, 716-717, n5, 286 CR 792, 818 P2d 75] .

6.33[5] Responding Party Must Justify Exercise of Peremptory Challenges. If the trial court rules that the moving party has made a prima facie showing of the discriminatory use of peremptory challenges, the peremptory attribute of the challenges is lost [*People v. Cervantes* (1991) 233 CA3d 323, 334, 284 CR 410] . At that point, the burden shifts to the party exercising the peremptory challenges to demonstrate that they were exercised on grounds that were reasonably relevant to the particular case or its parties or witnesses, that is, for reasons of specific bias, or at least for a neutral reason related to the issues of the case [*Johnson v. California* (2005) 545 US 162, 125 S Ct 2410, 2416, 162 L Ed2d 129, 138 ; *People v. Wheeler* (1978) 22 C3d 258, 283, 148 CR 890, 583 P2d 748 ; *People v. Williams* (1997) 16 C4th 153, 188, 66 CR2d 123, 940 P2d 710] . The party exercising the challenges must also establish that the

proffered reasons are not sham reasons, and they actually prompted the exercise of the particular peremptory challenges [*People v. Mills* (2010) 48 C4th 158, 174-175, 106 CR3d 153, 226 P3d 276 (determination focuses on prosecutor's credibility); *People v. Wheeler* (1978) 22 C3d 258, 282, 148 CR 890, 583 P2d 748 ; *People v. Fuentes* (1991) 54 C3d 707, 720, 286 CR 792, 818 P2d 75 (reviewing courts accord great deference to discretion of trial court in distinguishing bona fide reasons from sham excuses)].

Cross Reference:

Discussion of moving party's prima facie showing, see 6.33[4].

Examples:

The following are examples of neutral, and therefore appropriate, reasons for peremptory challenges:

- The juror's appearance and demeanor suggested she was uptight with the attorney who exercised the peremptory challenge [see *People v. Ward* (2005) 36 C4th 186, 202, 30 CR3d 464, 114 P3d 717] .
- The challenged juror gave conflicting and possibly untrue answers to voir dire questions regarding whether the juror had followed the case in the media [*People v. Jones* (1998) 17 C4th 279, 294, 70 CR2d 793, 949 P2d 890] .
- The challenged juror had family circumstances similar to those of a party [*People v. Williams* (1997) 16 C4th 635, 664-665, 66 CR2d 573, 941 P2d 752] .
- The challenged juror knew one of the attorneys in the case and had worked with the attorney's wife on volunteer committees [*People v. Williams* (1997) 16 C4th 635, 664-665, 66 CR2d 573, 941 P2d 752] .
- The challenging attorney made a mistake [*People v. Williams* (1997) 16 C4th 153, 188-190, 66 CR2d 123, 940 P2d 710] .
- The jurors' statements suggested they were "sympathetic to the defendant" [*People v. Stanley* (2006) 39 C4th 913, 935-945, 47 CR3d 420, 140 P3d 736].

6.33[6] Court Must Determine Whether Challenges Were Based on Impermissible Group Bias. If the responding party has offered a valid reason for the exercise of peremptory challenges, the court must decide whether the moving party has carried the burden of proving purposeful discrimination [*Johnson v. California* (2005) 545 US 162, 125 S Ct 2410, 2416-2419, 162 L Ed2d 129, 138-141 ; *People v. Wheeler* (1978) 22 C3d 258, 280-282, 148 CR 890, 583 P2d 748] .

If the court finds that the peremptory challenges at issue were not made for valid reasons, the presumption of the constitutionality of their exercise is rebutted [see *People v. Smith* (1993) 21 CA4th 342, 344-345, 25 CR2d 850 ; *People v. Cervantes* (1991) 233 CA3d 323, 333, 284 CR 410] . In that event, the court ordinarily must dismiss the jurors thus far selected, quash any remaining jury panel (i.e., dismiss the remaining panel members), and summon a different panel. The jury selection process may then begin anew [*People v. Wheeler* (1978) 22 C3d 258, 276-287, 148 CR 890, 583 P2d 748 ; *People v. Willis* (2002) 27 C4th 811, 813, 118 CR2d 301, 43 P3d 130] .

Exceptions:

If the court grants the *Wheeler* motion, it ordinarily will dismiss the jurors selected thus far and any remaining panel members [*People v. Wheeler* (1978) 22 C3d 258, 276-287, 148 CR 890, 583 P2d 748] . However, if the moving party assents to the trial court's imposing a remedy other than dismissal of the

jury panel, the trial court has discretion to impose an alternative remedy, such as imposing sanctions against offending counsel, reseating improperly discharged jurors, or allowing the moving party additional peremptory challenges. The court may also require that any future peremptory challenges be made at a sidebar conference [*People v. Willis* (2002) 27 C4th 811, 819-821, 118 CR2d 301, 43 P3d 130] .

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury
TrialsJurorsSelectionPeremptory Challenges



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Chapter 6 Jury Selection
VIII. FORMS

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.34

6.34 Judicial Council Form MC-001--Juror Questionnaire for Civil Cases.

Judicial Council Form MC-001 Juror Questionnaire for Civil Cases.

[Click here to view image.](#)

NOTES.

Authority:

CCP § 205; Cal Rules Ct, Rule 3.1540; Cal Rules Ct, Stds Jud Admin, Std 3.25(b). California Judicial Council Form MC-001, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]



Timing:

See 6.09[1]



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Chapter 6 Jury Selection
VIII. FORMS

1-6 MB Practice Guide: Trial & Post-Trial Civil Proc 6.35

6.35 Notice of Motion and Motion to Approve Juror Questionnaire.

Notice of Motion and Motion to Approve Juror Questionnaire.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name]	)	Case No. _____
Plaintiff,	)	NOTICE OF MOTION TO APPROVE JUROR
vs.	)	QUESTIONNAIRE
_____ [name],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

TO DEFENDANT _____ [name] AND HER ATTORNEY OF RECORD:

PLEASE TAKE NOTICE THAT on _____ [date] at _____ [time], or as soon thereafter as the matter can be heard, in _____ [Department or Division] _____ of this court, located at _____ [address], Plaintiff _____ [name] will, and hereby does, move the court for an order approving distribution of the attached juror questionnaire to the prospective jurors in this action.

The motion is made on the ground that the prospective jurors' answers to the questions included in the questionnaire are relevant and necessary to assist the voir dire process and ensure the selection of a fair and impartial jury in this action.

The motion will be based on the proposed questionnaire and on the supporting memorandum and declaration of counsel attached to the motion, together with the files, records, and papers in this action and such further testimony and argument as may be presented at the hearing on the motion.

Dated: _____

_____ [signature]

_____ [name]

Attorney for Plaintiff _____

NOTES.

Authority:

CCP § 205(d)



Timing:

See 6.09[2]

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Chapter 6 Jury Selection

VIII. FORMS

6.36 Stipulation and Order Regarding Calling Alternative Jurors.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Defendant.

$$\begin{pmatrix}) \\) \\) \\) \\) \\) \\) \end{pmatrix}$$

Trial Date: _____

Dated: _____

_____ [name]

Attorney for Plaintiff_____

_____ [signature]

_____ [name]

Attorney for Defendant _____

IT IS SO ORDERED:

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP § 234



Timing:

See 6.08[4]

Grounds:

See 6.08[4]



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Chapter 6 Jury Selection
VIII. FORMS

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6.37 Jury Selection Chart.

Jury Selection Chart.

[Click here to view image.](#)

NOTES.

Use of chart:

See 6.10



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Chapter 7 Compelling Witness Attendance and Witness Preparation

1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.syn

§ 7.syn Synopsis to Chapter 7: Compelling Witness Attendance and Witness Preparation

7.01 Scope.

7.02 Objective and Strategy.

7.03 CHECKLIST: Compelling Witness Attendance at Trial and Witness Fees.

7.04 Options and Strategies for Compelling Attendance of Witnesses at Trial.

7.05 Every Person Is Presumed to Be Qualified to Testify.

7.06 Compelling Attendance of Witnesses at Trial.

7.06[1] Court Has Inherent Power to Compel Attendance of Witness.

7.06[2] Use Subpoena to Compel Attendance of Witness.

7.06[2][a] Purpose of Subpoena Is to Compel Attendance.

7.06[2][b] Subpoena Is Effective Only for California Residents.

7.06[2][c] Clerk or Judge May Issue Subpoena.

7.06[2][d] Attorney May Issue Subpoena.

7.06[2][e] Use Mandatory Judicial Council Forms for Subpoena.

7.06[3] Use Notice to Attorney in Lieu of Subpoena to Compel Attendance of Certain Witnesses.

7.06[3][a] Serve Party With Notice in Lieu of Subpoena.

7.06[3][b] Serve Person for Whose Immediate Benefit Action or Proceeding Is Prosecuted or Defended With Notice in Lieu of Subpoena.

7.06[3][c] Serve Officer, Director, or Managing Agent of Party or Person With Notice in Lieu of Subpoena.

7.07 Observe Time Limits for Service of Subpoena or Notice.

7.07[1] Service of Subpoena Must Give Witness Reasonable Time to Prepare and Travel.

7.07[2] If No Documents, Books, or Other Things Are Requested, Serve Notice in Lieu of Subpoena at Least 10 Days Before Trial.

7.07[3] If Books, Documents, or Other Things Are Requested, Serve Notice in Lieu of Subpoena at Least 20 Days Before Trial.

7.08 Serving Subpoena.

7.08[1] Generally Make Personal Service on Witness.

7.08[2] Serve Declaration With Subpoena Duces Tecum.

7.08[3] Serve Minor by Serving Parent or Guardian.

7.08[4] Serve Peace Officers, Firefighters, and Other Public Employees by Serving Employee's Superior.

7.08[5] Serve Nonresident Member of California Highway Patrol by Delivering Copy to Person in Charge of Office at Least Five Days Before Attendance Date.

7.08[6] Direct Sheriff to Serve Concealed Witness.

7.08[7] Subpoenaing Party May Recover Costs of Service If Prevailing Party.

7.09 Subpoenaing Party Must Pay Witness Fees.

7.09[1] Witness May Receive Attendance and Mileage Fees.

7.09[2] Experts May Charge Fees for Attendance.

7.09[2][a] Subpoenaing Party Must Tender Fees to Expert.

7.09[2][b] Expert's Fee May Not Exceed Fee Charged Retaining Party.

7.09[2][c] Subpoenaing Party May Make Motion to Set Compensation.

7.09[2][d] Paying Expert If Trial Is Continued or Canceled.

7.09[2][e] Prevailing Party May Recover Expert Fees.

7.09[3] Subpoenaing Party Must Pay Fees to Public Employees.

7.09[3][a] Subpoenaing Party Must Tender \$150 to City and County Employees, Peace Officers, Firefighters, and Others.

7.09[3][b] Public Employer Must Pay Witness's Salary and Expenses.

7.09[3][c] Subpoenaing Party Must Reimburse Public Employer.

7.09[3][d] Subpoenaing Party and Public Employer Must Address Overpayment or Underpayment.

7.09[3][e] Subpoenaing Party Must Pay Nonresident Highway Patrol Officer Fees.

7.09[3][f] Subpoenaing Party Need Not Pay Additional Fees If Court Continues Proceeding.

7.09[3][g] Subpoenaing Party May Obtain Relief From Fee Payment Requirement.

7.10 Subpoenaing Party May Obtain Witness's Agreement to Appear at Trial.

7.10[1] Subpoenaing Party May Coordinate With Witness Before Serving Subpoena.

7.10[2] Subpoenaing Party May Coordinate With Witness After Serving Subpoena.

7.10[3] Failure to Appear Pursuant to Agreement Is Punishable by Contempt.

7.11 Person in Court May Be Compelled to Testify Without Subpoena.

7.12 Enforcing Compliance With Subpoena.

7.12[1] Failure to Comply With Subpoena Is Contempt.

7.12[2] Service of Subpoena on Witness Necessary for Contempt.

7.12[3] Stay of Contempt Action Against Witnesses Pending Petition for Extraordinary Relief.

7.12[3][a] Contempt Action Against Public Safety Employee Is Stayed Pending Petition for Extraordinary Relief.

7.12[3][b] Contempt Action Against Sexual Assault Victim Is Stayed Pending Petition for Extraordinary Relief.

7.12[3][c] Contempt Action Against Domestic Violence Victim Is Stayed Pending Petition for Extraordinary Relief.

7.12[4] Court May Impose Penalties Against Noncomplying Witness.

7.12[4][a] Noncomplying Witness May Be Required to Reimburse Subpoenaing Party.

7.12[4][b] Noncomplying Witness May Be Subject to Warrant and Arrest.

7.12[4][c] Noncomplying Witness May Be Required to Pay Court.

7.13 CHECKLIST: Challenging Attendance of Witnesses at Trial.

7.14 Options and Strategies for Challenging Attendance of Witnesses at Trial.

7.15 Determine Whether Grounds for Motion to Quash or Modify Subpoena Exist.

7.15[1] Make Motion to Quash or Modify Subpoena on Ground That Subpoena Was Served on Out of State Resident.

7.15[2] Make Motion to Quash or Modify Subpoena on Ground That Subpoena Fails to Comply With Applicable Form or Content Requirements.

7.15[3] Make Motion to Quash or Modify Subpoena on Ground That Subpoena Was Not Served Properly.

7.15[4] Make Motion to Quash or Modify Subpoena on Ground That Matters Sought Are Privileged, Protected, or Otherwise Beyond Scope of Discovery.

7.15[5] Make Motion to Quash or Modify Subpoena on Ground That It Is Unreasonable or Oppressive or Unreasonable Violation of Right to Privacy.

7.15[6] Make Motion to Quash or Modify Subpoena on Ground That It Is Unreasonably Cumulative, Duplicative, or Obtainable From Another Source.

7.16 Nonparty May File Motion to Quash or Modify Subpoena.

7.17 Public Employee May File Motion to Quash or Modify Subpoena.

7.18 Party Objecting to Notice Requesting Production Must File Objections Within Five Days of Receiving Notice.

7.19 Challenging Party May Obtain Various Forms of Relief.

7.20 Challenging Party May Recover Costs of Motion.

7.21 CHECKLIST: Preparing Witnesses for Examination.

7.22 Options and Strategies for Preparing Witnesses for Examination.

7.23 Begin Preparing Witnesses As Early As Possible.

7.24 Explain General Procedure for Trial.

7.25 Review Facts of Case and Exhibits With Witness.

7.26 Review Witness's Discovery Statements and Prior Testimony.

7.27 Explain to Witness How to Answer Questions.

7.28 Advise Witness How to Dress for Trial.

7.29 Provide Witness Directions to Courtroom or Where to Meet Before Going to Court.

7.30 Judicial Council Form SUBP-001--Civil Subpoena for Personal Appearance at Trial or Hearing.

7.31 Judicial Council Form SUBP-002--Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration.

7.32 Declaration in Support of Subpoena Duces Tecum.

7.33 Notice to Attorney in Lieu of Subpoena to Compel Attendance of Party or Party-Related Person Before Court.

7.34 Notice to Attorney in Lieu of Subpoena Duces Tecum to Compel Attendance of Party or Party-Related Person Before Court and Bringing of Books, Documents, or Other Things.

7.35 Objection to Request That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court on Notice to Attorney.

7.36 Notice of Motion and Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion.

7.37 Declaration in Support of Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion.

7.38 Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Expenses of Motion.

7.39 Notice of Motion and Motion for Order Quashing, Modifying, or Directing Compliance With Subpoena or Subpoena Duces Tecum and for Expenses of Motion.

7.40 Declaration Under Penalty of Perjury in Support of Motion for Order Quashing, Modifying, or Enforcing Subpoena or Subpoena Duces Tecum and for Expenses of Motion.

7.41 Order Quashing, Modifying, or Directing Conditional Compliance With Subpoena, or Protecting a Party, Witness, Consumer, or Employee From Unreasonable or Oppressive Demands, and Awarding Expenses of Motion.



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Chapter 7 Compelling Witness Attendance and Witness Preparation
I. STRATEGY

1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.01

7.01 Scope.

This chapter covers:

- Objectives and strategy for compelling witness attendance at trial [*see* 7.03 -7.12; Forms: *see* 7.30 -7.34, 7.36 -7.38].
- Objectives and strategy for challenging witness attendance at trial [*see* 7.13 -7.20; Forms: *see* 7.35, 7.39 -7.41]
- Preparing witnesses for trial [*see* 7.21 -7.29].

Core Statutes:

CCP §§ 1985-1994

Legal Topics:

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

Civil ProcedurePretrial MattersSubpoenasEvidenceTestimonyGeneral Overview



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Chapter 7 Compelling Witness Attendance and Witness Preparation
I. STRATEGY

1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.02

7.02 Objective and Strategy.

Testimony from witnesses is crucial for proving a case at trial. Getting a witness to appear at trial and testify in a manner that best serves a party's cases is a key component of winning a trial. The witness's relationship to the party seeking the testimony determines whether the witness is friendly or adverse, whether the witness is likely to attend voluntarily, or needs to be compelled, whether subpoenas are necessary, the advisability or necessity of videotaped depositions, and the need for use of out-of-state depositions (and the need, therefore, for a commission, letters rogatory, or related processes).

For non-party witnesses, it is always advisable to take a deposition, and if the exposure or potential for damages is sufficient to warrant the expense, it is more effective at trial to use videotaped depositions. Jurors, and judges in bench trials, have difficulty following the important points in testimony in written depositions that is read. A short videotape extract (5 to 10 minutes) is the most effective way to provide deposition testimony to a finder of fact from an absent witness.

Witnesses who are non-parties should always be served with a subpoena, and if they have documents that need to be authenticated or for which a foundation needs to be laid for admissibility, the subpoena should be duces tecum, which compels production at the trial of the necessary documents. This can be worked out with most witnesses who will acknowledge receipt of trial subpoenas so as to avoid use of a process server.



Trap:

Even if the witness agrees to appear voluntarily, counsel must still follow up with a subpoena in case the witness fails to appear. If counsel has only a witness's agreement to appear, the witness is not subject to compulsory process.

It is important in compelling attendance to try the "nice" route first; always start by asking whether the witness is willing to appear voluntarily and offer to try to work out any scheduling issues.

Discuss with witnesses that their testimony most likely will not be needed for the first day of trial, which may be reflected on the subpoena, but that counsel needs them available on short notice, usually one day, to be available for testimony. Advise them as early as possible when a trial is scheduled that will, or may, require their testimony.

Arrange for a convenient time to meet with cooperative witnesses to prepare for their testimony. This will typically be after-hours or on a weekend on a day as close as practical to the time of their testimony. Witnesses should be advised that the most important rule for all testimony is to tell the truth. Further advise them they likely will be examined by opposing counsel about whether they met with trial counsel calling them to testify and what was discussed during that meeting.

 Cross References:

Discussion of depositions, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Chs. 6-8.

Discussion of subpoena duces tecum, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 10, Inspection of Documents, Tangible Things, and Land.

Discussion of taking depositions outside California, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 7, Oral Depositions Outside of California.

An interpreter must be appointed for any witness who does not understand English or can not express himself or herself in English so as to be understood directly by counsel, court, and jury [*Evid Code* § 752(a)].

 Cross Reference:

Discussion of interpreters, see Ch. 8, Interpreters.

Detailed discussion/forms, see California Forms of Pleading and Practice, Ch. 535, Subpoena (Matthew Bender).

California Points and Authorities, Ch. 218, Subpoena (Matthew Bender).

Sometimes finding and/or serving a witness can be difficult. Some witnesses will avoid service of the subpoena, and others will attempt to avoid being compelled to attend trial even after being served. Online resources are available to locate and find witnesses for trial.

 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 ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial
 MattersSubpoenasEvidenceTestimonyGeneral Overview



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Chapter 7 Compelling Witness Attendance and Witness Preparation
II. COMPELLING WITNESS ATTENDANCE AT TRIAL AND WITNESS FEES

1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.03

7.03 CHECKLIST: Compelling Witness Attendance at Trial and Witness Fees.

- ☐ Make preliminary determinations.
 - ☐ Determine what facts need to be proved to prevail.
 - ☐ Determine what information is necessary to prove those facts.
 - ☐ Determine who can provide that information, either by testimony or the production of documents.
 - ☒ Determine timing.
 - ☐ Determine date, time, and place for appearance.
 - ☐ Determine when service will be made, which must be reasonable time to allow witness to prepare and travel.

Authority:
CCP § 1987(a)

Discussion:
See 7.06, 7.07

- ☐ Decide the type and content of most appropriate subpoena.

☐ Determine whether the witness resides in California.

☐ Determine status of witness.

Authority:

CCP § 1989

Discussion:

See 7.06

☐ Determine documents to be produced, if any.

Authority:

CCP § 1985

Discussion:

See 7.06

☐ Determine whether attorney may sign and issue subpoena without seal, or must obtain signed and sealed subpoena from clerk or judge to be filled in by attorney.

Authority:

CCP §§ 1985(c), 1986

Discussion:

See 7.06[2]

☐ Determine fee to be paid to witness.

Authority:

CCP § 2065

Discussion:

See 7.09

☐ Serve subpoena.

☐ Pay witness fees.

☐ Prepare proof of service.

☐ File subpoena and proof with court (recommended but not required).

Authority:

CCP § 1985 et seq.

Discussion:

See 7.08, 7.09

Form:

See 7.30

- ☐ Seek to compel appearance by notice to attorney in lieu of subpoena.
- ☐ Determine whether witness is one who may be compelled to attend by notice to their attorney in lieu of subpoena.
- ☐ To compel attendance without books, documents, or other things:
- ☐ Prepare notice.
 - ☐ Prepare proof of service by mail.
 - ☐ Serve notice and execute proof of service at least 10 days before the time required for attendance (unless the court prescribes a shorter time).
 - ☐ Serve copy of the notice on the attorney for the witness.
 - ☐ Execute proof of service.
 - ☐ Present the original notice to the court clerk for filing.
- ☐ To compel attendance with books, documents, or other things:
- ☐ Prepare notice.
 - ☐ Prepare proof of service.
 - ☐ Serve notice and execute proof of service at least 20 days before the time required for attendance (or within such shorter time as the court may order).
 - ☐ Serve copy of the notice on the attorney for the witness.
 - ☐ Execute proof of service.
 - ☐ Present the original notice to the court clerk for filing.

Authority:

CCP § 1987

Discussion:

See 7.06[3]

Forms:

See 7.31, 7.33, 7.34

☐ If witness files objections:

☐ Prepare moving papers:

☐ Notice of motion.

☐ Supporting declaration.

☐ Memorandum.

☐ Draft copies, serve, and file papers in the same manner as for any noticed motion.

Authority:

CCP § 1987.1

Discussion:

See 7.12

Form:

See 7.39

☐ Obtain penalties for noncompliance.

☐ Contempt proceedings.

☐ Request court to issue warrant to have witness arrested and brought before court.

☐ Obtain other sanctions or penalties.

Authority:

CCP §§ 1991-1993

Discussion:

See 7.12[4]

Legal Topics:

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

Civil Procedure Pretrial Matters Subpoenas Civil Procedure Remedies Costs & Attorney Fees Costs Witnesses



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7.04 Options and Strategies for Compelling Attendance of Witnesses at Trial.

A witness is a person whose declaration under oath is received as evidence for any purpose [CCP § 1878]. In a trial, a witness is a person whose declaration under oath is made in person before the trier of fact [see CCP §§ 1878, 2002, 2005, 2094; Evid Code § 710; *Elkins v. Superior Court* (2007) 41 C4th 1337, 1356-1359, 63 CR3d 483, 163 P3d 160 (witnesses' oral testimony, as opposed to affidavits, supplies valuable evidence relevant to credibility)]. Strategies for compelling witness attendance include the means to have the witness testify, the use of subpoenas, commissions, and letters rogatory, and videotaped depositions of out-of-state non-party witnesses.

It is important to think about the issue of compelling attendance early, well in advance of trial. Once discovery is closed, it is too late to do anything with respect to a witness who is beyond the subpoena power of the court, if the witness does not agree to appear voluntarily. And it is always wise first to interview a witness. If the witness does not want to take the time to meet with the attorney, it can help to explain that the interview may obviate the need for their attendance at trial.



Strategic Point:

If a party seeks to compel attendance of a witness at trial, and the witness is favorable to the other side, counsel is faced with a dilemma. Avoiding the hard impeachment evidence or avoiding using evidence damaging to the other side at trial allows the other side to (1) bring the witness thinking that they are good for their case, or (2) if they know about the damaging testimony, not bring the witness because they would have good testimony in the deposition. On the other hand, if the witness is a non-party, the problems of establishing that the witness is unavailable may interfere with the second of these alternatives if the witness is under the control of the party seeking to use the deposition.

Personal service of a trial subpoena is the most effective method of assuring the attendance of witnesses. All witnesses, other than party witnesses, should be subpoenaed. Many cooperative witnesses will freely accept a trial subpoena or sign an acknowledgment of receipt of a subpoena to avoid the expense and inconvenience of service by a process server. With uncooperative witnesses, in particular, it is sometimes necessary to have them attend the first day of trial, even though their testimony will not likely take place at that time. They can then be ordered by the trial judge to return at a future time when the need for their testimony is more likely.

** Judge's Perspective:**

After a witness has been served, counsel should personally contact the witness and determine how much advance notice the witness will require in order to appear in court. Then, if the witness is cooperative, such an arrangement can be made that will minimize inconvenience to the witness and give counsel the assurance that the witness will honor the subpoena.

Legal Topics:

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

Civil Procedure
Pretrial Matters
Subpoenas
Civil Procedure
Trials
Depositions
Civil Procedure
Remedies
Costs & Attorney Fees
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Witnesses
International Law
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Assistance



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7.05 Every Person Is Presumed to Be Qualified to Testify.

There is the presumption that every person is presumed to be qualified to testify, and the party challenging a witness's competency has the burden of proving that the witness is not competent to testify [*People v. Augustin (2003) 112 CA4th 444, 447, 5 CR3d 171*]. Failure to object at trial waives the issue on appeal [*People v. Augustin (2003) 112 CA4th 444, 447, 5 CR3d 171*].

Specific areas of a witness's competency may arise at trial, including the following:

- A witness's ability to be understood.
- Competency of a child witness.
- A witness's physical or mental limitations.
- Attorneys, judges, and jurors as witnesses.
- Experts as witnesses.
- Prisoners as witnesses.



Cross Reference:

Discussion of capacity to testify with examples, see *Ch. 11, Questioning Witnesses and Objections, 11.14.*

Legal Topics:

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

EvidenceCompetencyGeneral OverviewEvidenceInferences & PresumptionsPresumptions



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7.06 Compelling Attendance of Witnesses at Trial.

7.06[1] Court Has Inherent Power to Compel Attendance of Witness. The court has the inherent power to compel the attendance of persons to testify in an action or proceeding [*CCP* § 128(a)(6)], although it does not have the power to compel attendance of a witness who is not a California resident at the time of service [*CCP* § 1989].



Strategic Point:

A request to an out-of-state witness will often obtain his or her agreement to appear voluntarily. However, counsel and the court do not have the ability to compel an out-of-state witness to appear if that person is not a resident of California or a party. They can be compelled to testify only as a witness by deposition, in which case a videotaped deposition will provide the most useful testimony that can be played at trial if the witness is "unavailable." The process involves obtaining a subpoena in the out-of-state jurisdiction (*not* a California subpoena) or, if required, such as for a foreign country, a commission from the trial court where the action is pending, then serving that with letters rogatory on the witness and taking a deposition for the purpose of eliciting trial testimony.



Judge's Perspective:

Counsel must comply with the law of the other state to compel the witness to give a deposition, which then may be used at trial in lieu of live testimony.



Cross References:

Discussion of compelling attendance, see *California Trial Guide*, § 20.70 (Matthew Bender).

Discussion of process for out-of-state witness, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 7, Oral Depositions Outside of California.

7.06[2] Use Subpoena to Compel Attendance of Witness.

7.06[2][a] Purpose of Subpoena Is to Compel Attendance. A subpoena is a writ or order directed to a person

requiring his or her attendance at a particular time and place to testify as a witness. It is the process by which the attendance of a witness is required [CCP § 1985(a)].



Strategic Point:

Counsel should plan to subpoena all non-party witnesses, and should include a cover letter with a subpoena explaining what the subpoena is, giving counsel's contact information, and offering to work with the witness on scheduling issues. If counsel is not worried that the witness will evade service, call the witness to arrange for service rather than sending out a process server, which can be embarrassing for the witness.

A subpoena duces tecum requires the witness to bring with him or her any books, documents, or other things under the witness's control which he or she is bound by law to produce in evidence [CCP § 1985(a)].



Cross Reference:

Discussion of subpoena duces tecum, see *California Trial Guide*, § 20.71 (Matthew Bender).



Strategic Point:

A party to the action or proceeding may also be served with a subpoena or subpoena duces tecum. However, the more common procedure for securing the presence of a party or a person for whose immediate benefit an action is prosecuted or defended, or an officer, director, or managing agent of the party or person, is through service of a notice to appear, which has the same effect as serving a subpoena [see CCP § 1987(b), (c)].



Cross Reference:

Discussion of notice in lieu of subpoena, see 7.06[3]].

7.06[2][b] Subpoena Is Effective Only for California Residents. A person served with a subpoena is not obligated to attend a trial as a witness unless he or she is a resident of California at the time the subpoena is served [CCP § 1989].

Exceptions:

- A custodian of records whose personal attendance is not required by the terms of the subpoena need not be a resident of California [CCP § 1987.3].

- A member of the California Highway Patrol may be required by a subpoena requiring attendance to appear as a witness before any court located in California, in any civil action or proceeding, in connection with a matter regarding an event or transaction which he or she has perceived or investigated in the course of his or her duties, even if he or she is not a resident of California [Gov Code § 68097.3].

7.06[2][c] Clerk or Judge May Issue Subpoena. The court clerk or a judge may issue a signed and sealed, but otherwise blank, subpoena or subpoena duces tecum to the party requesting it, who must fill it in before serving it [CCP § 1985(c)].

7.06[2][d] Attorney May Issue Subpoena. The attorney of record in an action or proceeding may sign and issue a subpoena to require attendance before the court in which the action or proceeding is pending. The subpoena in such a

case need not be sealed [CCP § 1985(c)]. The attorney of record may also sign and issue a subpoena duces tecum to require production of the matters or things described in the subpoena [CCP § 1985(c)].

7.06[2][e] Use Mandatory Judicial Council Forms for Subpoena. If seeking attendance of a witness at a trial or hearing, Judicial Council Form SUBP-001--Civil Subpoena for Personal Appearance at Trial or Hearing is the mandatory form of subpoena [Cal Rules Ct, Rule 1.31]. If seeking attendance of a witness at a trial or hearing, as well as production of documents and things at the trial or hearing, Judicial Council Form SUBP-002--Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration is the mandatory form of subpoena [Cal Rules Ct, Rule 1.31].



Cross Reference:

Forms, see 7.30, 7.31.

7.06[3] Use Notice to Attorney in Lieu of Subpoena to Compel Attendance of Certain Witnesses.

7.06[3][a] Serve Party With Notice in Lieu of Subpoena. A party to the action or proceeding may be served with notice in lieu of a subpoena [CCP § 1987(b)].



Strategic Point:

A notice in lieu of a subpoena should be used only against a party to a trial; there is no legitimate reason to subpoena a party. In the case of witnesses the other side indicates will be produced, counsel for the party seeking that witness's attendance should nonetheless generally use a subpoena to compel attendance at trial. The requirements of attendance on a specific day can be modified by agreement between the witness and the counsel serving the subpoena [see CCP § 1985.1], but the compulsion of a subpoena is the only way to guarantee the presence of the witness.

7.06[3][b] Serve Person for Whose Immediate Benefit Action or Proceeding Is Prosecuted or Defended With Notice in Lieu of Subpoena. A person for whose immediate benefit the action or proceeding is prosecuted or defended may be served with notice in lieu of a subpoena [CCP § 1987(b)]. A "benefitted" person is one who would have an immediate right to an amount recovered, or some of it, as soon as it is recovered by a nominal plaintiff [*Southern Cal. Edison Co. v. Superior Court* (1972) 7 C3d 832, 837-838, 103 CR 709, 500 P2d 621] . A person with immediate and direct liability is a person for whose immediate benefit an action is defended [*Waters v. Superior Court* (1962) 58 C2d 885, 897, 27 CR 153, 377 P2d 265] .

7.06[3][c] Serve Officer, Director, or Managing Agent of Party or Person With Notice in Lieu of Subpoena. An officer, director, or managing agent of any party or person may be served with notice in lieu of a subpoena [CCP § 1987(b)].



Cross Reference:

Forms, see 7.33, 7.34.

Legal Topics:

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

Civil Procedure Pretrial Matters Subpoenas Evidence Testimony General Overview Governments Courts Authority to Adjudicate



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7.07 Observe Time Limits for Service of Subpoena or Notice.

7.07[1] Service of Subpoena Must Give Witness Reasonable Time to Prepare and Travel. Service of a subpoena must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance [CCP § 1987(a)].



Strategic Point:

It is good practice to give as much notice as possible to avoid the assertion that the notice was not reasonable. Because the time required in the situation of a notice in lieu of a subpoena is at least 10 days (if documents are requested, 20 days), these are likely the minimum time requirements [see CCP § 1987(b), (c)]. A party seeking to quash a subpoena based on insufficient time presumably can use these limits as "presumptive" requirements. For a witness with potential scheduling issues, it is wise to serve the subpoena at least a month in advance of trial.

7.07[2] If No Documents, Books, or Other Things Are Requested, Serve Notice in Lieu of Subpoena at Least 10 Days Before Trial. The written notice must be served on the attorney of the party or person at least 10 days before the time required for attendance, unless the court prescribes a shorter time [CCP § 1987(b)].

7.07[3] If Books, Documents, or Other Things Are Requested, Serve Notice in Lieu of Subpoena at Least 20 Days Before Trial. If the notice is served at least 20 days before the time required for attendance, or within a shorter time as is ordered by the court, it may include a request that the party or person bring with him or her books, documents, or other things. The notice must state the exact things or materials sought, and that the party or person has them in his or her possession or under his or control [CCP § 1987(c)].

Legal Topics:

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



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7.08 Serving Subpoena.

7.08[1] Generally Make Personal Service on Witness. Service of a subpoena is generally made on a witness (except on peace officers, firefighters, and specified technical analysts) by delivering a copy to the witness personally [CCP § 1987(a)]. Service may be made by any person [CCP § 1987(a)].

► Cross References:

Discussion of service on peace officers, firefighters, and public employees, see 7.08[4].

Form, see 7.30.

7.08[2] Serve Declaration With Subpoena Duces Tecum. A copy of the declaration on which the subpoena duces tecum is based must be served simultaneously with the subpoena duces tecum [CCP § 1987.5].

► Cross Reference:

Forms, see 7.31, 7.32.

7.08[3] Serve Minor by Serving Parent or Guardian. When service of a subpoena is to be made on a minor, service must be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service must be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is 12 years of age or older.

If the minor is under the jurisdiction of the juvenile court pursuant to *W&I Code* § 300, 601, or 602 and the minor is not in the custody of a parent or guardian, regardless of the minor's age, service also must be made on the designated agent for service of process at the county child welfare department or the probation department under whose jurisdiction the minor has been placed [CCP § 1987(a); *Pen Code* § 1328(b); see *W&I Code* §§ 300, 601, 602].

7.08[4] Serve Peace Officers, Firefighters, and Other Public Employees by Serving Employee's Superior. If a witness is one of the following public employees and is required as a witness before a court in a civil action in

connection with an event or transaction that he or she has perceived or investigated in the course of his or her duties, the subpoena may be served by delivering a copy either to the person personally or by delivering two copies to that person's immediate superior at the public entity by which he or she is employed [*Gov Code* § 68097.1(a)]:

- A peace officer of the California Highway Patrol.
- A member of the California State Police.
- A Department of Justice peace officer or technical analyst.
- A sheriff or deputy sheriff.
- A marshal or deputy marshal.
- A district attorney inspector.
- A probation officer.
- A building inspector.
- A firefighter.
- A city police officer.

If a witness is any other state employee or an employee of the trial courts required to testify regarding a matter, event, or transaction about which he or she has expertise gained in the course of his or her duties, the subpoena may be served by delivering a copy either to the witness personally or by delivering two copies to his or her immediate superior [*Gov Code* § 68097.1(b)].

7.08[5] Serve Nonresident Member of California Highway Patrol by Delivering Copy to Person in Charge of Office at Least Five Days Before Attendance Date. A member of the California Highway Patrol who is not a resident of California may be served by delivering a copy, during usual office hours, at least five days before the date of the member's required attendance, to the person in charge of the office of the California Highway Patrol where the member filed his or her report of the event or transaction [*Gov Code* § 68097.3].

7.08[6] Direct Sheriff to Serve Concealed Witness. If a witness is concealed in a building or vessel to avoid service of a subpoena, any court, judge, or officer issuing the subpoena may, on proof by affidavit or declaration of the concealment and of the witness's materiality, order that the sheriff serve the subpoena. The sheriff may then, for that purpose, break into the building or vessel where the witness is concealed [*CCP* § 1988].

Strategic Point:



This process applies to a witness who is deliberately evading service. In this case, ask the court to direct the sheriff to serve the witness.

7.08[7] Subpoenaing Party May Recover Costs of Service If Prevailing Party. The fee for serving a subpoena by a public officer, registered process server, or other means is an allowable cost [*CCP* § 1033.5(a)(4)]. If service is by a public officer, the recoverable cost is the fee authorized by law at the time of service [*CCP* § 1033.5(a)(4)(A)]. For sheriffs, the fee for service of process is governed by *Gov Code* § 26721, and certain charges for actual expenses are set out in *Gov Code* § 26748. Marshals are required to charge and collect for their services the fees, expenses, and mileage

allowed by law to sheriffs [*Gov Code* § 71266]. If service is by a process server registered pursuant to *B&P Code* § 22350 *et seq.*, the recoverable cost is the amount actually incurred in effecting service, including, but not limited to, a stake out or other means employed in locating the person to be served, unless those charges are successfully challenged by a party to the action [*CCP* § 1033.5(a)(4)(B)]. If service is made by a person other than a public officer or registered process server, the recoverable cost is the sum actually incurred or the amount allowed to a public officer in California for that service, whichever is less, except that the court may allow the sum actually incurred in effecting service [*CCP* § 1033.5(a)(4)(D)].



Cross Reference:

Discussion of recovering costs, see *Ch. 24, Costs*, 24.03 *et seq.*

Legal Topics:

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

Civil Procedure Parties Capacity of Parties Guardians Civil Procedure Pretrial Matters Subpoenas Civil
 Procedure Remedies Costs & Attorney Fees Costs Witnesses Family Law Guardians General Overview Family Law Parental
 Duties & Rights Duties Care & Control of Children



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7.09 Subpoenaing Party Must Pay Witness Fees.

7.09[1] Witness May Receive Attendance and Mileage Fees. A witness subpoenaed in any civil or administrative action or proceeding must be given written notice on the subpoena that he or she may be entitled to receive attendance fees and payment for mileage [CCP § 2065]. If the witness demands it, payment for mileage and attendance fees for one day must be given or offered to the witness at the time of service of the subpoena [CCP § 1987(a)]. A witness who demands this payment is not compelled to attend under the terms of the subpoena until the fees are paid [Gov Code § 68097]. The amount of witness fees for each day's actual attendance and for mileage actually traveled, both ways, is provided for by statute [see Gov Code § 68093].

7.09[2] Experts May Charge Fees for Attendance.

7.09[2][a] Subpoenaing Party Must Tender Fees to Expert. A party subpoenaing an expert witness to testify before any court, tribunal, or arbiter in any civil action or proceeding must pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that witness by any party attending the action or proceeding [Gov Code § 68092.5(a)]. For the purpose of this provision, "expert witness" means a witness other than one who is a party or employee of a party, and who is one of the following [Gov Code § 68092.5(a)]:

- An expert retained by a party in connection with litigation pursuant to CCP § 2034.210(b).
- A treating physician and surgeon or other treating health care practitioner who is to be asked to express opinion testimony, including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practitioner, but not including testimony requiring only the reading of words and symbols contained in the relevant medical record.
- An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which he or she is asked to express an opinion within his or her expertise and relevant to the action or proceeding.

An express contract, relating to compensation, entered into between a person and the party requesting or

requiring the person to testify prevails over the provisions of *Gov Code* § 68092.5 [*Gov Code* § 68092.5(e)].

If the expert's appearance takes longer than expected, the party serving the subpoena must pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert [*Gov Code* § 68092.5(a)].

7.09[2][b] Expert's Fee May Not Exceed Fee Charged Retaining Party. The expert's hourly or daily fee must not exceed the fee charged the party who retained the expert except when the expert donated his or her services to a charitable or other nonprofit organization [*Gov Code* § 68092.5(a)].

7.09[2][c] Subpoenaing Party May Make Motion to Set Compensation. If the subpoenaing party believes that the expert's hourly or daily fee for providing testimony is unreasonable, the party may move for an order setting the expert's compensation. Notice of the motion must be given to the expert and the opposing party [*Gov Code* § 68092.5(c)]. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. In the attempt at an informal resolution, either the party or the expert must provide the other with the following information [*Gov Code* § 68092.5(c)]:

- Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation.
- The total number of times the demanded fee has ever been charged and received by that expert.
- The frequency and regularity with which the demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community, and any other facts the court deems necessary or appropriate to make its determination. On determining that the fee demanded by the expert is unreasonable, and based on the evidence and factors considered, the court must set the expert's fee [*Gov Code* § 68092.5(c)].

7.09[2][d] Paying Expert If Trial Is Continued or Canceled. If the proceeding at which an expert witness has been notified his or her attendance is required is continued or canceled in advance of the time for which it is scheduled, the witness must be notified by the party requiring the expert's attendance by the quickest and most reliable means of giving notice under the circumstances, or the expert witness is entitled to receive the compensation specified in *Gov Code* § 68092.5(a), notwithstanding his or her failure to give any testimony [*Gov Code* § 68092.5(d)].

7.09[2][e] Prevailing Party May Recover Expert Fees. There is no prohibition against allowing costs for expert witness fees under *Gov Code* § 68092.5.



Cross Reference:

Discussion of expert fees, see *Ch. 24, Costs*, 24.11[2].

7.09[3] Subpoenaing Party Must Pay Fees to Public Employees.

7.09[3][a] Subpoenaing Party Must Tender \$150 to City and County Employees, Peace Officers, Firefighters, and Others. A party subpoenaing an employee of a local agency or any peace officer, firefighter, or state employee must tender \$150 with the subpoena to the person accepting the subpoena for each day that the employee or officer is required to remain in attendance pursuant to the subpoena [*Gov Code* §§ 68096.1(b), 68097.2(b)].

**Strategic Point:**

For these witnesses, counsel should have the checks prepared in time for delivery with the subpoena.

7.09[3][b] Public Employer Must Pay Witness's Salary and Expenses. Any local agency employee, peace officer, firefighter, or state employee who is obliged by subpoena to attend as a witness must receive the salary or other compensation to which he or she is normally entitled from the public entity by which he or she is employed during the time the officer or employee travels to and from the place where the court or other tribunal is located and while required to remain at there pursuant to the subpoena. The officer or employee must also receive from the employing public entity the actual, necessary, and reasonable traveling expenses incurred in complying with the subpoena [Gov Code §§ 68096.1(a), 68097.2(a)].

7.09[3][c] Subpoenaing Party Must Reimburse Public Employer. The party at whose request the subpoena is issued must reimburse the public entity for the full cost the public entity incurred in paying the employee or officer his or her salary or other compensation and traveling expenses, for each day that the employee or officer is required to remain in attendance pursuant to the subpoena [Gov Code §§ 68096.1(b), 68097.2(b)].

It is not necessary to reimburse a public entity that is itself a defendant through the actions of its officers or employees. In that case, the usual statutory provisions with respect to witnesses apply [*Patterson v. Sharp* (1967) 253 CA2d 838, 840-841, 61 CR 517 ; see Gov Code §§ 68093, 68096.1(a), 68097].

7.09[3][d] Subpoenaing Party and Public Employer Must Address Overpayment or Underpayment. If the public entity's actual expenses are proved to be less than the amount tendered, the entity must refund the excess of the amount tendered [Gov Code §§ 68096.1(c), 68097.2(c)]. If the public entity's actual expenses are proved to be more than the amount deposited, the subpoenaing party must pay the difference to the public entity [Gov Code §§ 68096.1(d), 68097.2(d)].

7.09[3][e] Subpoenaing Party Must Pay Nonresident Highway Patrol Officer Fees. When a member of the California Highway Patrol is subpoenaed under Gov Code § 68097.3, a deposit in an amount equal to the estimated amount of his or her salary and expenses for the time and travel required by the subpoena must be made with the clerk of the court before issuance of the subpoena [Gov Code § 68097.4].

7.09[3][f] Subpoenaing Party Need Not Pay Additional Fees If Court Continues Proceeding. If a court continues a proceeding on its own motion, no additional witness fees are required prior to the issuance of the subpoena or to the making of an order directing an employee or officer to appear on the date to which the proceeding is continued [Gov Code §§ 68096.1(e), 68097.2(e)].

A peace officer of the California Highway Patrol, peace officer of the State Fire Marshal's Office, employee of the Department of Justice who is a peace officer or technical analyst, sheriff, deputy sheriff, marshal, deputy marshal, firefighter, or city police officer may not be ordered by the court to return for subsequent proceedings beyond the date stated in the subpoena or the day on which that witness appeared pursuant to an agreement, unless the party at whose request the subpoena was issued, or the party at whose request the witness is ordered to return, tenders to the public entity that employs the witness the sum required to be tendered for the issuance of the subpoena in the first instance [Gov Code § 68097.5].

7.09[3][g] Subpoenaing Party May Obtain Relief From Fee Payment Requirement. The court, on good cause shown, including the fact that the party is proceeding in forma pauperis (fee waiver), may relieve a party of the duty to make a deposit or payment required by Gov Code §§ 68096.1, 68097.1-68097.5 [Gov Code § 68097.55].

Legal Topics:

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

Civil ProcedurePretrial MattersSubpoenasCivil ProcedureRemediesCosts & Attorney

FeesCostsWitnessesEvidenceTestimonyExpertsGeneral OverviewGovernmentsLocal GovernmentsEmployees &

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7.10 Subpoenaing Party May Obtain Witness's Agreement to Appear at Trial.

7.10[1] Subpoenaing Party May Coordinate With Witness Before Serving Subpoena. To save time and minimize scheduling problems, the subpoenaing party may contact witnesses before serving the subpoena to let them know they will be subpoenaed and to accommodate their schedules. This will not only save time, but it may yield a more cooperative witness. If there is an agreement to appear at another time, the subpoenaing party should make sure to memorialize it in writing.

7.10[2] Subpoenaing Party May Coordinate With Witness After Serving Subpoena. A subpoenaed person may, in lieu of appearance at the time specified in the subpoena, agree with the subpoenaing party to appear at another time or on such notice as may be agreed on [*CCP* § 1985.1].

7.10[3] Failure to Appear Pursuant to Agreement Is Punishable by Contempt. Failure to appear at trial pursuant to an agreement may be punishable as contempt by the court issuing the subpoena [*CCP* § 1985.1]. Facts establishing or disproving such an agreement and the failure to appear may be proved by an affidavit or declaration under penalty of perjury [*CCP* § 2015.5] of any person with personal knowledge of the facts [*CCP* § 1985.1].



Cross Reference:

Discussion of contempt, see Ch. 23, Contempt.

Legal Topics:

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



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7.11 Person in Court May Be Compelled to Testify Without Subpoena.

A person present in court may be required to testify in the same manner as if he or she were in attendance on a subpoena issued by the court [CCP § 1990].

Example:

A representative of a Nevada bank, who was voluntarily in the California courtroom, was properly compelled to testify as a witness on direct and cross-examination [*People v. Simon* (1951) 107 CA2d 105, 121-122, 236 P2d 855] .



Strategic Point:

Because a person voluntarily in court can be compelled to testify, it is best to advise clients, family members, and other related and interested parties not to come to court unless required. This is especially true for people who live out of state, who are not subject to service of process; they should not enter California. In addition, once a witness have been excused and the party on whose behalf the witness testified believes that the best possible testimony has been obtained, the party should have the witness leave the court premises so as not to be recalled anew.

Legal Topics:

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

Civil ProcedurePretrial MattersSubpoenasEvidenceTestimonyGeneral Overview



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7.12 Enforcing Compliance With Subpoena.

7.12[1] Failure to Comply With Subpoena Is Contempt. Disobeying a subpoena or refusing to be sworn, to answer as a witness, or to subscribe an affidavit when required may be punished as a contempt by the court that issued the subpoena [CCP § 1991]. In addition, advising a witness to conceal himself or herself for the purpose of avoiding service of a subpoena violates *Pen Code § 136.1*, and is considered contempt [*In re Holmes* (1983) 145 CA3d 934, 942-943, 193 CR 790] .

Cross Reference:

Discussion of contempt, see Ch. 23, Contempt.

7.12[2] Service of Subpoena on Witness Necessary for Contempt. For contempt proceedings to be proper when a witness has not obeyed a subpoena, the subpoena must have been served directly on the witness. Substituted service of a subpoena on an attorney does not confer personal jurisdiction over the witness. Therefore, the witness may not be held in criminal contempt for disobeying the subpoena if the service of the subpoena was made without the witness's knowledge and out of the witness's presence [*Sullivan v. State Bd. of Control* (1985) 176 CA3d 1059, 225 CR 454] .

7.12[3] Stay of Contempt Action Against Witnesses Pending Petition for Extraordinary Relief.

7.12[3][a] Contempt Action Against Public Safety Employee Is Stayed Pending Petition for Extraordinary Relief. If a court issues a contempt order regarding a public safety employee acting within the scope of his or her employment because of the employee's failure to comply with a subpoena or subpoena duces tecum, the execution of any sentence must be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order on which contempt is based [CCP §§ 128(c), 1209(d)].

"Public safety employee" includes a peace officer, firefighter, paramedic, or other employee of a public law enforcement agency whose duty is either to maintain official records or to analyze or present evidence for investigative or prosecutorial purposes [CCP §§ 128(c), 1209(d)].

7.12[3][b] Contempt Action Against Sexual Assault Victim Is Stayed Pending Petition for Extraordinary Relief. If a contempt order affects a victim of sexual assault, when the contempt consists of refusing to testify

concerning that sexual assault, the execution of any sentence is stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt [CCP § 128(d)].

"Sexual assault" means an act made punishable by *Pen Code* §§ 261, 262, 264.1, 285, 286, 288, 288a, or 289 [CCP § 128(d)].

7.12[3][c] Contempt Action Against Domestic Violence Victim Is Stayed Pending Petition for Extraordinary Relief. If a contempt order affects a victim of domestic violence, when the contempt consists of refusing to testify concerning that domestic violence, the execution of any sentence is stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt [CCP § 128(e)].

7.12[4] Court May Impose Penalties Against Noncomplying Witness.

7.12[4][a] Noncomplying Witness May Be Required to Reimburse Subpoenaing Party. A person failing to appear pursuant to a subpoena or court order forfeits to the aggrieved party \$500 and all damages that the aggrieved party may have sustained by the person's failure to appear. This forfeiture and damages may be recovered in a civil action [CCP § 1992].

7.12[4][b] Noncomplying Witness May Be Subject to Warrant and Arrest. If a witness fails to attend a trial, the court or officer that issued the subpoena, on proof of service and of the failure of the witness to attend and on payment of fees, may issue a warrant to the sheriff of the county to arrest the witness and bring him or her before the court or officer where attendance was required [CCP § 1993(a)(1)].

A warrant must specify with particularity the cause of the commitment for contempt, and if it is for refusing to answer a question, that question must be stated in the warrant [CCP § 1994]. Thus, a body attachment may be issued to compel the attendance of a witness, but it must specify the reason for the attachment [*Allison v. County of Ventura* (1977) 68 CA3d 689, 702, 137 CR 542] .

7.12[4][c] Noncomplying Witness May Be Required to Pay Court. A judicial officer may impose reasonable money sanctions, not to exceed \$1,500, payable to the court, for violation of a lawful court order without good cause or substantial justification. Sanctions may be imposed against a witness, party, and/or party's attorney [CCP § 177.5].

Legal Topics:

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

Civil Procedure
Pretrial Matters
Subpoenas
Civil Procedure
Judgments
Entry of Judgments
Stays of Proceedings
General Overview
Civil Procedure
Remedies
Writs
Common Law Writs
General Overview
Civil Procedure
Sanctions
Contempt
General Overview
Criminal Law & Procedure
Criminal Offenses
Miscellaneous Offenses
Obstruction of Justice
General Overview



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7.13 CHECKLIST: Challenging Attendance of Witnesses at Trial.

☐ Review subpoena or notice to attorney in lieu of subpoena.



Calendar relevant dates.

Discussion:

See 7.15

☐ Determine whether to comply, move to modify or quash, or object to subpoena.

☐ For out of state resident or nonparty, move to quash or modify.

Authority:

CCP § 1989

Discussion:

See 7.15[1], 7.16

☐ Object if witness is a consumer or employee.

☐ For consumer, serve written objection in lieu of a motion to quash.

☐ For employee, serve written objection in lieu of a motion to quash.

Authority:

CCP §§ 1985.3, 1985.6

Discussion:

See 7.17, 7.19

Form:

See 7.35

☐ To move to quash or modify subpoena:

- ☐ Prepare notice of motion to quash or modify.
- ☐ Prepare supporting declaration.
- ☐ Prepare memorandum of points and authorities.
- ☐ Follow general procedures for noticed motions.
- ☐ If motion is granted, prepare, file, and serve order.

Authority:

CCP §§ 1985.3, 1985.6

Discussion:

See 7.15[2] -[6]

Forms:

See 7.39, 7.40

☐ To object to notice in lieu of subpoena:

- ☐ Prepare objections.
- ☐ Sign objections.
- ☐ Prepare proof of service by mail.
- ☐ Serve written objections and execute proof of service.
- ☐ Present original objections to the court clerk for filing.

Authority:

CCP § 1987

Discussion:

See 7.18

Form:

See 7.35

Legal Topics:

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

Civil Procedure
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7.14 Options and Strategies for Challenging Attendance of Witnesses at Trial.

There are three aspects in considering whether to challenge the attendance of an adverse witness. First, consider whether there are grounds to challenge the attendance based on lack of opportunity to obtain deposition or other discovery of the witness, surprise (such as failure to disclose the witness on a witness list), and competence of the witness. Second, if the witness is going to be permitted anyway, the strategy should be to obtain advance indications of the testimony, by offer of proof or deposition in the midst of trial, or as soon after notice that the particular witness will be called to attempt to obtain either evidence sufficient to challenge the competency or, more likely, some evidence that will permit adequate cross-examination at trial. Third, consider whether the process by which the witness is being compelled can be challenged, as in the case of an impermissible use of the subpoena power, or failure to describe with sufficient specificity the materials sought to be produced.

► Cross Reference:

Discussion of competency of witnesses, see *Ch. 11, Questioning Witnesses and Objections, 11.09 et seq.*

For a witness who is not adverse, the issue of whether to challenge the witnesses appearance at trial is based on whether live testimony at trial is necessary: Is the knowledge of the witness helpful, and if so, can the witness qualify as "unavailable" so that prior deposition testimony can be used? Normally, if the witness is a non-party and the testimony anticipated is favorable, allowing the witness to be compelled is not an issue.

As with any process, if the service was defective or made on the wrong person, a motion to quash may be warranted. If such service, or a notice to appear to a party witness, was not timely served, a motion to quash service, or a refusal to produce the party witness, may be appropriate.

Legal Topics:

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

Civil ProcedureDiscoveryMisconductCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral Overview



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7.15 Determine Whether Grounds for Motion to Quash or Modify Subpoena Exist.

7.15[1] Make Motion to Quash or Modify Subpoena on Ground That Subpoena Was Served on Out of State Resident. A person is not obliged to attend as a witness pursuant to a subpoena unless the witness is a resident of California at the time of service of the subpoena [*CCP § 1989*]. For the purpose of a subpoena, "residence" means residence in fact and not domicile [*CCP § 1989*].

Exceptions:

- The residence requirement does not apply when a subpoena duces tecum is served on a custodian of records or other qualified witness as provided by *Evid Code §§ 1560-1566* and his or her personal attendance is not required by the terms of the subpoena [*CCP § 1987.3*].
- A member of the California Highway Patrol may be required by a subpoena requiring attendance to appear as a witness before any court located in California, in any civil action or proceeding, in connection with a matter regarding an event or transaction he or she has perceived or investigated in the course of his or her duties, even if not a resident of California [*Gov Code § 68097.3*].

➤ Cross Reference:

Form, see 7.39.

7.15[2] Make Motion to Quash or Modify Subpoena on Ground That Subpoena Fails to Comply With Applicable Form or Content Requirements. A motion to quash or modify a subpoena may be made on the ground that the subpoena fails to comply with the form or content requirements of the applicable statutory provisions [*CCP §§ 1985, 1985.3, 2020.210*].

➤ Cross Reference:

Form, see 7.39.

7.15[3] Make Motion to Quash or Modify Subpoena on Ground That Subpoena Was Not Served Properly.

A motion to quash or modify a subpoena may be made on the ground that the subpoena fails to comply with the service requirements of the applicable statutory provisions [*CCP* §§ 1985, 1985.3, 2020.210; *see* 7.08].

 Cross Reference:

Form, *see* 7.39.

7.15[4] Make Motion to Quash or Modify Subpoena on Ground That Matters Sought Are Privileged, Protected, or Otherwise Beyond Scope of Discovery. A motion to quash or modify a subpoena may be made on the ground that the matters sought to be produced are privileged, protected, or otherwise beyond the scope of discovery [*CCP* § 2017.010].

 Cross Reference:

Form, *see* 7.39.

7.15[5] Make Motion to Quash or Modify Subpoena on Ground That It Is Unreasonable or Oppressive or Unreasonable Violation of Right to Privacy. A motion to quash or modify a subpoena may be made on the ground that the discovery sought is an unreasonable or oppressive demand or unreasonable violation of the deponent's right to privacy [*CCP* § 1987.1].

 Cross Reference:

Form, *see* 7.39.

7.15[6] Make Motion to Quash or Modify Subpoena on Ground That It Is Unreasonably Cumulative, Duplicative, or Obtainable From Another Source. A motion to quash or modify a subpoena may be made on the ground that the discovery sought is unreasonably cumulative, duplicative, or obtainable from another source that is more convenient, less burdensome, or less expensive [*CCP* § 2019.030(a)].

 Cross Reference:

Form, *see* 7.39.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersSubpoenasEvidencePrivilegesGeneral Overview



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7.16 Nonparty May File Motion to Quash or Modify Subpoena.

A nonparty who wants to challenge a subpoena calling for either records only or records and testimony may, but is not required to, file a motion to quash the subpoena. Or, the nonparty may wait, putting the burden on the proponent to move to compel, and object to the subpoena in opposition to the proponent's motion [see CCP § 1987.1; *Monarch Healthcare v. Superior Court* (2000) 78 CA4th 1282, 1284, 93 CR2d 619] .

Cross Reference:

Form, see 7.39.

Legal Topics:

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

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7.17 Public Employee May File Motion to Quash or Modify Subpoena.

A state or local agency employee who is a party to the action may bring a motion to quash pursuant to *CCP* § 1987.1 when the records in question are covered by *CCP* § 1985.4 [see *CCP* §§ 1985.3(g), 1985.4]. Furthermore, a nonparty public employee may file a written objection to prevent production, instead of bringing a motion to quash [see *CCP* § 1985.3(g)].

► Cross Reference:

Form, see 7.39.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial
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7.18 Party Objecting to Notice Requesting Production Must File Objections Within Five Days of Receiving Notice.

Within five days after service of a notice in lieu of subpoena requesting documents, or within another period that the court may allow, the party or person to whom the request to bring books, documents, or other things is made may serve and file written objections to the request with a statement of grounds [CCP § 1987(c)]. The five-day period for objection is extended if the notice was served by mail [see CCP § 1013].

➡ Cross Reference:

Form, see 7.35.

Legal Topics:

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

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7.19 Challenging Party May Obtain Various Forms of Relief.

In response to a motion to quash, the court may make an order quashing the subpoena entirely, modifying it, or directing compliance with it on specified terms or conditions. This may be done on a motion made by a party, a witness, a party-consumer described in *CCP* § 1985.3 or a party-employee described in *CCP* § 1985.6. It may also be done after the subpoenaing party files a motion to compel after written objections are served by a nonparty consumer or employee pursuant to *CCP* §§ 1985.3(g), 1985.6(f), or on the court's own motion after giving counsel an opportunity to be heard. The court may make any other order to protect the parties, the witness, the consumer, or the employee from unreasonable or oppressive demands, including unreasonable violations of a witness's, consumer's, or employee's right to privacy [*CCP* § 1987.1; see *CCP* §§ 1985.3(g), 1985.6(f)].

Legal Topics:

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

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7.20 Challenging Party May Recover Costs of Motion.

If the court finds that a motion to quash or modify a subpoena was made or opposed in bad faith or without substantial justification, or that one or more of the requirements of the subpoena was oppressive, it may award the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees [CCP § 1987.2].

Cross Reference:

Discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersSubpoenasCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses



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7.21 CHECKLIST: Preparing Witnesses for Examination.



Begin preparing witnesses as early as possible.

Discussion:

See 7.23

- ☐ Explain general procedure for trial.

Discussion:

See 7.24

- ☐ Review facts of case and exhibits.

Discussion:

See 7.25

- ☐ Review witness's discovery statements and prior testimony.

Discussion:

See 7.26

- ☐ Explain to witness how to answer questions.

Discussion:

See 7.27

- ☐ Advise witness how to dress for trial.

Discussion:

See 7.28

- ☐ Provide witness directions to courtroom or place to meet before trial.

Discussion:

See 7.29

Legal Topics:

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

EvidenceTestimonyGeneral Overview



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.22

7.22 Options and Strategies for Preparing Witnesses for Examination.

It is important to begin early preparation of a witness and to discover exactly what a witness knows and will say, not what the witness thinks counsel wants to hear or wants the witness to say. If the witness will be deposed, it is better, unless there are overriding strategic considerations, to allow the witness to answer properly framed questions with as few objections or interjections as possible so that the testimony will be substantially the same as the witness will provide at trial. Preparation should include a complete debriefing of the witness to learn what he or she knows and to refresh as much as possible what are the witness's observations about the salient events or transactions. The witness should also be prepared on all of the positions (allegations, defenses) of the opposition. In addition, the witness should be familiar with the documents that are necessary to help the party for whom the witness is testifying to prevail.

At all times, underscore the cardinal rule of testifying, to tell the truth. Witnesses who have given deposition testimony and/or provided statements or declarations should review those earlier statements and testimony. Within reason, and consistent with the attorney's trial strategy, it may be helpful for witnesses to review the deposition testimony and statements of other witnesses as well as documents that may have a bearing on the trial outcome. Key witnesses may need a dress rehearsal of their testimony by taking them through mock examinations and cross-examinations. It can be helpful to have a colleague conduct an unfriendly cross-examination of the type the witness will likely face in court.

Counsel must be aware of any restrictions on the ability to tell witnesses about testimony of other witnesses (i.e., if there is an order excluding witnesses, counsel cannot circumvent it by sharing transcripts of testimony with witnesses). It is permissible, however, to ask witnesses how they will testify.



Cross Reference:

Discussion of excluding witnesses, see *Ch. 11, Questioning Witnesses and Objections, 11.03 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.23 Begin Preparing Witnesses As Early As Possible.

The attorney should begin preparing witnesses as early as possible. However, as trial nears and as testimony develops, new facts may emerge that will require the attorney to update the witnesses right before they are scheduled to testify.

A witness should be interviewed, prepared, and debriefed at the earliest time possible. It is also essential, if time and economics permit, to revisit the issues to which the witness is familiar right before trial. If the witness has been deposed (which can be a long time before trial), it is important to go over with the witness the important points that came up in the deposition to make sure that the witness is comfortable when being cross-examined.

Be sure to ask all questions of a witness in advance so that, at the actual trial, counsel will not be surprised by an unexpected answer.

Legal Topics:

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



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7.24 Explain General Procedure for Trial.

Most people have never testified in a trial and are unfamiliar with what will occur. The attorney should assume the witness has no knowledge about basic trial details, and explain to the witness:

- That the witness should be in or near the courtroom to be called on time.
- That the clerk or bailiff will swear in the witness.
- That the witness will sit in the witness stand.
- Whether there will be a jury.
- Whether the witness will be excluded from the courtroom when other witnesses testify.
- Approximately how long the witness may be expected to testify.



Cross Reference:

Discussion of excluding witnesses, see *Ch. 11, Questioning Witnesses and Objections, 11.03 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7.25 Review Facts of Case and Exhibits With Witness.

The witness may know only about his or her portion of the case, and not understand the entire case and what each side's position is. The attorney should review the entire case with the witness. The attorney should also review with the witness any exhibits that may be shown to the witness either on direct or cross-examination.



Strategic Point:

Be sure to conduct a mock cross-examination witness and explain how opposing counsel may try to trick the witness.

Legal Topics:

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



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7.26 Review Witness's Discovery Statements and Prior Testimony.

If the witness gave any prior statements related to the case or had his or her deposition taken in the case, the attorney should allow the witness to review those statements or transcripts. If the witness's prior statements are inconsistent with what the witness will testify to at trial, the attorney should help the witness articulate as clearly as possible why that testimony has changed.

This is also true if the witness participated in drafting any pertinent documents, maintains a file that might be relevant, or has correspondence or notes of any relevant events, transactions, or statements. These should all be carefully reviewed with the witness.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewEvidenceTestimonyGeneral Overview



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7.27 Explain to Witness How to Answer Questions.

Because most witnesses have never testified in a trial before, the attorney should advise the witness how to answer questions both on direct and on cross-examination.

Warning:

Los Angeles Local Rule 8.86 provides that no consultation between a witness while on the stand and counsel will be permitted without prior permission of the court pursuant to a request made on the record. In other words, without court permission, counsel may not take breaks and counsel a witness whose testimony is not going well. Therefore, thorough witness preparation before trial is crucial [Los Angeles Super Ct Rules, Rule 8.86]. The rule is unclear as to whether counsel may consult with the witness while the witness has not been excused but court is not in session (such as during a recess or overnight).

First and foremost, the attorney should advise the witness to always tell the truth as the witness knows the facts. The witness should be prepared to answer the question "What did your attorney tell you to say?" with the response "He/she told me to tell the truth." In addition, the attorney should advise the witness to take the following approach:

- Wait to hear the full question before answering.



Warning:

The witness should never anticipate what the question is, but should wait until the full question has been asked.

- Speak slowly and clearly.
- Answer only the question that is asked.
- Make eye contact with jurors.
- Do not speculate.

**Strategic Point:**

This is the most difficult part of being a witness. It is easy to understand why a witness might speculate when it relates to something that the witness did not hear or see directly, but was involved in, because there are always gaps in a witness's knowledge or memory. For example, the events being elicited may involve a meeting. Several people may have been present, but the witness cannot remember their names or the statements made as clearly as he or she would like. It is not helpful for the witness to fill in any blanks in the story. If something "must have happened" but the witness is not sure he or she saw it or heard it, it is imperative that the witness not volunteer that information. The witness should be prepared, and should understand, that it is normal for a witness to want to be truthful and careful, but also not to be forgetful, inartful, careless at the time, or otherwise "stupid." To the extent witnesses are afraid that they will be less respected if they do not remember something, they should be prepared to accept that feeling, and not to "remember" something they do not know. For example, few witnesses will remember who went into a room during a meeting first. It probably does not matter anyway, and they should know it does not matter.

- Do not offer opinions.
- Do not offer extra information unless asked.

**Strategic Point:**

A witness should not attempt to win the case; that is for the attorney to do. The witness will know the facts and the testimony if properly prepared. A witness who is not asked about something he or she expects to be asked about should understand there may be tactical and strategic reasons why that fact was not elicited *from that witness*. It may be that there is a better witness on the point, the fact may be damaging and unknown to the other side, the jury may, in the attorney's view, be more receptive to the fact at a later time after other preliminary facts are elicited, or the fact may require more foundation from other witnesses.

- If the witness does not know the answer to a question, say so.

**Strategic Point:**

It is better for a witness not to know something than to "know" more than he or she actually remembers. A statement that is based on what the witness actually remembers will not change; the witness will presumably remember the same way when asked again. However, if the witness does not actually know the answer but tries to provide one anyway, this may result in a different answer to the same question at a later time with devastating, impeaching results.

Legal Topics:

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



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Chapter 7 Compelling Witness Attendance and Witness Preparation
IV. PREPARING WITNESSES FOR EXAMINATION

1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.28

7.28 Advise Witness How to Dress for Trial.

The witness should be advised how best to dress for trial. A witness's credibility may be enhanced if he or she is dressed neatly and conservatively, and does not wear apparel that may be offensive to the court or a juror.



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7.29 Provide Witness Directions to Courtroom or Where to Meet Before Going to Court.

The attorney should provide witnesses with complete directions to the courtroom or place where the attorney will meet the witness, including the best place to park and how to get to the specific division, department, or room on time.



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.30

7.30 Judicial Council Form SUBP-001--Civil Subpoena for Personal Appearance at Trial or Hearing.

Judicial Council Form SUBP-001--Civil Subpoena for Personal Appearance at Trial or Hearing.

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 1985

Grounds:

See 7.06



Timing:

See 7.07

Service:

See 7.08

Related Forms of Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration:

See 7.31



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.31

7.31 Judicial Council Form SUBP-002--Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration.

Judicial Council Form SUBP-002--Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration.

[Click here to view image.](#)

NOTES.

Authority:

CCP § 1985

Grounds:

See 7.06



Timing:

See 7.07

Service:

See 7.08

Related Form of Subpoena for Personal Appearance at Trial:

See 7.30



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.32

7.32 Declaration in Support of Subpoena Duces Tecum.

Declaration in Support of Subpoena Duces Tecum.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION RE
_____ [name],	)	SUBPOENA DUCES TECUM
Defendant.	)	
	)	
	)	

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. This cause was duly set for trial on _____ [date], at _____ [time], in Department _____ of the above-entitled court.

3. _____ [Name of witness] has in his/her possession or under his/her control the following things: _____ [specify exact matters or things to be produced].

4. The described items are material to the issues and good cause exists for the production of the described items, in that _____ [explain relevance of items sought to be produced, e.g., This action is for personal injuries arising out of an automobile accident. Plaintiff John Smith received medical care for his injuries arising from the

accident at Main Street Hospital, located at 1122 Main Street. These medical records, diagnoses, histories, X-rays, and other data are material and relevant and necessary for a proper prosecution of this case. Good cause exists for their production in that they are unavailable elsewhere].

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 §§ 1985(b), 1987.5



Timing:

See 7.07

Related Form of Order:

See 7.41

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.33

7.33 Notice to Attorney in Lieu of Subpoena to Compel Attendance of Party or Party-Related Person Before Court.

Notice to Attorney in Lieu of Subpoena to Compel Attendance of Party or Party-Related Person Before Court.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE TO COMPEL
_____ [name],	)	ATTENDANCE BEFORE
Defendant.	)	COURT
	)	
	)	

To _____ [attorney's name, e.g., Jane Lee], attorney for _____ [party's name, e.g., Defendant Mary Jones]:

NOTICE IS HEREBY GIVEN that _____ [specify party, e.g., Defendant Mary Jones] is requested to attend before the above-entitled court, located at _____ [street address of court and city], on _____ [date], at _____ [time], at _____ [department, division, or room number, if any], to testify as a witness in this action.

This request is made pursuant to *Code of Civil Procedure Section 1987(b)*, which provides that giving this notice has the same effect as the service of a subpoena and that, in the event of noncompliance with this notice, the parties will have the rights, and the court may make such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

Attorney for Plaintiff _____ [typed name]

NOTES.

Authority:

CCP § 1987(b)



Timing:

See 7.07

Grounds:

See 7.06[3]

Related Form of Order:

See 7.38

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.34

7.34 Notice to Attorney in Lieu of Subpoena Duces Tecum to Compel Attendance of Party or Party-Related Person Before Court and Bringing of Books, Documents, or Other Things.

Notice to Attorney in Lieu of Subpoena Duces Tecum to Compel Attendance of Party or Party-Related Person Before Court and Bringing of Books, Documents, or Other Things.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE TO COMPEL
_____ [name],	)	ATTENDANCE BEFORE
Defendant.	)	COURT AND TO BRING
	)	BOOKS DOCUMENTS
	)	AND OTHER THINGS
	)	

To _____ [attorney's name, e.g., Jane Lee], attorney for _____ [party's name, e.g., Defendant Mary Jones]:

NOTICE IS HEREBY GIVEN that _____ [specify party, e.g., Defendant Mary Jones] is requested to attend before the above-entitled court, located at _____ [street address of court and city], on _____ [date], at _____ [time], at _____ [department, division, or room number, if any], to testify as a witness in this action.

_____ [Specify party, e.g., Defendant Mary Jones] has in her possession or under her control the following _____ [specify type of material, e.g., accounting ledgers for the years 2005 and 2006]:

_____ [specify party, e.g., Defendant Mary Jones] is requested to bring with her the above-described books or documents or other things.

This request is made pursuant to *Code of Civil Procedure Section 1987(b), (c)*, which provide that giving this notice has the same effect as the service of a subpoena and that, in the event of noncompliance with this notice, the parties will have such rights, and the court may make such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

Attorney for Plaintiff _____ [typed name]

NOTES.

Authority:

CCP § 1987(c)



Timing:

See 7.07

Grounds:

See 7.06[3]

Related Form of Order:

See 7.38

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.35

7.35 Objection to Request That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court on Notice to Attorney.

Objection to Request That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court on Notice to Attorney.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	OBJECTIONS TO REQUEST
_____ [name],	)	TO PRODUCE BOOKS,
Defendant.	)	DOCUMENTS, OR OTHER
	)	THINGS
	)	

To _____ [party's name, e.g., Plaintiff John Smith] and his/her attorney:

NOTICE IS HEREBY GIVEN that _____ [specify party, e.g., Defendant Mary Jones] objects to the notice to compel production of _____ [books or documents or other things], served on _____ [date], on the following grounds: _____ [specify grounds, e.g., the documents requested are not material to the issues in this action in that they relate solely to Defendant's business, and not to the automobile accident that is the subject matter of this action].

Dated: _____

_____ [firm name, if any]

By: _____ [*signature*]

Attorney for Defendant _____ [*typed name*]

NOTES.

Authority:

CCP § 1987(c)



Timing:

See 7.18

Grounds:

See 7.15

Related Form of Order:

See 7.38

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.36

7.36 Notice of Motion and Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion.

Notice of Motion and Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION FOR
_____ [name],	)	ORDER TO BRING BOOKS
Defendant.	)	DOCUMENTS, OR OTHER
	)	THINGS BEFORE COURT
	)	[AND REASONABLE
	)	EXPENSES OF MOTION]
	)	

To _____ [party's name, e.g., Defendant Mary Jones] and 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, division, or room number, if any], of the above-entitled court, located at _____ [street address], _____ [city], California, _____ [party's name, e.g., Plaintiff John Smith] will move for an order directing _____ [party's name, e.g., Defendant Mary Jones] to appear before this court on _____ [date], at _____ [time], _____ [department, division, or room number, if any], to testify as a witness in this action and to bring with her the following _____ [specify type of material, e.g., books or documents or other things]: _____. [If reasonable expenses are

sought, add: Plaintiff John Smith will also move for an order requiring Defendant Mary Jones to pay to him the reasonable expenses of making this motion, including reasonable attorney's fees.]

The motion will be made on the grounds that _____ [*party's name, e.g., Defendant Mary Jones*] has such _____ [*books or documents or other things*] in her possession or under her control, that a notice to produce said items was served on her attorney on _____ [*date*], and objections to that notice were served and filed by her on _____ [*date*], pursuant to *Code of Civil Procedure Section 1987(c)*, and that _____ [*party's name, e.g., Plaintiff John Smith*] has good cause to request the production of these items and that they are material to the issues in this action, all as is more particularly set forth in the declaration of _____ [*name*] attached hereto.

[*If reasonable expenses of motion are sought, add:* The motion for expenses is made on the ground that the objections were made _____ (in bad faith or without substantial justification).]

The motion will be based on this notice of motion, the declaration of _____ [*name*], the supporting memorandum served and filed herewith, the papers and records on file herein, and such oral and documentary evidence as may be presented at the hearing of this motion.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Plaintiff _____ [*typed name*]

NOTES.

Authority:

CCP §§ 1987(c), 1987.2

Grounds:

See 7.12

Related Form of Order:

See 7.38

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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V. FORMS

1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.37

7.37 Declaration in Support of Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion.

Declaration in Support of Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION IN SUPPORT
_____ [name],	)	OF MOTION FOR ORDER
Defendant.	)	TO BRING BOOKS
	)	DOCUMENTS, OR OTHER
	)	THINGS BEFORE COURT
	)	[AND REASONABLE
	)	EXPENSES OF MOTION]
	)	

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. A notice to attend _____ [before the court or at trial] on _____ [date], with _____ [books or documents or other things] was served on _____ [party's name, e.g., Defendant Mary Jones] on _____ [date]. A copy of that notice is attached to this declaration as Exhibit A and made a part hereof.

3. _____ [Party's name, e.g., Defendant Mary Jones] is _____ [a party to this action or a person for whose immediate benefit this action is _____ (prosecuted or defended) or a(n) _____ (officer or director or managing agent) of _____ (specify name and status of a person who is a party or for whose immediate benefit the action is being prosecuted or defended)].

4. _____ [Party's name, e.g., Defendant Mary Jones] has in her possession or under her control the _____ [specify the materials or things desired, e.g., books or documents or other things] to be produced.

5. Good cause exists for the production of the above-described materials or things by reason of the following facts: _____ [state reasons, e.g., because they are not otherwise available to Plaintiff John Smith].

6. The above-described materials or things are material to the issues involved in the case by reason of the following facts: _____ [state reasons, e.g., they indicate Defendant's control of and responsibility for Plaintiff's goods].

[7. If desired, state reasons why reasonable expenses of making the motion, including reasonable attorney's fees, should be awarded, e.g., Defendant Mary Jones opposed the motion in bad faith or without justification, and reasonable expenses of the motion, including attorney's fees, should therefore be awarded to Plaintiff John Smith.]

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 §§ 1987(c), 1987.2

Grounds:

See 7.12

Related Form of Order:

See 7.38

Related Forms of Memoranda:

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7.38 Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Expenses of Motion.

Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Expenses of Motion.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER TO BRING BOOKS
_____ [name],	)	DOCUMENTS, OR OTHER
Defendant.	)	THINGS BEFORE COURT
	)	[AND REASONABLE
	)	EXPENSES OF MOTION]
	)	

The motion of _____ [party's name, e.g., Plaintiff John Smith] for an order requiring _____ [party's name, e.g., Defendant Mary Jones] to produce _____ [specify items] at the trial of this action 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 granted under _____ (limitations or conditions)],

[EITHER]

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [party's name, e.g., Defendant Mary Jones] appear before this court on _____ [date], at _____ [time], at _____ [department, division, or room number, if any], to testify as a witness in this action and to bring with her the following _____ [state exact materials or things].

[OR]

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [party's name, e.g., Defendant Mary Jones] appear before this court on _____ [date], at _____ [time], at _____ [department, division, or room number, if any], to testify as a witness in this action and to bring her the following _____ [state exact materials or things]. _____ [State limitations or conditions on use of produced items, e.g., _____ (specify documents) may only be inspected in camera].

[CONTINUE]

[If expenses awarded, add:] IT IS FURTHER ORDERED that _____ [party's name, e.g., Defendant Mary Jones] pay the sum of \$_____ to _____ [party's name, e.g., Plaintiff John Smith] as reasonable expenses and attorney's fees.

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 1987(c), 1987.2

Grounds:

See 7.12

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.39

7.39 Notice of Motion and Motion for Order Quashing, Modifying, or Directing Compliance With Subpoena or Subpoena Duces Tecum and for Expenses of Motion.

Notice of Motion and Motion for Order Quashing, Modifying, or Directing Compliance With Subpoena or Subpoena Duces Tecum and for Expenses of Motion.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION FOR ORDER
Defendant.	)	[QUASHING or MODIFYING
	)	or DIRECTING COMPLIANCE
	)	WITH] SUBPOENA [AND
	)	FOR EXPENSES OF MOTION]
	)	

To _____ [party's name, e.g., Defendant Mary Jones] and 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], _____ [name], the _____ [witness or consumer or employee or specify party, e.g., Plaintiff John Smith] will, and hereby does, move for an order _____ [quashing or modifying or enforcing compliance with] the subpoena [duces tecum] issued and served on _____ [name], the witness, requiring his/her attendance at _____ [the trial of the above-entitled matter or the hearing of the above-entitled matter] on _____ [date] [, and the production of certain records].

[If reasonable expenses sought, add: Plaintiff John Smith will also move for an order requiring _____ (specify party who sought subpoena, e.g., Defendant Mary Jones) to pay him the reasonable expenses of making the motion, including reasonable attorney's fees.]

The motion will be made on the ground that _____ [specify, e.g., there is no good cause for production of the documents sought, or, if motion to comply, the documents are not otherwise available]. [If expenses of motion are sought, add: The motion for expenses is made on the ground that one or more of the requirements of the subpoena is oppressive.]

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 on the hearing of the motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

Attorney for Plaintiff _____ [typed name]

NOTES.

Authority:

CCP §§ 1987.1, 1987.2

Grounds:

See 7.15

Related Form of Order:

See 7.41

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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1-7 MB Practice Guide: Trial & Post-Trial Civil Proc 7.40

7.40 Declaration Under Penalty of Perjury in Support of Motion for Order Quashing, Modifying, or Enforcing Subpoena or Subpoena Duces Tecum and for Expenses of Motion.

Declaration Under Penalty of Perjury in Support of Motion for Order Quashing, Modifying, or Enforcing Subpoena or Subpoena Duces Tecum and for Expenses of Motion.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION IN SUPPORT
_____ [name],	)	OF NOTICE OF MOTION AND
Defendant.	)	MOTION FOR ORDER
	)	[QUASHING <i>or</i> MODIFYING
	)	<i>or</i> DIRECTING COMPLIANCE
	)	WITH] SUBPOENA [AND FOR
	)	EXPENSES OF MOTION]
	)	

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. On _____ [date], a subpoena [duces tecum], issued in the above-entitled cause, was served on _____ [name], as a witness on behalf of [specify, e.g., defendant] at _____ the trial of the above-entitled matter.

3. _____ [State reasons why subpoena should be quashed, modified, or enforced, e.g., Good cause does not exist for the production of the subpoenaed records because they are otherwise available to the defendant or The subpoenaed records may not be introduced because they are privileged pursuant to _____ (specify appropriate authority)].

[4. If expenses are requested pursuant to CCP § 1987.2, state reasons why reasonable expenses of making motion, including reasonable attorney's fees, should be awarded, e.g., The requirements of the subpoena were oppressive in that _____ (specify), and reasonable expenses of this motion, including attorney's fees, should therefore be awarded to plaintiff John Smith.]

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 §§ 1987.1, 1987.2

Grounds:

See 7.15

Related Form of Order:

See 7.41

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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7.41 Order Quashing, Modifying, or Directing Conditional Compliance With Subpoena, or Protecting a Party, Witness, Consumer, or Employee From Unreasonable or Oppressive Demands, and Awarding Expenses of Motion.

Order Quashing, Modifying, or Directing Conditional Compliance With Subpoena, or Protecting a Party, Witness, Consumer, or Employee From Unreasonable or Oppressive Demands, and Awarding Expenses of Motion.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER [QUASHING <i>or</i>
_____ [name],	)	MODIFYING <i>or</i> DIRECTING
Defendant.	)	COMPLIANCE WITH]
	)	SUBPOENA [AND FOR
	)	EXPENSES OF MOTION]
	)	

The motion of _____ [name of moving party, e.g., Plaintiff John Smith] for an order _____ [specify] 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 should be granted,

[EITHER]

IT IS HEREBY ORDERED that the subpoena [duces tecum] served on _____ [name of witness] on

_____ [date], to compel the attendance of _____ [name of witness] at the trial of the above-entitled matter on _____ [date], [with certain things] be deemed, and is, quashed.

[OR]

IT IS HEREBY ORDERED that the subpoena [duces tecum] served on _____ [name of witness] on _____ [date], to compel the attendance of _____ [name of witness] at the trial of the above-entitled matter on _____ [date], [with certain things] be modified in the following respects: _____ [specify].

[OR]

IT IS HEREBY ORDERED that the subpoena [duces tecum] served on _____ [name of witness] on _____ [date], to compel the attendance of _____ [name of witness] at the trial of the above-entitled matter on _____ [date], [with certain things] be complied with on the following terms: _____ [specify].

[AND/OR]

IT IS HEREBY [FURTHER] ORDERED that, in order to protect the _____ [parties or witness or consumer or employee] from unreasonable or oppressive demands, _____ [specify limitations, e.g., only employment records from _____ (date), to _____ (date), need be produced].

[CONTINUE]

[If costs and expenses ordered, add: IT IS FURTHER ORDERED that _____ (name of party) pay to _____ (name of party or witness) the sum of \$_____ as reasonable costs, expenses, and attorney's fees.]

Judge of the Superior Court [signature]

NOTES.

Authority:

CCP §§ 1987.1, 1987.2

Grounds:

See 7.15

Related Forms of Memoranda:

See California Points and Authorities, Ch. 218, Subpoena (Matthew Bender)



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Chapter 8 Interpreters

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.syn

§ 8.syn Synopsis to Chapter 8: Interpreters

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Chapter 8 Interpreters
I. STRATEGY

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.01

8.01 Scope.

This chapter covers:

- Objectives and strategy for using an interpreter at trial [*see* 8.02].
- Assessing whether any parties or trial witnesses will need an interpreter [*see* 8.03 -8.09].
- Obtaining an interpreter for a party or witness [*see* 8.10 -8.19; Forms: *see* 8.33 -8.35].
- Eliciting testimony from a witness with an interpreter's aid [*see* 8.20 -8.27].
- Special considerations when a disabled juror requires a service provider [*see* 8.28 -8.32].

Core Statutes:

Evid Code §§ 750-755.5; *CCP* § 224



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 750 *et seq.*, see *Cotchett, California Courtroom Evidence*, 16.18 *et seq.* (Matthew Bender).

Legal Topics:

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



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Chapter 8 Interpreters
I. STRATEGY

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.02

8.02 Objective and Strategy.

Judicial proceedings be conducted in the English language [CCP § 185]. Parties must use interpreters to present the testimony of a non-English speaking party or witness in English [Evid Code § 752(a)]. In addition, sign language interpreters are sometimes needed for deaf or hearing-impaired witnesses [Evid Code § 754]. A disabled juror may also be entitled to an interpreter [CCP § 224].

Consider:

California law refers to an "interpreter" as either a foreign language interpreter or a sign language interpreter [Evid Code § 754(d)]. A "translator" is a person who deciphers or translates a writing [Evid Code § 753(a)].

The difficulty for the practitioner is in knowing what the testimony of the witness truly is. It can happen that the interpreter will hear counsel's question, state something to the witness and then follow up with the witness, while the answer put into the record after translation is just one or two sentences. If there is a problem with an adverse witness, counsel should have his or her own interpreter to relay what the interpreter is saying to the witness. Check the local rules about the use of interpreters and translators in a particular county. For example, in Los Angeles County, the court does not provide interpreters, but can provide a list of available interpreters. The party calling a witness for whom an interpreter is required must provide in advance for, and compensate, the interpreter [Los Angeles Super Ct Rules, Rule 8.18]. It is always a good idea to work with opposing counsel if an interpreter is needed, and perhaps stipulate about the use of interpreters.

Counsel involved in a matter in which an interpreter is, or may be needed, should become familiar with the sources from which interpreters are selected. For example, will the interpreter be one whose primary language is that spoken by the witness? And are there cultural differences between the witness and the interpreter which may interfere or impact on the candor of the interpretation?

Detailed Discussion:

California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

California Trial Guide, § 20.13 (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:

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Chapter 8 Interpreters

II. ASSESSING WHETHER WITNESSES OR PARTIES WILL NEED INTERPRETER

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8.03 CHECKLIST: Assessing Whether Witnesses or Parties Will Need Interpreter.

☐ Determine whether any witnesses are non-English speaking.

☐ Does the witness speak English so as to be understood directly by counsel, court, and the jury?

Authority:

Evid Code § 752(a); Cal Rules Ct, Stds Jud Admin, Std 2.10(a)

Discussion:

See 8.06

☐ Determine whether any parties are non-English speaking.

☐ Can the party understand and speak English well enough to participate in the proceedings?

☐ Can the party understand and speak English well enough to assist counsel?

Authority:

Cal Rules Ct, Stds Jud Admin, Std 2.10(a)

Discussion:

See 8.07

☐ Determine whether any witness or party is deaf or hearing impaired.

☐ Does the witness or party have a hearing loss so great as to prevent understanding language spoken

in a normal tone?

Authority:

Evid Code § 754

Discussion:

See 8.08

☐ Determine whether any writings counsel will seek to admit into evidence will be translated.

Authority:

Evid Code § 753(a)

Discussion:

See 8.09

Legal Topics:

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Chapter 8 Interpreters

II. ASSESSING WHETHER WITNESSES OR PARTIES WILL NEED INTERPRETER

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.04

8.04 Options and Strategies for Assessing Whether Witnesses or Parties Will Need Interpreter.

A witness who is non-English speaking must have an interpreter [*Evid Code* § 752]. In this situation, counsel may request that the opposing party stipulate to having an interpreter appointed, move to have an interpreter appointed, or request that the court examine the witness on the record. The Evidence Code does not directly address the issue of a non-English speaking party. However, the Rules of Court state that an interpreter is needed when a party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel [Cal Rules Ct, Stds Jud Admin, Std 2.10(a)].



Strategic Point:

In some instances a party may wish to involve an informal "check interpreter" to verify the accuracy of translation of the other side's interpreter. This also applies to translators.



Cross References:

Discussion of procedures for hiring and paying for a foreign language interpreter, see 8.13 -8.17.

Discussion of procedures for hiring and compensating a sign language interpreter, see 8.18.

Legal Topics:

For related research and practice materials, see the following legal topics:
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II. ASSESSING WHETHER WITNESSES OR PARTIES WILL NEED INTERPRETER

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.05

8.05 Trial Must Be Conducted in English.

Judicial proceedings must be conducted in the English language [*CCP* § 185].

Legal Topics:

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



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II. ASSESSING WHETHER WITNESSES OR PARTIES WILL NEED INTERPRETER

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.06

8.06 Non-English Speaking Witnesses Must Have Interpreter.

A witness who is incapable of understanding the English language or incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury must have an interpreter sworn to interpret for him or her [*Evid Code* § 752(a); Cal Rules Ct, Stds Jud Admin, Std 2.10(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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II. ASSESSING WHETHER WITNESSES OR PARTIES WILL NEED INTERPRETER

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.07

8.07 Court May Require Non-English Speaking Parties to Have Interpreter.

An interpreter is needed if, after an examination of a party, the court concludes that the party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel [Cal Rules Ct, Stds Jud Admin, Std 2.10(a)].



Strategic Point:

The main strategic consideration is whether it is better or worse to highlight a client's unfamiliarity with English. For example, if the client signed a document and now contends that he did not understand it, counsel should have an interpreter present, and should always converse with the client (when in the jury's presence) through an interpreter. On the other hand, to emphasize that the client is "American," or successful and sophisticated, it may be best to de-emphasize any language issues.

Also, an interpreter may be able to explain to the attorney cultural nuances about substantive issues in a matter that might go unnoticed by the attorney. These nuances may affect the meaning of testimony, which might otherwise seem clear. Similarly, a good interpreter may clarify whether a word choice in clear English may, when interpreted, mean something different to the witness.



Cross References:

Discussion of examination by the court, see 8.12.

Discussion of procedures for hiring and paying for an interpreter, see 8.13 -8.17.

Exceptions:

In the following cases, parties who do not proficiently speak or understand English must have an interpreter present without the need for an examination [*Evid Code* § 755]:

- An action arising under the Domestic Violence Protective Act (*Fam Code* § 6200 *et seq.*).

- An action arising under the Uniform Parentage Act (*Fam Code § 7600 et seq.*).
- An action for dissolution or nullity of marriage or legal separation of the parties in which a protective order is being sought under *Fam Code § 6221*.

Legal Topics:

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

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II. ASSESSING WHETHER WITNESSES OR PARTIES WILL NEED INTERPRETER

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.08

8.08 Witnesses and Parties Who Are Deaf or Hearing Impaired Must Have Sign Language Interpreter.

8.08[1] Evidence Code Defines Deaf or Hearing Impaired. A person is "deaf or hearing impaired" when he or she has a hearing loss so great as to prevent his or her understanding language spoken in a normal tone. However, the term does not include an individual who is hearing impaired provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment [*Evid Code* § 754(a)].

8.08[2] Evidence Code Provides for Interpreters for Deaf or Hearing Impaired Parties As Well As Witnesses. In any civil action including, but not limited to, a small claims court, juvenile court, or family court proceeding, where a party or witness is deaf or hearing impaired and is present and participating, the proceedings must be interpreted by a qualified interpreter [*Evid Code* § 754(b)].

► Cross References:

Discussion of procedures for hiring and compensating a sign language interpreter, see 8.18.

Law Revision Commission comments and case authority interpreting *Evid Code* § 754, see *Cotchett, California Courtroom Evidence*, 16.22 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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II. ASSESSING WHETHER WITNESSES OR PARTIES WILL NEED INTERPRETER

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8.09 Parties May Use Translator to Decipher Writing.

When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language must be sworn to decipher or translate the writing [*Evid Code* § 753(a)].



Strategic Point:

It is common for parties to stipulate to the translation of a particular noncontroversial document in advance of the trial, and resolve any disputes about the proper translation at the pretrial conference. Qualifying a translator with respect to a written document begins to cross over into the realm of an expert witness, with a corresponding need to very specific knowledge, background, and experience.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceWritingsTranscripts & TranslationsTranslations



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Chapter 8 Interpreters

III. OBTAINING INTERPRETER FOR TRIAL WITNESSES OR PARTIES

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8.10 CHECKLIST: Obtaining Interpreter for Trial Witnesses or Parties.

☐ For a non-English speaking party or witness, determine whether to request an examination or move for an interpreter without an examination.

☐ Request examination if counsel is uncertain whether interpreter is needed.

Authority:

Cal Rules Ct, Stds Jud Admin, Std 2.10(b)

Discussion:

See 8.12

☐ If interpreter is needed, determine how to best proceed.

☐ Court may appoint interpreter on its own motion.

Authority:

Evid Code §§ 752(b), 730

Discussion:

See 8.14 -8.15[1]

☐ Request that other party enter into stipulation for appointment of interpreter.

Authority:

Evid Code §§ 752, 731(c)

Discussion:

See 8.13

- ☐ If stipulation is not feasible, make oral or noticed motion for appointment of interpreter.

Authority:

Evid Code §§ 752(b), 730

Discussion:

See 8.14

Forms:

See 8.33 -8.35



Warning:

Be sure to check local rules; some courts have time lines for requesting an interpreter. Additionally, some may maintain lists of qualified interpreters.

- ☐ Locate a qualified interpreter.

- ☐ Court may keep list of qualified interpreters.

Authority:

See, e.g., Sacramento Super Ct Rules, Rule 9.07(A)

Discussion:

See 8.17[1]

- ☐ Interpreter must be certified.

Authority:

Gov Code § 68561(a)

Discussion:

See 8.15[3]

- ☐ In counties with populations of 900,000 or more, court-employed interpreter may be available.

Authority:

Gov Code § 26806

Discussion:

See 8.15[2]

- ☐ Notify court if deaf or hearing impaired party or witness needs sign language interpreter.

Authority:

Evid Code § 754

Discussion:

See 8.18

☐ Determine whether there are grounds for disqualification of interpreter.☐ Competency.☐ Bias.**Authority:***Gov Code §§ 68561(a), 68562; Cal Rules Ct, Rule 2.890***Discussion:**

See 8.19[3]

☐ If necessary, voir dire interpreter.**Authority:***People v. Sanchez (1947) 30 C2d 560, 574, 184 P2d 673 ; Cal Rules Ct, Stds Jud Admin, Std 2.11(b)(3)***Discussion:**

See 8.19[2]

☐ If necessary, move to disqualify interpreter.**Authority:***Evid Code §§ 750, 752(a); Cal Rules Ct, Rule 2.890***Discussion:**

See 8.19[1]

Legal Topics:

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

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Chapter 8 Interpreters

III. OBTAINING INTERPRETER FOR TRIAL WITNESSES OR PARTIES

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8.11 Options and Strategies for Obtaining Interpreter.

Counsel faced with a witness who does not speak or understand English should make sure that the need for an interpreter is raised before trial, either in the final pretrial status conference or, if necessary, on a motion. Trials must be conducted in English. If the witness is adverse, a motion in limine can seek to exclude non-English testimony, and force the other side to get an interpreter. If the witness is the party's own witness, either a stipulation to employ an interpreter or a request to use one is appropriate *before* trial starts. It is important to check local rules on the use and availability of interpreters.

The strategy will also depend on whether the witness is on counsel's side or the other side. If on counsel's side, an interpreter may be needed both to meet with the witness in advance of the actual testimony to prepare the testimony, as well as in the courtroom. If the witness will use an interpreter on the stand, counsel must have prepared the witness with an interpreter. It is generally better to have a witness who allows counsel to address the jury directly, and have a translator available only if the witness needs help; encourage the witness to speak English to the extent possible.

Finding good interpreters is hard; there are referral services, as for experts. Meet with the witness or client and the interpreter in advance to make sure that the interpreter's English skills are good and that the witness and the interpreter can communicate. Sometimes dialect differences can get in the way. Also, if the subject matter is technical, the interpreter must be familiar with the relevant vocabulary. If there are no certified interpreters available, counsel should file the appropriate Judicial Council forms for use of an uncertified interpreter.

Cross Reference:

Discussion of final pretrial conference, see Ch. 4, Final Pretrial Conference.

Legal Topics:

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



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III. OBTAINING INTERPRETER FOR TRIAL WITNESSES OR PARTIES

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8.12 Party, Counsel, or Court May Request Examination.

8.12[1] Party or Counsel May Request Examination. A party or counsel may request that the court conduct an examination to determine whether a party or witness needs an interpreter [Cal Rules Ct, Stds Jud Admin, Std 2.10(b)].

8.12[2] Court May Conduct Examination on Its Own Initiative. The court should examine a party or witness on the record to determine whether an interpreter is needed if it appears to the court that the party or witness may not understand and speak English well enough to participate fully in the proceedings [Cal Rules Ct, Stds Jud Admin, Std 2.10(b)].

8.12[3] Rules of Court Provide Sample Examination Questions. The court should include questions such as identification (e.g., name, address, birthdate, age), active vocabulary in vernacular English (e.g., "How did you come to court today?"), and questions regarding the court proceedings [Cal Rules Ct, Stds Jud Admin, Std 2.10(c)].

8.12[4] Court Should State Conclusion After Examination. After the examination, the court should state its conclusion on the record regarding whether an interpreter is needed [Cal Rules Ct, Stds Jud Admin, Std 2.10(d)].

Legal Topics:

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

EvidenceCompetencyInterpretersEvidenceTestimonyExaminationJudicial Interrogation



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Chapter 8 Interpreters

III. OBTAINING INTERPRETER FOR TRIAL WITNESSES OR PARTIES

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8.13 Parties May Stipulate to Use of Interpreter.

The simplest way to inform the court of the need for an interpreter is for the parties to stipulate to the use of an interpreter. The stipulation should set forth the apportionment of the interpreter's fees and should be placed on the record [*Evid Code* §§ 752(b), 731(c)].



Strategic Point:

Strategy as to an interpreter will vary if the opposing counsel is on good relations or the matter is so highly contentious that communications are made in writing. The best situation is for counsel to communicate and reach a stipulation; this is the most common procedure. If opposing counsel is reluctant and it is imperative to use an interpreter, the local court rule procedures may provide a method for requesting use of an approved interpreter. Without that, a motion for an interpreter is required. The interpreter should be a good one, unbiased, and with a great deal of experience. The greatest advantage of stipulating is that it saves time. This should be addressed at the pretrial conference.

Usually, the need for an interpreter becomes apparent in discovery when one party seeks to take the deposition of a party or witness not conversant in English. At that time, the attorney representing that witness or party almost always advises the noticing attorney of the language issues and a stipulation is reached. The decision, under such circumstances, to use an interpreter is rarely one that necessitates a motion and court ruling.

Legal Topics:

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



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III. OBTAINING INTERPRETER FOR TRIAL WITNESSES OR PARTIES

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.14

8.14 Party or Court May Make Motion for Interpreter.

8.14[1] Party May Make Oral Motion on Record. A party may make an oral motion for the appointment of an interpreter on the record when it becomes apparent that a witness is incapable of understanding or communicating in the English language [*Evid Code* §§ 752, 730].

8.14[2] Party May Make Noticed Motion. A party may make a noticed motion for an interpreter in accordance with regular motion procedures [*CCP* § 1005].



Strategic Point:

Counsel does not want to be in the position of a having a noticed motion for an interpreter filed against him or her. Being on the receiving end of such a motion may send a message to the judge that counsel does not want the facts of the case to readily come out. It is better to stipulate to the use of an interpreter than to force the other side to file a noticed motion.



Judge's Perspective:

Noticed motions for an interpreter in a civil action are rare. Generally, when counsel determines if an interpreter is needed, that party obtains an interpreter at the party's own expense. This adds to the client's costs, but provides greater control over the interpreter quality.



Cross Reference:

Forms, see 8.33 -8.35.

8.14[3] Appointment May Be on Court's Motion. The court may appoint an interpreter on its own motion [*Evid Code* §§ 752(b), 730].

8.14[4] Local Rules May Provide Timelines for Notifying Court of Need for Interpreter. Local rules may affected timing of the appointment of an interpreter. For example, if an interpreter is required by any party to an action in Placer County, counsel must advise the court of the need for an interpreter at least five court days before the trial or

hearing [Placer Super Ct Rules, Rule 10.14].

8.14[5] Parties May Use Uncertified or Unregistered Interpreter in Absence of Certified or Registered Interpreter. It can be difficult to find qualified, certified, registered interpreters, especially for languages not commonly spoken in a particular locale. Accordingly, a noncertified interpreter can be qualified for six-month periods for use by a court after voir dire of the prospective interpreter. If counsel intends to use such an interpreter, counsel must first ensure that the court administrator has certified to the unavailability of certified or registered interpreters on Judicial Council Form IN-120, and can use the voir dire questions on Judicial Council Form IN-110 to qualify the noncertified or nonregistered interpreter [*Gov Code* § 68561(c); see *Gov Code* § 68564 (standards for interpreters)].



Cross Reference:

Forms of Qualifications of a Noncertified or Nonregistered Interpreter [Judicial Council Form INT-110] and Certification of Unavailability of a Certified or Registered Interpreter [Judicial Council Form INT-120], see 8.36, 8.37.

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice General Overview Evidence Competency Interpreters



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Chapter 8 Interpreters

III. OBTAINING INTERPRETER FOR TRIAL WITNESSES OR PARTIES

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.15

8.15 Court Must Appoint Interpreter Using Expert Witness Procedures.

8.15[1] Courts Follow Expert Witness Statute in Appointing Interpreters. Foreign language interpreters are appointed and compensated in accordance with *Evid Code § 730 et seq.* [*Evid Code § 752(b)*].

8.15[2] Interpreters May Be Employed by Large Counties. The clerk of a court in a county having a population of 900,000 or more may employ as many foreign language interpreters as may be necessary to interpret in criminal and juvenile courts. When the interpreters' services are not required in criminal and juvenile courts, the clerk may assign them to interpret in civil cases and collect the fee fixed by the court from the litigants [*Gov Code § 26806*].

8.15[3] Interpreter Must Be Certified. Any person interpreting court proceedings must be a certified court interpreter [*Gov Code § 68561(a)*]. A certified court interpreter is someone who holds a valid certificate issued by a certification entity approved by the Judicial Council [*Gov Code §§ 68562, 68566*].

Exception:

The court may, for good cause, appoint an interpreter who does not hold a court interpreter certificate. The court must follow the good cause and qualification procedures and guide lines adopted by the Judicial Council [*Gov Code § 68561(c)*].

Legal Topics:

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

EvidenceCompetencyInterpretersEvidenceTestimonyExpertsCourt-Appointed ExpertsGeneral

OverviewEvidenceTestimonyExpertsCourt-Appointed

ExpertsCompensationEvidenceTestimonyExpertsCourt-Appointed ExpertsProceduresGovernmentsCourtsClerks of Court



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1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.16

8.16 Parties Must Pay for Foreign Language Interpreters.

8.16[1] Expert Witness Rules Pertain. Language interpreters are to be compensated as provided in the rules pertaining to expert witnesses [*Evid Code § 752(b)*].

8.16[2] Court May Fix Compensation. The court may fix the compensation for services rendered by an interpreter at the amount as seems reasonable to the court [*Evid Code § 730*].

8.16[3] Court May Determine Apportionment of Interpreter's Fee. The compensation as fixed by the court must be apportioned and charged to the several parties in such proportion as the court may determine [*Evid Code § 731(c)*].

Exception:

Some local rules specify that the party requesting the interpreter must pay the interpreter's fees [*see, e.g., Sacramento Super Ct Rules, Rule 9.07(B)*].

8.16[4] Prevailing Party May Recover Costs of Interpreter. The interpreter's compensation may be taxed and allowed in like manner as other costs [*Evid Code § 731(c)*; *Gov Code § 68092*].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney

Fees Costs Witnesses Evidence Competency Interpreters Evidence Testimony Experts Court-Appointed

Experts Appointments Evidence Testimony Experts Court-Appointed

Experts Compensation Evidence Testimony Experts Court-Appointed Experts Procedures



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1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.17

8.17 Local Rules Set Forth Additional Procedures for Appointing Interpreters.

8.17[1] Most Courts Keep Lists of Available Interpreters. Most courts maintain lists of qualified interpreters. For example, Sacramento County local rules require the court to make a reasonable effort to maintain and make available a list of interpreters for all languages [Sacramento Super Ct Rules, Rule 9.07(A)]. In Los Angeles County, counsel may contact the court's Division of Interpreter Assignments for a list of available interpreters [Los Angeles Super Ct Rules, Rule 8.18].

Consider:

No later than the pretrial conference, counsel in need of an interpreter should request the roster of qualified interpreters from the trial judge or appropriate department in the court.

8.17[2] Some Courts Allow Parties to Use Relative or Friend As Interpreter. Los Angeles County local rules allow a party to use a relative or friend as an interpreter if the other parties consent [Los Angeles Super Ct Rules, Rule 8.18].



Warning:

Use of a relative or family member as an interpreter is not recommended. Friends and relatives will not be trained as interpreters, they may not understand their obligation simply to recite what the witness is saying, rather than adding their own commentary, and there is a risk that the friend or relative might also be a witness. An interpreter who is also a witness may actually testify to what he or she thought, not what the witness thought.

8.17[3] Some Courts' Rules Do Not Address Interpreters. The following courts' local rules, among others, do not contain any provisions regarding interpreters: Orange, Alameda, and San Diego Counties. Make sure to check local rules.

Legal Topics:

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

ExpertsAppointmentsEvidenceTestimonyExpertsCourt-Appointed ExpertsProceduresGovernmentsCourtsRule
Application & Interpretation



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1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.18

8.18 Court Provides and Compensates Sign Language Interpreters.

8.18[1] Parties May Agree on Sign Language Interpreter. The parties may agree on a sign language interpreter if one is needed for a party or witness who is deaf or hearing impaired [*Evid Code § 754(b), (n); see Evid Code § 754(a) (definition)*].

8.18[2] Court May Appoint Sign Language Interpreter. If the parties need one, and do not agree on a sign language interpreter, the court may appoint a qualified interpreter and proceedings must not begin until the appointed sign language interpreter is in full view of the individual needing assistance and spatially situated to assure proper communication [*Evid Code § 754(b), (n)*].

8.18[3] Sign Language Interpreters Must Be Qualified by Judicial Council Approved Entity. "Qualified interpreter" means an interpreter who has been certified as competent by a testing organization, agency, or educational institution approved by the Judicial Council [*Evid Code § 754(f)*].

8.18[4] Court Must Maintain Roster of Qualified Sign Language Interpreters. Each superior court must maintain a current roster of qualified sign language interpreters [*Evid Code § 754(o)*].

Consider:

No later than the pretrial conference, counsel in need of this type of interpreter should request the roster of qualified sign language interpreters from the trial judge or appropriate department in the court.

Example:

In San Diego County, the court interpreter's office will provide a list of certified and non-certified interpreters for languages where it is difficult to obtain certified interpreters.

8.18[5] County Pays Sign Language Interpreter's Fees. Payment of the sign language interpreter's fee must be a charge against the county or other political subdivision of the state [*Evid Code § 754(I)*].

Legal Topics:

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

EvidenceCompetencyInterpretersEvidenceTestimonyGeneral Overview



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8.19 Party May Attempt to Disqualify Interpreter.

8.19[1] Party May Move to Disqualify Interpreter. A party may make an oral objection to an interpreter on the record [*Evid Code* §§ 750, 752(a); *Cal Rules Ct, Rule 2.890*].



Timing:

Although it is best to object to an interpreter before he or she begins interpreting, if the grounds for objection are not immediately apparent, or arise during trial, a motion to disqualify may be made at any time [*People v. Estrada* (1986) 176 CA3d 410, 416, 221 CR 922] .



Strategic Point:

If counsel is using his or her own interpreter to ensure that the other side's interpreter is accurate, a motion to disqualify is appropriate if the other side's interpreter is not performing satisfactorily.

8.19[2] Party May Conduct Voir Dire of Interpreter. When a party can show a reasonable basis for believing the interpreter is subject to disqualification, the court must permit voir dire [*People v. Sanchez* (1947) 30 C2d 560, 574, 184 P2d 673 ; *Cal Rules Ct, Stds Jud Admin, Std 2.11(b)(3)*].



Cross Reference:

Suggested list of voir dire questions on the issues of competency to interpret and conflict of interest, see *California Trial Guide*, § 20.13[3][e] (Matthew Bender).

8.19[3] Party May Assert Various Grounds for Objecting to Interpreter.

8.19[3][a] Party May Object to Interpreter for Lack of Competency. A party may question an interpreter's competency in the witness's language [*see Gov Code* §§ 68561(a), 68562].

8.19[3][b] Party May Object to Interpreter Because of Bias. An interpreter must disclose to the judge and the parties any actual or apparent conflict of interest, including the fact that the interpreter is acquainted with or related to

any witness or party to the action or has an interest in the outcome of the case [*Cal Rules Ct, Rule 2.890(c)*; see *Hsu v. Mount Zion Hosp.* (1968) 259 CA2d 562, 582-583, 66 CR 659].

 Cross Reference:

Suggested list of voir dire questions on conflicts of interest, see *California Trial Guide*, § 20.13[3][e] (Matthew Bender).

Legal Topics:

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

EvidenceCompetencyGeneral OverviewEvidenceCompetencyInterpretersEvidenceTestimonyGeneral Overview



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1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.20

8.20 CHECKLIST: Eliciting Testimony From Witness Using Interpreter.

- ☐ Defend against hearsay objections; interpreter does not add a layer of hearsay.

Authority:

Correa v. Superior Court (2002) 27 C4th 444, 455-463, 117 CR2d 27, 40 P3d 739

Discussion:

See 8.24

- ☐ If there is a dispute as to interpretation, approach the bench and discuss with the court outside the jury's hearing.

Authority:

Cal Rules Ct, Stds Jud Admin, Std 2.11(b)(2)

Discussion:

See 8.26

- ☐ Request jury instruction regarding disagreement with interpreter's interpretation.

Authority:

People v. Cabrera (1991) 230 CA3d 300, 304, 281 CR 238 ; Judicial Council of California Civil Jury Instructions, CACI Nos. 108, 5008 (LexisNexis Matthew Bender)

Discussion:

See 8.27

Legal Topics:

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

[EvidenceCompetencyInterpretersEvidenceHearsayGeneral OverviewEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect Examination](#)



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8.21 Options and Strategies for Parties Eliciting Testimony From Witness Using Interpreter.

Interpreters are sworn as are regular witnesses and are subject to the same rules of law [*Evid Code* § 750]. However, issues may arise with regard to the accuracy of the interpretations. Counsel must be prepared to address interpretation objections and, when possible, rephrase questions to avoid objection.

Strategic Point:



A successful approach in dealing with a witness through an interpreter is to address the witness directly. Look at, and talk to, the witness, not the interpreter. For example, ask "Where were you standing at 5:00 o'clock when Mr. Smith signed the contract?" rather than "Ask the witness where he was standing." The latter form of question sends a message to the jury that counsel is not interrogating the witness, but rather the interpreter, and also signals the interpreter that counsel wants the interpreter's version of the answer rather than a verbatim recital of what the witness says. The former conveys a different image: counsel is asking the witness a question and the witness is responding; the interpreter simply interprets.

Ask short questions so that each can be translated all at once. Leading questions can be helpful. It is important to avoid double negatives and compound questions. If it is counsel's witness, take special care in preparing to have the witness respond concisely, and wait for the interpreter. Always use an interpreter when preparing a witness to appear on the stand in court. Also be aware of cultural differences about significance of nonverbal cues, like nodding. And never be seen by the jurors as taking advantage of a witness's difficulty with English.

Judge's Perspective:

It is best to use simple, straightforward questions and to avoid the use of colloquialisms. Also avoid idioms and other phrases that do not translate well.

Cross Reference:

Detailed information regarding questioning witnesses and objections, see *Ch. 11, Questioning Witnesses and Objections, 11.20 et seq.*

Legal Topics:

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

EvidenceCompetencyInterpretersEvidenceDocumentary EvidenceWritingsTranscripts &
TranslationsIdiomsEvidenceTestimonyExaminationGeneral Overview



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1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.22

8.22 Interpreters Must Take Oath.

8.22[1] Interpreter's Oath. An interpreter must take an oath that he or she will make a true interpretation to the witness in a language that the witness understands and that the interpreter will make a true interpretation of the witness's answers to questions to counsel, court, or jury, in the English language, with his or her best skill and judgment [*Evid Code* § 751(a)].

8.22[2] Translator's Oath. A translator must take an oath that he or she will make a true translation in the English language of any writing the interpreter is to decipher or translate [*Evid Code* § 751(c)].

Legal Topics:

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

EvidenceCompetencyAffirmations & OathsEvidenceCompetencyInterpretersEvidenceTestimonyGeneral Overview



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8.23 Interpreters Are Subject to All Rules of Law Relating to Witnesses.

A person who serves as an interpreter or translator in any action is subject to all the rules of law relating to witnesses [Evid Code § 750].



Warning:

Although most interpreters take seriously the oath taken to give truthful translations, occasionally an errant interpreter will put his or her own "gloss" on what is communicated to the witness when translating English or when communicating to the jury when giving the foreign language translation.

Example:

An interpreter may not speculate as to what the witness means in the use of a colloquialism, that is, to substitute a word with different "shades" of meaning by speculating on what the witness meant.

Legal Topics:

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

EvidenceCompetencyInterpretersEvidenceTestimonyGeneral OverviewEvidenceTestimonyLay WitnessesGeneral Overview



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8.24 Interpreters Do Not Create Hearsay Problem.

Under the California Supreme Court's "language conduit" theory, an interpreter's statement is considered the statement of the original declarant so that no additional level of hearsay is added by the translation [see *Correa v. Superior Court* (2002) 27 C4th 444, 455-463, 117 CR2d 27, 40 P3d 739].



Warning:

The fact of a translation can give rise to issues concerning the attorney-client privilege. If the attorney does not understand the foreign language being spoken, it may not be clear until the English translation has been said out loud in court that privileged information was involved. If this occurs, request that the translation stop immediately, ask the court to excuse the jury, and hold a hearing outside the jury's presence about the privileged matter.

Legal Topics:

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



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8.25 Court May Allow Leading Questions When Interpreter Is Used.

Leading questions are permitted when a witness is testifying through an interpreter. The use of an interpreter is considered a "special circumstance" within the meaning of *Evid Code* § 767(a)(1) [see, e.g., *People v. McNeal* (1954) 123 CA2d 222, 225, 266 P2d 529] .



Strategic Point:

Although leading questions are permissible when a witness has an interpreter, their use should be limited. Jurors want to hear the witness's version of the events, and may not look as favorably on a witness when leading questions are asked. However, some use of leading questions is acceptable to make an examination comprehensible when dealing with a non-English speaking witness.



Cross Reference:

See *Cotchett, California Courtroom Evidence*, § 16.30 (Matthew Bender).

Legal Topics:

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

EvidenceCompetencyInterpretersEvidenceCompetencyInterpretersEvidenceTestimonyExaminationLeading Questions



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8.26 Party May Object to Accuracy of Interpretation Outside Jury's Hearing.

If a party disputes an interpretation, counsel should ask permission to approach the bench to discuss the problem [Cal Rules Ct, Stds Jud Admin, Std 2.11(b)(2)].



Strategic Point:

The court must either accept the interpreter's interpretation and overrule the objection or sustain the objection with appropriate findings. The ruling must be on the record. If there is a question whether the translation or interpretation will be accurate, counsel should consider retaining a separate interpreter to tell what the interpreter is doing.



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8.27 Party May Request Jury Instruction Regarding Disagreement With Interpreter.

A bilingual juror may sometimes disagree with the interpreter's interpretation of a witness's testimony. If this occurs, counsel should request an instruction telling jurors to advise the court of a disagreement with any interpretations. The relevant CACI jury instructions tell the juror that he or she must rely solely on the translation provided by the interpreter [see, e.g., *People v. Cabrera* (1991) 230 CA3d 300, 304, 281 CR 238] .

Jury Instructions:

Duty to Abide by Translation Provided in Court, see Judicial Council of California Civil Jury Instructions, CACI Nos. 108, 5008 (LexisNexis Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral

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Chapter 8 Interpreters
V. SPECIAL CONSIDERATIONS WHEN JUROR REQUIRES SERVICE PROVIDER

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.28

8.28 CHECKLIST: Special Considerations When Juror Requires Service Provider.

☐ If there is a disabled juror serving in the case:

☐ Stipulate to the presence of the juror's service provider in the jury room.

Authority:
CCP § 224

Discussion:
See 8.32[2]

☐ Prepare and deliver to the court proposed jury instructions for the service provider.

Authority:
CCP § 224; see, e.g., Judicial Council of California Civil Jury Instructions, CACI Nos. 110, 5004 (LexisNexis Matthew Bender)

Discussion:
See 8.32[1]

☐ Make certain the court gives jury instructions regarding the presence of the service provider in the jury room.

Authority:
Judicial Council of California Civil Jury Instructions, CACI Nos. 110, 5004 (LexisNexis Matthew Bender)

Discussion:
See 8.32[2]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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8.29 Options and Strategies for Parties When Juror Requires Service Provider.

People who do not speak English may not perform jury service, but deaf, blind, or otherwise disabled people are not prevented from serving [CCP §§ 203(a)(6), 224]. In this case, the court appoints service providers, at its own expense, to facilitate communication with disabled jurors [CCP § 224]. The relevant CACI jury instructions address this issue by informing the jury that one of their fellow jurors will be assisted by a service provider and that the service provider only participates in the deliberations to the extent needed to provide the service.

Strategic Point:



The main benefit to the use of interpreter is ensuring that the client's story is clear to the jury. If the client cannot be understood, it is imperative to use an interpreter. Another benefit is that the questions can be vetted with the court before the non-Englishspeaker must answer. This raises the issue of whether the interpreter explains the question beyond straight, literal translation. There can be disadvantages to the use of an interpreter. If a case involving technical or colloquial language that involves close language evaluation and the interpreter does not understand the usage, misunderstandings can arise. For example, an interpreter who does not understand the phrase "in a pickle" to mean in a difficult position may translate it to mean a literal pickle.

Note that in California, there are many jurisdictions in which non-English speakers may be in the majority. This can work in a non-English speaker's favor if a sympathetic jury of true peers thinks the English speaker took unfair advantage of the non-English speaker.

Jury Instructions:

Service Provider for Juror With Disability, see Judicial Council of California Civil Jury Instructions, CACI Nos. 110, 5004 (LexisNexis Matthew Bender).



Cross Reference:

Detailed information regarding jury selection, see Ch. 6, Jury Selection.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewEvidenceCompetencyInterpreters



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8.30 Jurors Who Do Not Possess Sufficient Knowledge of English Are Disqualified.

People who do not have sufficient knowledge of the English language are not qualified and eligible to be jurors [CCP § 203(a)(6)].



Strategic Point:

A challenge for cause should remove jurors who cannot understand English. Be aware that in voir dire a potential juror may have sufficient ability with written English to complete a questionnaire, but may not be able to understand spoken English, or make himself or herself understood in spoken English.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionChallenges for Cause



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1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.31

8.31 Disabled Jurors Must Be Provided With Service Provider at Court's Expense.

8.31[1] Deaf, Hearing Impaired, Blind, and Speech Impaired Jurors Entitled to Service Providers. Deaf, hearing impaired, blind, visually impaired and speech impaired persons are not disqualified from jury service [*CCP* § 203(a)(6)]. The court must provide such jurors with service providers who will facilitate communication [*CCP* § 224].

8.31[2] Juror Service Providers Compensated in Same Manner As Sign Language Interpreters for Witnesses. Service providers appointed for disabled jurors are to be compensated in the same manner as sign language interpreters for witnesses and parties; i.e., the court pays for their services [*CCP* § 224(c); *Evid Code* § 754(i)].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewEvidenceCompetencyInterpreters



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1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.32

8.32 Disabled Juror's Service Provider Must Be Present During Deliberations.

8.32[1] Service Providers Must Be Presented With Jury Instructions. The parties must prepare and deliver to the court proposed jury instructions for a disabled juror's service provider [*CCP* § 224(a)].

8.32[2] Service Provider Is Present in Jury Room. The parties must stipulate to the presence of the service provider in the jury room [*CCP* § 224(a)]. The parties should request jury instructions informing the other jurors that the service provider will be present during deliberations, but will not participate in the deliberations other than to facilitate communication for the juror requiring the service [*CCP* § 224(a)].

Jury Instructions:

Service Provider for Juror With Disability, see Judicial Council of California Civil Jury Instructions, CACI Nos. 110, 5004 (LexisNexis Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsEvidenceCompetencyInterpreters



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Chapter 8 Interpreters
VI. FORMS

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.33

8.33 Notice of Motion for Order Appointing Interpreter.

Notice of Motion for Order Appointing Interpreter.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name(s)],

Plaintiff(s),

vs.

_____ [name(s)],

Defendant(s).

)
)
)
)
)
)
)

NO. _____

NOTICE OF MOTION FOR ORDER APPOINTING

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 counsel can be heard, at the courtroom of _____ (Department or Division)

_____ of] this court, located at _____ [address],

_____ [city], _____ [moving party, e.g., Defendant Mary Jones] will move the court

for an order appointing an interpreter to interpret for _____ [witness, e.g., Maria Garcia] to testify at

the trial of the above-entitled action, relative to the issue of _____ [briefly describe issue, e.g., the fact that she witnessed the accident that is the subject of the lawsuit].

This motion will be made on the ground that _____ [the witness is incapable of hearing or understanding the English language or the witness is incapable of expressing himself in the English language so as to be understood directly by counsel, court, and jury].

The motion will be made and based on this notice, the pleadings, records, and papers on file herein, and the declaration of _____ [*counsel, e.g., Defense Attorney Jane Lee*].

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

NOTES.

Authority:

Evid Code § 752; CCP § 1005

Grounds for Motion:

See 8.14



Timing:

See 8.14[4]

Related Form of Declaration:

See 8.34

Related Form of Order:

See 8.35



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VI. FORMS

1-8 MB Practice Guide: Trial & Post-Trial Civil Proc 8.34

8.34 Declaration in Support of Motion for Order Appointing Interpreter.

Declaration in Support of Motion for Order Appointing Interpreter.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name(s)],	)	NO. _____
Plaintiff(s),	)	DECLARATION OF
vs.	)	_____ [name] IN
_____ [name(s)],	)	SUPPORT OF MOTION FOR
Defendant(s).	)	ORDER APPOINTING
	)	INTERPRETER
	)	

1. I, _____ [name], declare:

2. 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 Motion for Order Appointing Interpreter].

3. This declaration is in support of _____'s [name of party] motion for an order appointing an interpreter to interpret for _____ [witness, e.g., Sue Brown] and thereby to enable _____ [witness, e.g., Maria Garcia] to testify at the trial of the above-entitled action, relative to the issue of _____ [briefly describe issue, e.g., the fact that she witnessed the accident that is the subject of the lawsuit].

4. _____ [Witness, e.g., Maria Garcia] is a material witness for the _____ [identify party, e.g., Defendant Mary Jones].

5. _____ [Witness, e.g., Maria Garcia] _____
 _____ [give concise account of witness's background, such as place of birth, schooling, and length of time in this country, to show why he or she does not speak or understand English].

6. _____ [Witness, e.g., Maria Garcia] does not speak or understand English but rather speaks and understands only _____ [identify language, e.g., Spanish], and his/her testimony cannot be received without the aid of an interpreter.

[OR when witness speaks and understands English to limited extent:]

6. _____ [Witness, e.g., Maria Garcia] does not speak and understand English sufficiently well to comprehend the significance of many of the questions to be asked him/her or to express himself/herself clearly in answering many of the questions, but rather speaks and understands completely only _____ [identify language, e.g., Spanish], and his/her testimony will be seriously hampered without the aid of an interpreter.

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:

Evid Code § 752; CCP § 1005

Related Form of Motion:

See 8.33

Related Form of Order:

See 8.35



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VI. FORMS

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8.35 Order Appointing Interpreter.

Order Appointing Interpreter.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name(s)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [name(s)],	)	ORDER APPOINTING INTERPRETER
Defendant(s).	)	
	)	
	)	

The motion of _____ [party, e.g., Defendant Mary Jones] for an order for the appointment of an interpreter to interpret for _____ [witness, e.g., Maria Garcia] and thereby to enable the witness to testify at the trial of the above-entitled action, came on for hearing before me this _____ day of _____ [date], _____ [name] appearing as attorney for _____ [party, e.g., Defendant Mary Jones], and _____ [name] appearing as attorney for _____ [party, e.g., Plaintiff John Smith], and the court being fully advised in the premises, and good cause appearing therefor;

It is hereby ordered that the motion be and the same is hereby granted; that _____ is hereby appointed to serve as interpreter for _____ [witness, e.g., Maria Garcia] on the issue of _____ [briefly describe issue, e.g., the fact that she witnessed the accident that is the subject of the lawsuit].

It is further ordered that _____ [identify interpreter, e.g., Sue Brown] be compensated for those services in the sum of \$ _____, and that this sum will be taxed and allowed as costs in these proceedings.

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

Evid Code § 752; CCP § 1005

Related Form of Motion:

See 8.33

Related Form of Declaration:

See 8.34



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Chapter 8 Interpreters
VI. FORMS

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8.36 Judicial Council Form INT-110--Qualifications of a Noncertified or Nonregistered Interpreter

Judicial Council Form INT-110--Qualifications of a Noncertified or Nonregistered Interpreter

[Click here to view image.](#)

NOTES.

Authority:

Gov Code §§ 68561(c), 68564(d)

Grounds:

See 8.14[5]

Related Form of Certification:

8.37

► 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 for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.



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8.37 Judicial Council Form INT-120--Certification of Unavailability of Certified or Registered Interpreter

Judicial Council Form INT-120--Certification of Unavailability of Certified or Registered Interpreter

[Click here to view image.](#)

NOTES.

Authority:

Gov Code § 68561(c); Cal Rules Ct, Rule 2.893

Grounds:

See 8.14[5]

Related Form of Interpreter's Qualifications:

8.36

► 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 for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.



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Chapter 9 Burden of Proof and Persuasion

1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.syn

§ 9.syn Synopsis to Chapter 9: Burden of Proof and Persuasion

9.01 Scope.

9.02 Objective and Strategy.

9.03 Burden of Proof Consists of Both Burden of Producing Evidence and Burden of Persuasion.

9.04 Terms "Burden of Proof" and "Burden of Persuasion" Are Interchangeable.

9.05 Burden of Producing Evidence Is Different From Burden of Proof.

9.05[1] Burden of Producing Evidence: Obligation to Present Evidence.

9.05[2] Shifting of Burdens.

9.05[2][a] Burden of Producing Evidence Shifts Between Parties; Burden of Proof Does Not Shift.

9.05[2][b] Exceptions When Burden of Proof Does Shift.

9.05[3] Judge Determines If Party Has Met Burden of Producing Evidence.

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9.06 Distinguishing Between Presumption and Inference Affecting Burden of Proof.

9.06[1] Presumption Assumes Fact Is True; Inference Is Something Logically Deducted From Fact.

9.06[2] Inconsistent Presumptions: More Specific Presumption Controls Over More General Presumption If They Conflict.

9.06[3] Presumptions Affect Burden of Proof or Burden of Producing Evidence.

9.06[4] Inference Is Logically Drawn From Facts, Not Speculation.

9.07 Presumptions Affecting Burden of Producing Evidence Aid Determination of Action.

9.08 Presumptions Affecting Burden of Proof Implement Public Policy.

9.09 Distinguishing Weight of Evidence From Sufficiency of Evidence.

9.10 CHECKLIST: Identifying and Meeting Burden of Producing Evidence.

9.11 Identifying Which Party Has Burden of Producing Evidence.

9.11[1] Plaintiff Has Initial Burden of Producing Evidence.

9.11[2] After Plaintiff Has Met Initial Burden of Producing Evidence, Defendant Has Burden to Produce Rebuttal Evidence.

9.11[3] Legislatively Established Evidence Code Presumptions May Alter Parties' Burden of Producing Evidence.

9.11[4] Presumptions Established by Case Law May Alter Parties' Burden of Producing Evidence.

9.11[5] Res Ipsa Loquitur Shifts Burden of Producing Evidence.

9.12 Meeting Burden of Producing Evidence.

9.12[1] Party Risks Nonsuit by Failing to Meet Burden to Produce Evidence.

9.12[2] Defendant Must Meet Burden to Produce Rebuttal Evidence After Plaintiff Meets Burden to Produce Evidence.

9.13 CHECKLIST: Identifying Who Has Burden of Proof.

9.14 Identifying Which Party Has Burden of Proof.

9.14[1] Party Asserting Claim or Defense Has Burden of Proof As to Each Fact Essential to Claim or Defense.

9.14[2] Court May Alter Which Party Has Burden of Proof.

9.14[3] Legislatively Established Presumptions in Evidence Code May Alter Burden of Proof.

9.14[4] Conclusive Presumptions Cannot Be Rebutted and Do Not Alter Burden of Proof.

9.15 CHECKLIST: Meeting Burden of Proof.

9.16 Two Civil Burdens of Proof Apply, and One Criminal Burden of Proof Applies.

9.17 For Some Claims, Party Must Meet Legislatively Established Burden of Proof.

9.18 Establishing Proof in Civil Actions by Preponderance of the Evidence.

9.18[1] Preponderance Standard Is Generally Applicable in Civil Actions Unless Higher Standard Is Mandated by

Law.

9.18[2] Party Satisfies Preponderance Standard If Evidence Suggests Assertion Is More Likely True Than Not True.

9.19 Establishing Proof in Civil Actions by Clear and Convincing Evidence.

9.19[1] Party Must Meet Clear and Convincing Standard in Specific Civil Actions When Mandated by Law.

9.19[1][a] Punitive Damages.

9.19[1][b] Termination of Parental Rights, Appointment of Conservator, Rebuttal of Full Beneficial Title Presumption.

9.19[1][c] Privacy Rights.

9.19[1][d] Defamation/Libel Actions.

9.19[2] Party Satisfies Clear and Convincing Standard by Establishing That It Is Highly Probable That Proposition Is True.

9.20 Criminal Burden of Proof Is Proof Beyond Reasonable Doubt.

9.21 Involuntary Commitment Requires Proof Beyond Reasonable Doubt.



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Chapter 9 Burden of Proof and Persuasion
I. STRATEGY

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9.01 Scope.

This chapter covers:

- Clarification and definition of the terms "burden of producing evidence," "burden of persuasion," and "burden of proof" [see 9.03 -9.09].
- Identifying and meeting the burden of producing evidence [see 9.10 -9.12].
- Identifying who has the burden of proof [see 9.13, 9.14].
- Meeting the burden of proof [see 9.15 -9.21].

Core Statutes:

Evid Code §§ 115, 550, 600 et seq.

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofInitial Burden of PersuasionEvidenceProcedural ConsiderationsBurdens of ProofUltimate Burden of Persuasion



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Chapter 9 Burden of Proof and Persuasion
I. STRATEGY

1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.02

9.02 Objective and Strategy.

Understanding and meeting the burden of producing evidence and the burden of proof is a key factor in successfully bringing a civil action.

Being clear on the requirements of the burden to produce evidence, that is, the party's obligation to bring evidence to support a claim or defense, is fundamental to the case [see 9.05]. Similarly, it is essential to be clear on the burden of proof, that is the degree of belief required, to establish each fact essential to the claim or defense [see 9.04].

A party should have a clear understanding of the difference between the two burdens, which facts it must bring evidence to establish, and the required degree of proof required for a particular type of case. Factoring into this analysis is ensuring the parties and the court are using the same terminology as to the burdens, the impact of shifting burdens, and the effect of presumptions and inferences.



Strategic Point:

Understanding the difference between the two burdens is particularly important when a party moving for summary judgment has the burden to produce evidence to support the motion in order for the burden to shift to the responding party, irrespective of whether the movant has the burden of proving (burden of persuasion) the issue at trial [see *Union Bank v. Superior Court* (1995) 31 CA4th 573, 590, 37 CR2d 653] .



Cross References:

Discussion of shifting burden on motion for summary judgment, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 38.05[3].

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:

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of
ProofBurden ShiftingEvidenceProcedural ConsiderationsBurdens of ProofInitial Burden of
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Chapter 9 Burden of Proof and Persuasion
II. CLARIFYING BURDEN OF PROOF TERMS

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9.03 Burden of Proof Consists of Both Burden of Producing Evidence and Burden of Persuasion.

There are two components to the concept of "burden of proof" [*Sargent Fletcher, Inc. v. Able Corp. (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279*] :

1. The burden of producing evidence [see 9.05].
2. The burden of proof (the burden of persuasion as to a fact or issue) [see 9.04].



Cross References:

Discussion of burden of producing evidence, see 9.10 -9.11.

Discussion of burden of proof, see 9.13 -9.21.

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofBurden Shifting



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Chapter 9 Burden of Proof and Persuasion
II. CLARIFYING BURDEN OF PROOF TERMS

1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.04

9.04 Terms "Burden of Proof" and "Burden of Persuasion" Are Interchangeable.

The "burden of proof" is a party's obligation to establish by evidence a required degree of belief concerning a fact in the mind of the trier of fact or the court [*Evid Code § 115*]. The terms "burden of proof" and "burden of persuasion" are used interchangeably and are synonymous [*Sargent Fletcher, Inc. v. Able Corp. (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279*] . California courts generally uses the term "burden of proof" [*Sargent Fletcher, Inc. v. Able Corp. (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279*] .

Jury Instructions:

Obligation to Prove--More Likely True Than Not True, see *Judicial Council of California Civil Jury Instructions, CACI No. 200* (LexisNexis Matthew Bender)

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofBurden Shifting



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II. CLARIFYING BURDEN OF PROOF TERMS

1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.05

9.05 Burden of Producing Evidence Is Different From Burden of Proof.

9.05[1] Burden of Producing Evidence: Obligation to Present Evidence. The "burden of producing evidence" is a party's obligation to present evidence to support its claim [*Evid Code* § 110; see *Grant v. Ratliff* (2008) 164 CA4th 1304, 1310, 79 CR3d 902] . The burden of proof means that if the evidence presented on an issue is of equal weight, the party with the burden of proof must lose [*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279 ; see *Evid Code* § 115].



Warning:

It is important to keep clear the distinctions between the burden of producing evidence and the burden of proof (and the different terms used for these concepts), especially when researching, and relying on, older opinions that may use the terms differently or interchangeably.

9.05[2] Shifting of Burdens.

9.05[2][a] Burden of Producing Evidence Shifts Between Parties; Burden of Proof Does Not Shift. The burden of producing evidence (the "burden to go forward with the evidence") shifts from one party to the other, while the burden of proof does not shift during trial [*Sander/Moses Productions, Inc. v. NBC Studios, Inc.* (2006) 142 CA4th 1086, 1097, 48 CR3d 525].

That is, the burden to produce evidence shifts, in that the first party produces sufficient evidence to make its prima facie case, and the second party then produces evidence to rebut that case [*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279] . Conversely, the burden of proof does not shift during trial, but remains with the party who originally bears it on a particular issue, defense, or claim throughout [see *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279] .



Warning:

Not all published opinions properly explain who has the burden of proof. For example, one reported appellate opinion approved burden shifting terminology that the defendant "has the burden to raise a reasonable doubt about the facts underlying" his defense theory. This is misleading because it implies

that the defendant has the burden to produce a certain level of evidence, whereas in fact what is required is whether the evidence presented leaves the jury with a reasonable doubt [*People v. Frazier* (2005) 128 CA4th 807, 817-818, 27 CR3d 336] . Accordingly, it is important to carefully draft jury instructions, and to review instructions prepared by the other party for such improper shifting.

► Cross References:

Discussion of who has burden of proof, see 9.11.

Discussion of meeting the burden of producing evidence, see 9.12.

California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

9.05[2][b] Exceptions When Burden of Proof Does Shift. On occasion, courts have altered the normal allocation of the burden of proof [*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 CA4th 1658, 1670, 3 CR3d 279 ; see *National Council Against Health Fraud, Inc. v. King Bio Pharm., Inc.* (2003) 107 CA4th 1336, 1346, 133 CR2d 207] . In evaluating whether to shift the normal allocation of the burden of proof, courts consider a number of factors [*Lakin v. Watkins Associated Indus.* (1993) 6 C4th 644, 660-661, 25 CR2d 109, 863 P2d 179] :

- The knowledge of the parties concerning the particular fact;
- The availability of the evidence to the parties;
- The most desirable result in terms of public policy in the absence of proof of the particular fact; and
- The probability of the existence or nonexistence of the fact.

Courts shift the burden of proof for causation when it is *impossible* for the plaintiff to otherwise prove its case [*Summers v. Tice* (1948) 33 C2d 80, 88, 199 P2d 1 ; see also *Aguiar v. Cintas Corporation No. 2* (2006) 144 CA4th 121, 134-135, 50 CR3d 135 (burden shifts to employer to prove time employee worked when employer kept inaccurate records)].

Examples:

Courts have shifted the burden in these instances:

- Burden of proof shifted to defendants when plaintiff could not prove which of two defendant hunters fired shot that struck him [*Summers v. Tice* (1948) 33 C2d 80, 88, 199 P2d 1] .
- Burden of proof shifted to hotel that failed to provide statutorily required lifeguard because violation not only endangered victims, but deprived the plaintiffs of witness to establish causation [*Haft v. Lone Palm Hotel* (1970) 3 C3d 756, 771-772, 91 CR 745, 478 P2d 465] .
- Burden of proof shifted to defendants to exculpate themselves when drug they manufactured injured plaintiffs in utero, and fungibility of drug made causation impossible to prove, but court required that plaintiff join substantial share of potentially liable drug manufacturers, and limited each defendant's liability to extent of its market share [*Sindell v. Abbott Labs.* (1980) 26 C3d 588, 612-613, 163 CR 132, 607 P2d 924] .
- Burden of proof shifted to attorney in malpractice case when attorney's negligence in handling underlying case made it impossible to prove causation in malpractice claim [*Galanek v. Wismar* (1999)

68 CA4th 1417, 1428, 81 CR2d 236] .

- Burden of proof for causation not shifted to attorney in malpractice action because attorney's error in underlying case did not make it impossible for plaintiff to prove case and attorney was not singularly responsible for loss of evidence [*Thomas v. Lusk* (1994) 27 CA4th 1709, 1718-1719, 34 CR2d 265] .

- Burden of proof not shifted to defendant when it was not impossible for plaintiff to prove causation of asbestos-related cancer in light of relaxed standard for causation in these cases (the substantial factor standard) [*Rutherford v. Owens-Illinois, Inc.* (1997) 16 C4th 953, 977-978, 983, 67 CR2d 16, 941 P2d 1203] .

9.05[3] Judge Determines If Party Has Met Burden of Producing Evidence. The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact [*Evid Code* § 550(b)]. If that party fails to produce sufficient evidence to make the prima facie case, the party risks having the other party move for nonsuit, or other unfavorable determination by the judge [*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 CA4th 1658, 1668, 3 CR3d 279] .

► **Cross Reference:**

For Law Revision Commission comments and case authority interpreting *Evid Code* § 550(b), see Cotchett, *California Courtroom Evidence*, § 14.01.

9.05[4] Finder of Fact Determines If Party Has Met Burden of Proof. The finder of fact determines if the party with the burden of proof has met its burden [*Evid Code* § 115; *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279] .

► **Cross Reference:**

Discussion of meeting the burden of proof, see 9.15 -9.21.

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofBurden Shifting



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Chapter 9 Burden of Proof and Persuasion
II. CLARIFYING BURDEN OF PROOF TERMS

1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.06

9.06 Distinguishing Between Presumption and Inference Affecting Burden of Proof.

9.06[1] Presumption Assumes Fact Is True; Inference Is Something Logically Deducted From Fact. A presumption is an assumption of fact the law requires to be made from another fact or group of facts established in an action [*Evid Code* § 600(a); see 9.06[2], [3]]. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts in an action [*Evid Code* § 600(b)].

► **Cross References:**

Discussion of presumptions, see 9.06[2], [3].

Discussion of inferences, see 9.06[4].

Further discussion of presumptions and inferences, see California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

9.06[2] Inconsistent Presumptions: More Specific Presumption Controls Over More General Presumption If They Conflict. When two presumptions conflict, the more specific presumption controls over the more general presumption [*In re Daniel Z. (1992) 10 CA4th 1009, 1019, 13 CR2d 139*].

9.06[3] Presumptions Affect Burden of Proof or Burden of Producing Evidence. Unless otherwise stated in a statute, courts must classify the many different statutes proposing a presumption as either affecting the burden of proof or affecting the burden of producing evidence [*Evid Code* § 601; see *Evid Code* §§ 603, 605, Legislative Committee Comment]. Every rebuttable presumption is either a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof [*Evid Code* § 601; see *Pellerin v. Kern County Employees' Retirement Association (2006) 145 CA4th 1099, 1106, 52 CR3d 201*].

► **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 601, see Cotchett, *California Courtroom Evidence*, 15.02 (Matthew Bender).

9.06[4] Inference Is Logically Drawn From Facts, Not Speculation. An inference is not evidence. Rather, it is the result of reasoning from the evidence; it is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts in an action [*Evid Code* § 600; see *Evid Code* § 600, Legislative Committee Comment]. An inference may not be based on speculation, supposition, conjecture, or guesswork [see *Nazir v. United Airlines, Inc.* (2009) 178 CA4th 243, 273, 100 CR3d 296 (inference driven by logic, not law)]. Inferences are sometimes referred to as "permissive presumptions" (as opposed to mandatory presumptions) because the effect of an inference is to permit, not require, the finder of fact to infer one fact from proof of another fact [People v. Thompson (2006) 38 C4th 811, 826, 43 CR3d 750, 135 P3d 3; *People v. McCall* (2004) 32 C4th 175, 182-184, 8 CR3d 337, 82 P3d 351] .



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 600, see Cotchett, *California Courtroom Evidence*, 15.01 (Matthew Bender).

Legal Topics:

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

EvidenceInferences & PresumptionsConflicting PresumptionsEvidenceInferences & PresumptionsInferencesEvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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II. CLARIFYING BURDEN OF PROOF TERMS

1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.07

9.07 Presumptions Affecting Burden of Producing Evidence Aid Determination of Action.

A presumption affecting the burden of producing evidence is a presumption established to facilitate the determination of the particular action in which the presumption is applied [*Evid Code* § 603]. The effect of the presumption is to require the finder of fact to assume the existence of the presumed fact unless and until evidence is introduced that would support a finding of its nonexistence [*Evid Code* § 604].



Cross References:

Discussion of presumptions affecting burden of producing evidence, see 9.11[3] -[5].

Law Revision Commission comments and case authority interpreting *Evid Code* § 603 *et seq.*, see Cotchett, *California Courtroom Evidence*, 15.04 *et seq.* (Matthew Bender).

Legal Topics:

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

EvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofBurden Shifting



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Chapter 9 Burden of Proof and Persuasion
II. CLARIFYING BURDEN OF PROOF TERMS

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9.08 Presumptions Affecting Burden of Proof Implement Public Policy.

A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied [*Evid Code* § 605; see *Real Estate Analytics, LLC v. Vallas* (2008) 160 CA4th 463, 474-475, 72 CR3d 835]. The effect of the presumption is to impose on the party against whom it operates the burden of proof as to the nonexistence of the presumed fact [*Evid Code* § 606].

► **Cross References:**

Discussion of presumptions affecting burden of proof, see 9.14[3], [4].

Law Revision Commission comments and case authority interpreting *Evid Code* § 605 *et seq.*, see Cotchett, *California Courtroom Evidence*, 15.06 *et seq.* (Matthew Bender).

Legal Topics:

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

EvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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Chapter 9 Burden of Proof and Persuasion
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9.09 Distinguishing Weight of Evidence From Sufficiency of Evidence.

"Weight of the evidence" refers to whether the evidence is strong or weak, direct or circumstantial [*Evid Code* §§ 410-413]. "Sufficiency of the evidence" refers to what is enough evidence to prove each element of the claim or defense by the applicable burden of proof [*Evid Code* §§ 115, 500, 502].



Cross References:

Discussion of applicable burdens of proof, see 9.18 -9.21.

Case authority interpreting *Evid Code* § 410 *et seq.*, see Cotchett, *California Courtroom Evidence*, 11.01 *et seq.* (Matthew Bender).

California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural
ConsiderationsCircumstantial & Direct EvidenceEvidenceProcedural ConsiderationsWeight & Sufficiency



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9.10 CHECKLIST: Identifying and Meeting Burden of Producing Evidence.

- ☐ Plaintiff normally has initial burden of producing evidence to avoid ruling against it on that issue.

Authority:

Evid Code § 110

Discussion:

See 9.11[1]

- ☐ Defendant then has burden of producing evidence to refute plaintiff's prima facie case.

Authority:

Evid Code § 550; Sargent Fletcher, Inc. v. Able Corp. (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279

Discussion:

See 9.11[2]

- ☐ Determine if burden of producing evidence has been altered by legislatively established presumptions for particular circumstances.

Authority:

Evid Code § 630; see Evid Code §§ 631-647, 1451-1605

Discussion:

See 9.11[3], [5]

- ☐ Determine if presumptions established by case law alter burden of producing evidence.

Authority:*Evid Code § 603***Discussion:**

See 9.11[4]

- ☐ If a presumption applies, determine if it is rebuttable, and if so, by what standard.

Discussion:

See 9.11[2], [3], [5], 9.12[2]

- ☐ If a common law or court-derived presumption, determine if presumption is within specifications of *Evid Code § 603* or if presumption instead affects the burden of proof.

Discussion:

See 9.11[4]

Legal Topics:

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

EvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral
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9.11 Identifying Which Party Has Burden of Producing Evidence.

9.11[1] Plaintiff Has Initial Burden of Producing Evidence. The burden of producing evidence refers to the obligation of a party to introduce evidence sufficient to avoid a ruling against that party on that issue [*Evid Code* § 110].

The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence [*Evid Code* § 550(a); see, e.g., *People v. Belton* (1979) 23 C3d 516, 523, 153 CR 195, 591 P2d 485]. The burden of producing evidence is initially on the party with the burden of proof as to that fact [*Evid Code* § 550(b)].

► **Cross References:**

Discussion of burden of producing evidence, see California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

Law Revision Commission comments and case authority interpreting *Evid Code* § 550, see Cotchett, *California Courtroom Evidence*, 14.01 (Matthew Bender).

9.11[2] After Plaintiff Has Met Initial Burden of Producing Evidence, Defendant Has Burden to Produce Rebuttal Evidence. Once a party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case [*Grant v. Ratliff* (2008) 164 CA4th 1304, 1310, 79 CR3d 902 ; *Evid Code* § 550; see *Evid Code* § 550, Law Revision Comm'n Cmt].

► **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 550(b), see Cotchett, *California Courtroom Evidence*, 14.01 (Matthew Bender).

9.11[3] Legislatively Established Evidence Code Presumptions May Alter Parties' Burden of Producing Evidence. The legislature has established rebuttable presumptions that affect the burden of producing evidence [*Evid Code* § 630; see *Evid Code* § 603]. Statutory presumptions enacted by the legislature in specific subject areas include the following:

■ **Presumption of Money Due.** Money delivered by one person to another person is presumed to have been due to the latter [*Evid Code* § 631].

■ **Presumption Regarding Ownership of a Thing Delivered.** A thing delivered by one person to another person is presumed to have belonged to the latter [*Evid Code* § 632].

■ **Presumption of Payment.** An obligation delivered to a debtor is presumed to have been paid [*Evid Code* § 633].

■ **Presumption Regarding Delivery.** A person in possession of an order for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly [*Evid Code* § 634].

■ **Presumption of Unpaid Debit.** An obligation possessed by a creditor is presumed not to have been paid [*Evid Code* § 635].

■ **Presumption of Previous Paid Installment Payments.** The payment of earlier rent or installments is presumed from a receipt for later rent or installments [*Evid Code* § 636].

■ **Presumption That Possession Equals Ownership.** The things that a person possesses are presumed to be owned by that person [*Evid Code* § 637].

■ **Presumption That Acts of Ownership Equal Ownership.** A person who exercises acts of ownership over property is presumed to be the owner of that property [*Evid Code* § 638].

■ **Judgment Is Presumed Correctly Determined.** A judgment, when not conclusive, is presumed to correctly determine the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined [*Evid Code* § 639].

■ **Date on Writing Is Presumed Correct.** A writing is presumed to have been truly dated [*Evid Code* § 640].

■ **Presumption of Delivery of Mail.** A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of the mail [*Evid Code* § 641].

■ **Presumption of Conveyance of Property in Quiet Title Actions.** A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to the person when the presumption is necessary to perfect title of the person or the person's successor in interest [*Evid Code* § 642].

■ **Presumption Deed Authentic.** A deed, will, or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it (1) is at least 30 years old; (2) is in such condition as to create no suspicion concerning its authenticity; (3) was kept, or if found was found, in a place where the writing, if authentic, would be likely to be kept or found; and (4) has been generally acted on as authentic by persons having an interest in the matter [*Evid Code* § 643].

■ **Presumption of Publication by Public Authority.** A book, purporting to be printed or published by public authority, is presumed to have been so printed or published [*Evid Code* § 644].

■ **Case Books Are Presumed to Contain Correct Reports of Cases.** A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of the cases [*Evid Code § 645*].

■ **Presumption Regarding Printed Material in Newspapers and Periodicals.** Printed materials, purporting to be a particular newspaper or periodical, are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months [*Evid Code § 645.1*].

■ **Presumption Regarding Service of Process.** The return of a registered process server or process or notice establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return [*Evid Code § 647*].

■ **Presumptions Affecting Acknowledged and Official Writings.** Several Evidence Code sections establish presumption affecting official writings [*Evid Code §§ 1451-1454*].

■ **Presumption That Computer Printouts Are Accurate.** Printed information of a computer program or computer information is presumed to be accurate [*Evid Code § 1552*].

■ **Presumption That Writing in Custody of Public Entity Is Authentic and Accurate.** A writing in the custody of a public entity is prima facie evidence of the existence and contents of the writing [*Evid Code § 1530*].

■ **Presumption That Official Record of Writing Is Accurate.** The official record of a writing is prima facie evidence of its existence and content [*Evid Code § 1532*].

■ **Presumption Regarding Recorded Instruments.** The recording of a writing with a public entity is prima facie evidence of its existence and contents [*Evid Code § 1600*].

■ **Legally Executed Deed Presumes Conveyance.** A deed of conveyance of real property, properly executed and recorded, is prima facie evidence of the conveyance [*Evid Code § 1603*].

■ **Holder of Certificate of Purchase of Land Is Presumed to Be Owner.** A certificate of purchase of lands in California is prima facie evidence that the holder is the owner of that land [*Evid Code § 1604*].

■ **Translations of Spanish and Mexican Title Papers Are Presumed Same as Originals.** Duplicate or authenticated translations of Spanish or Mexican title papers regarding California land issued and authenticated by the Spanish or Mexican government and recorded with a county recorder are presumed to have the effect of an original of such papers [*Evid Code § 1605*].



Cross References:

Discussion of particular presumptions, see California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

Law Revision Commission comments and case authority interpreting Evid Code sections, see Cotchett, California Courtroom Evidence (Matthew Bender).

Examples of application of rebuttable presumptions, see Cotchett, *California Courtroom Evidence*, 15.15 (Matthew Bender).

9.11[4] Presumptions Established by Case Law May Alter Parties' Burden of Producing Evidence. All

presumptions established by law that fall within the criteria of *Evid Code* § 603 are presumptions affecting the burden of producing evidence. Thus, in the absence of specific statutory classification, the courts may determine whether a presumption is a presumption affecting the burden of producing evidence by applying the standards contained in *Evid Code* § 603 [*Evid Code* § 603, Law Revision Comm'n Cmt].

The criteria for determining if a presumption is one affecting the burden of producing evidence is that it not be based on any public policy extrinsic to the action in which it is invoked [*see Evid Code* § 603]. Presumptions affecting the burden of producing evidence are designed to dispense with unnecessary proof of facts that are likely to be true if not disputed [*Evid Code* § 603, Law Revision Comm'n Cmt].

Typically, presumptions affecting the burden of producing evidence are based on an underlying logical inference [*Evid Code* § 603; *see Evid Code* § 603, Law Revision Comm'n Cmt].

Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 603, see Cotchett, *California Courtroom Evidence*, 15.04 (Matthew Bender).

9.11[5] Res Ipsa Loquitur Shifts Burden of Producing Evidence. "Res ipsa loquitur" is a doctrine created by case law that shifts the burden of producing evidence from the plaintiff to the defendant once plaintiff proves the doctrine's elements [*Evid Code* § 646]. The doctrine of res ipsa loquitur ("the thing speaks for itself") applies when an accident is of such a nature that, in the light of past experience, it can be inferred that the accident was probably caused by negligence, and that the defendant is probably the responsible party [*Newing v. Cheatham* (1975) 15 C3d 351, 359, 124 CR 193, 540 P2d 33] .

Jury Instructions:

Special Doctrines: Res Ipsa Loquitur, see *Judicial Council of California Civil Jury Instructions*, CACI No. 417 (LexisNexis Matthew Bender)

Cross References:

Discussion of use of res ipsa loquitur, see *California Forms of Pleading and Practice*, Ch. 551, Trial (Matthew Bender).

California Trial Guide, Unit 11, Opening Statement (Matthew Bender).

Legal Topics:

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

EvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsBurdens of ProofBurden ShiftingTortsNegligenceProofRes Ipsa LoquiturEvidentiary Effect



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III. IDENTIFYING AND MEETING BURDEN OF PRODUCING EVIDENCE

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9.12 Meeting Burden of Producing Evidence.

9.12[1] Party Risks Nonsuit by Failing to Meet Burden to Produce Evidence. If the party with the initial burden of producing evidence fails to produce sufficient evidence to make a prima facie case, that party risks a nonsuit or other unfavorable determination by the court [*Sargent Fletcher, Inc. v. Able Corp. (2003) 110 CA4th 1658, 1666-1667, 3 CR3d 279*] .

9.12[2] Defendant Must Meet Burden to Produce Rebuttal Evidence After Plaintiff Meets Burden to Produce Evidence. After the party with the initial burden to produce evidence (generally the plaintiff) relies on a presumption, the defendant then must introduce evidence that supports a finding of the non-existence of the presumed fact. If the defendant meets this, the presumption vanishes and the jury must decide the matter from the evidence presented without regard to the presumption [*Evid Code § 604*]. However, the jury may draw reasonable inferences from the evidence [*Evid Code § 600(b)*].

If the defendant produces no evidence contradicting the presumed fact, or produces insufficient evidence to support a finding contrary to the presumed fact, the court will instruct the jury that it must find that the presumed fact exists [*Security Pac. Nat'l Bank v. Associated Motor Sales (1980) 106 CA3d 171, 178-179, 165 CR 38*] .

Legal Topics:

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

Civil Procedure Pretrial Judgments Nonsuits General Overview Evidence Procedural Considerations Burdens of Proof Burden Shifting



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IV. IDENTIFYING WHO HAS BURDEN OF PROOF

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9.13 CHECKLIST: Identifying Who Has Burden of Proof.

- ☐ Party normally has to meet the burden of proof as to each fact essential to its claim or defense.

Authority:

Evid Code § 500

Discussion:

See 9.14[1]

- ☐ Determine if a court is likely to alter the normal approach to the burden of proof.

Authority:

Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 C3d 55, 71, 141 CR 146, 569 P2d 740

Discussion:

See 9.14[2]

- ☐ Determine if proof has been altered by legislatively established presumptions for particular circumstances.

Authority:

Evid Code § 660; see Evid Code §§ 661-670

Discussion:

See 9.14[3]

- ☐ If a presumption applies, determine if it is:

- ☐ Rebuttable, in which case it is subject to rebuttal evidence; or

Discussion:

See 9.14[3]

- ☐ Conclusive, in which case no evidence will be received to contradict it.

Discussion:

See 9.14[4]

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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9.14 Identifying Which Party Has Burden of Proof.

9.14[1] Party Asserting Claim or Defense Has Burden of Proof As to Each Fact Essential to Claim or Defense. Unless otherwise provided, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense the party is asserting [*Evid Code* § 500; see *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 C4th 12, 23-25, 109 CR3d 329, 230 P3d 1117 (discussing statute's history and purpose)].

► **Cross References:**

Discussion of altered burdens and presumptions, see 9.14[2], [3].

Law Revision Commission comments and case authority interpreting *Evid Code* § 500, see Cotchett, *California Courtroom Evidence*, 13.01 (Matthew Bender).

9.14[2] Court May Alter Which Party Has Burden of Proof. The court may alter the normal application of the burden of proof and require a party to bear the burden of proof on an issue that is not part of the affirmative case [*Evid Code* § 500; see *Evid Code* § 500, Law Revision Comm'n Cmt].

► **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 500, see Cotchett, *California Courtroom Evidence*, 13.01 (Matthew Bender).

This exception applies when the evidence necessary to establish a fact essential to a claim is peculiarly within the knowledge and competence of one of the parties. Thus, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim [*Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 C3d 55, 71, 141 CR 146, 569 P2d 740] .

Example:

In a case involving unemployment insurance benefits, once the benefits claimant showed his availability for suitable work, the burden of proof on the issue of whether the person was available to a "substantial field of employment" shifted to the EDD [*Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 C3d

55, 71, 141 CR 146, 569 P2d 740] .

In determining whether to shift the burden of proof, courts will consider the following [*County of Orange v. Barratt American, Inc.* (2007) 150 CA4th 420, 437-438, 58 CR3d 542] :

- The knowledge of each party concerning the particular fact.
- The availability of the evidence to each party.
- The most desirable result in terms of public policy in the absence of proof of the particular fact.
- The probability of the existence or nonexistence of the fact.

Cross Reference:

Discussion of shifting burden, see California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

Consider:

The ordinary rules governing allocation of the burden of proof may be disregarded for policy reasons in exceptional circumstances. However, these exceptions are "few and narrow" and the reasons justifying a shift in the normal allocation of the burden of proof must be "compelling" [*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 C4th 12, 25, 109 CR3d 329, 230 P3d 1117] .

9.14[3] Legislatively Established Presumptions in Evidence Code May Alter Burden of Proof. The legislature has established rebuttable presumptions that affect the burden of proof [*Evid Code* § 660; see *Evid Code* § 605]. Statutory presumptions enacted by the legislature in specific subject areas include the following:

■ **Legal Title to Property Is Presumed to Be Full Beneficial Title.** The owner of the legal title to property is presumed to be the owner of the full beneficial title [*Evid Code* § 662]. This presumption may be rebutted only by clear and convincing proof and is superseded by a presumption of undue influence that arises when one spouse takes advantage of the other in an interspousal transaction [*Evid Code* § 662; see *In re Marriage of Barneson* (1995) 69 CA4th 583, 593, 81 CR2d 726] . Further, *Evid Code* § 662 does not apply in cases involving contested transmutation of community property [*Fam Code* § 852; see *Estate of Bibb* (2001) 87 CA4th 461, 469-470, 104 CR2d 415] .

■ **Ceremonial Marriage Is Presumed Valid.** A ceremonial marriage is presumed to be valid [*Evid Code* § 663].

■ **Official Duty Presumed Regularly Performed.** There is a presumption that an official duty has been regularly performed [*Evid Code* § 664].

■ **Person Presumed to Have Intended Ordinary Consequences of Voluntary Act.** A person is presumed to intend the ordinary consequences of his or her voluntary acts [*Evid Code* § 665].

■ **Presumption of Lawful Exercise of Legal Jurisdiction.** Any California or United States court, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack [*Evid Code* § 666].

■ **Presumption of Death After Five Years.** A person not heard from for five years is presumed to be

dead [*Evid Code* § 667].

- **Presumption of Unlawful Intent.** An unlawful intent is presumed from the doing of an unlawful act [*Evid Code* § 668].

- **Presumption of Negligence Per Se.** The failure of a person to exercise due care is presumed from the person's violation of a statute, ordinance, or regulation of a public entity [*Evid Code* § 669]. State and local government conduct rules, policies, manuals, and guidelines for public employees are not considered a statute, ordinance, or agency regulation within the meaning of *Evid Code* § 669 unless so formally adopted [*Evid Code* § 669.1].

- **Presumption Regarding Building Moratorium's Impact on Home Supply.** Ordinances limiting the number of building permits issued for residential construction are presumed to have an impact on the supply of residential units in the area [*Evid Code* § 669.5].

- **Presumption That Check Is Paid If Copy of Canceled Check and Bank Statement Showing Cleared Check Produced.** A copy of a check and a copy or original of the bank statement reflecting the payment of the check creates a presumption that the check was paid by the bank [*Evid Code* § 670].

Cross References:

Discussion of presumptions, California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

Examples of application of rebuttable presumptions, see Cotchett, *California Courtroom Evidence*, 15.34 (Matthew Bender).

9.14[4] Conclusive Presumptions Cannot Be Rebutted and Do Not Alter Burden of Proof. Legislatively established conclusive presumptions, and all other presumptions declared by law to be conclusive, are in fact conclusive presumptions [*Evid Code* § 620; see *Evid Code* §§ 622-624].



Strategic Point:

Conclusive presumptions are not so much evidentiary rules as rules of substantive law. If by law certain facts are deemed conclusive presumptions, evidence cannot be received to contradict those facts [*People v. McCall* (2004) 32 C4th 175, 184-185, 8 CR3d 337, 82 P3d 351 ; *Kopping v. Workers' Compensation Appeals Board* (2006) 142 CA4th 1099, 1106, 48 CR3d 618].

The legislatively enacted conclusive presumptions include the following:

- **Facts in Written Instrument Are True.** The facts recited in a written instrument are conclusively presumed to be true as between the parties or their successors in interest [*Evid Code* § 622; see *Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn.* (1982) 136 CA3d 387, 395, 186 CR 218] . However, this rule does not apply to the recital of a consideration [*Evid Code* § 622; *Stoneridge Parkway Partners, LLC v. MW Housing Partners III L.P.* (2007) 153 CA4th 1373, 1382, 64 CR3d 61] .

- **Intentional Representation Relied on by Another Person Is Conclusively Presumed True in Later Litigation.** Whenever a person has intentionally and deliberately led another person to believe a particular thing to be true, the party is not, in any litigation arising out of the statement or conduct, permitted to contradict it [*Evid Code* § 623].

■ **Conclusive Presumption of Landlord's Ownership.** A tenant is not permitted to deny the title of his or her landlord at the outset of the relationship [*Evid Code* § 624].

■ **Conclusive Presumptions Contained in Other Codes.** For a listing of conclusive presumptions contained in the Civil Code, Government Code, Insurance Code, Labor Code, Probate Code, and others, see Cotchett, *California Courtroom Evidence*, 15.09 (Matthew Bender).



Cross References:

California Forms of Pleading and Practice, Ch. 551, Trial.

Examples of application of conclusive presumptions, see Cotchett, *California Courtroom Evidence*, 15.09 (Matthew Bender).

Legal Topics:

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

EvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsEvidenceProcedural ConsiderationsBurdens of ProofAllocation



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V. MEETING BURDEN OF PROOF

1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.15

9.15 CHECKLIST: Meeting Burden of Proof.

☐ Determine if action is civil or criminal.

Discussion:

See 9.16

☐ If civil action relating to involuntary commitment, establish proof beyond a reasonable doubt.

Authority:

Conservatorship of Roulet (1979) 23 C3d 219, 223-230, 152 CR 425, 590 P2d 1

Discussion:

See 9.21

☐ If civil action relating to constitutional rights, punitive damages, defamation, conservator's petition over conservatee, rebuttal of *Evid Code* § 662 relating to full and beneficial title to land, establish clear and convincing proof.

Authority:

CC § 3294(a); *Fam Code* § 7821; *Prob Code* § 1801; *Evid Code* §§ 160, 662; *Lillian F. v. Superior Court (1984) 160 CA3d 314, 320, 322-324, 206 CR 603* ; *Prob Code* § 2355; *Conservatorship of Wendland (2001) 26 C4th 519, 546-548, 110 CR 2d 412, 28 P3d 151*

Discussion:

See 9.19

☐ If civil action that is none of the above, establish proof by a preponderance of the evidence.

Discussion:

See 9.18

- ☐ If criminal action, establish proof beyond a reasonable doubt.

Authority:

Evid Code § 501; see Pen Code § 1096

Discussion:

See 9.20

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofEvidenceProcedural
ConsiderationsBurdens of ProofPreponderance of EvidenceEvidenceProcedural ConsiderationsBurdens of ProofProof
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9.16 Two Civil Burdens of Proof Apply, and One Criminal Burden of Proof Applies.

In meeting the burden of proof as to the existence or nonexistence of a particular fact, one of three standards of proof applies, listed from weakest to strongest proof, depending on the type of case [*Evid Code* § 115; *see Evid Code* § 502; *Lillian F. v. Superior Court* (1984) 160 CA3d 314, 320, 206 CR 603] :

- Proof by a preponderance of the evidence (most civil cases) [*see* 9.18].
- Clear and convincing proof (select civil cases) [*see* 9.19].
- Proof beyond a reasonable doubt (criminal cases and involuntary commitments) [*see* 9.20, 9.21].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureTrialsBurdens of ProofGeneral Overview



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9.17 For Some Claims, Party Must Meet Legislatively Established Burden of Proof.

The burden of proof in civil cases is a preponderance of the evidence unless a greater or lesser burden is specifically required in a case because of constitutional, statutory, or decisional law [*Evid Code* § 115; see *Evid Code* § 115, Law Revision Comm'n Cmt; *In re Marriage of Ettefagh* (2007) 150 CA4th 1578, 1585, 59 CR3d 419 (preponderance of evidence standard is default standard of proof in civil actions)].

Examples:

The legislature has altered the burden of proof in the following types of civil actions, among others:

- Actions to terminate parental rights require clear and convincing evidence [*In re Michael G.* (1998) 63 CA4th 700, 709, 74 CR2d 642] .
- Waiver of a right requires clear and convincing evidence [*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout* (1994) 30 CA4th 54, 60, 35 CR2d 515] .

Jury Instructions:

Affirmative Defense--Waiver, see *Judicial Council of California Civil Jury Instructions*, CACI No. 336 (LexisNexis Matthew Bender).

- For punitive damages, the plaintiff must show by a preponderance that, but for attorney negligence, the jury would have found clear and convincing evidence of oppression, fraud, or malice [*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 C4th 1037, 1049-1050, 135 CR2d 46, 69 P3d 965] .

Consider:

A burden of proof higher than the preponderance standard is applied only when certain important individual interests or rights are at stake. Even severe civil sanctions implicating those interests or rights do not require a higher standard of proof [*In re Marriage of Peters* (1997) 52 CA4th 1487, 1490-1491, 61 CR2d 493] .

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofEvidenceProcedural
ConsiderationsBurdens of ProofPreponderance of Evidence



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Chapter 9 Burden of Proof and Persuasion
V. MEETING BURDEN OF PROOF

1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.18

9.18 Establishing Proof in Civil Actions by Preponderance of the Evidence.

9.18[1] Preponderance Standard Is Generally Applicable in Civil Actions Unless Higher Standard Is Mandated by Law. The preponderance of the evidence standard is the standard of proof generally applicable in civil cases [see *Evid Code* § 115; *In re Marriage of Ettetfagh* (2007) 150 CA4th 1578, 1585, 59 CR3d 419] .

9.18[2] Party Satisfies Preponderance Standard If Evidence Suggests Assertion Is More Likely True Than Not True. Proof by a preponderance of the evidence requires the finder of fact to believe that the existence of a fact is more probable than its nonexistence [*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 CA4th 1549, 1567, 90 CR3d 644] .

Jury Instructions:

Obligation to Prove--More Likely True Than Not True, see *Judicial Council of California Civil Jury Instructions, CACI No. 200* (LexisNexis Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofPreponderance of Evidence



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1-9 MB Practice Guide: Trial & Post-Trial Civil Proc 9.19

9.19 Establishing Proof in Civil Actions by Clear and Convincing Evidence.

9.19[1] Party Must Meet Clear and Convincing Standard in Specific Civil Actions When Mandated by Law.

9.19[1][a] Punitive Damages. For recovery of punitive damages, the clear and convincing proof standard applies when seeking to prove that a defendant is guilty of oppression, fraud, or malice [*CC* § 3294(a); see *Virtanen v. O'Connell* (2006) 140 CA4th 688, 714, 44 CR3d 702].

Example:

Evidence that was sufficient to find an insurer guilty of bad faith under the preponderance of the evidence standard was not sufficient to find the insurer guilty of oppression or malice under the clear and convincing proof standard [*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 CA4th 847, 890-893, 93 CR2d 364] .

Jury Instructions:

Prerequisites for Award of Punitive Damages, see *California Forms of Jury Instruction, Ch. 70A, Instr. MB 7000A.07* (Matthew Bender).

In Title VII cases the burden of proof on punitive damages [*see 42 USC § 1981a(b)(1)*] is preponderance of the evidence, not clear and convincing evidence [*see, e.g., White v. Burlington Northern & Santa Fe Ry.* (6th Cir 2004) 364 F3d 789, 805-808] .



Strategic Point:

If the burden of proof is critical, whether the specific issue is to be decided on a higher standard for the burden in state court than in federal, and counsel represents the plaintiff in such an action, consider filing in federal court. If representing the defendant, and the burden in state court on an issue is higher than the burden would be in federal court, consider removal. This presumes that the burden is procedural, not substantive, in which case a federal court would generally apply state law.

9.19[1][b] Termination of Parental Rights, Appointment of Conservator, Rebuttal of Full Beneficial Title

Presumption. Clear and convincing proof is required in the following instances:

- To terminate parental rights [*Fam Code § 7821*].
- To appoint a conservator [*Prob Code § 1801*].
- To rebut a presumption that legal title to property encompasses full beneficial title [*Evid Code § 662*].

9.19[1][c] Privacy Rights. Constitutional privacy rights require a conservator to show by clear and convincing proof that a conservatee lacks the capacity to consent to, or refuse, an intrusive medical treatment (electroconvulsive therapy), when that finding is necessary for an order sought by the conservator authorizing such treatment [*Lillian F. v. Superior Court* (1984) 160 CA3d 314, 320, 322-324, 206 CR 603 ; *Evid Code § 160*; see *Conservatorship of Wendland* (2001) 26 C4th 519, 546-548, 110 CR 2d 412, 28 P.3d 151] .

Similarly, the clear and convincing standard applies when a conservator seeks to withdraw nutrition and hydration from a conservatee [*Prob Code § 2355*; *Conservatorship of Wendland* (2001) 26 C4th 519, 546-548, 110 CR 2d 412, 28 P.3d 151] .

9.19[1][d] Defamation/Libel Actions. First Amendment rights require that a plaintiff in an action for libel show a defendant's actual malice by clear and convincing proof [see *Tague v. Citizens for Law & Order, Inc.* (1977) 75 CA3d Supp 16, 26, 142 CR 689] .

Jury Instructions:

More Likely True--Clear and Convincing Proof, see *Judicial Council of California Civil Jury Instructions, CACI No. 201* (LexisNexis Matthew Bender).

Defamation Per Se--Essential Factual Elements (Public Officer/Figure and Limited Public Figure), see *Judicial Council of California Civil Jury Instructions, CACI No. 1700* (LexisNexis Matthew Bender).

 Cross Reference:

California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

9.19[2] Party Satisfies Clear and Convincing Standard by Establishing That It Is Highly Probable That Proposition Is True. Meeting the standard of clear and convincing evidence requires a finding of high probability of truth. The evidence must be "so clear as to leave no substantial doubt," and must be sufficiently strong to "command the unhesitating assent of every reasonable mind" [*In re Brian P.* (2002) 99 CA4th 616, 624, 121 CR 2d 326 ; see *In re Jerome D.* (2000) 84 CA4th 1200, 1205, 101 CR 2d 449] .

Jury Instructions:

More Likely True--Clear and Convincing Proof, see *Judicial Council of California Civil Jury Instructions, CACI No. 201* (LexisNexis Matthew Bender).



Strategic Point:

CACI No. 201 is less rigorous than the language in the cases as to clear and convincing standard just as in BAJI 2.62, although courts have upheld BAJI 2.62. However, courts are evidencing a clear preference for CACI, as they should, over conflicting or different BAJI, even if BAJI is on point.

Legal Topics:

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

Civil Procedure Remedies Damages Punitive Damages Constitutional Law Substantive Due Process Privacy General
Overview Evidence Procedural Considerations Burdens of Proof Clear & Convincing Proof Torts Intentional
Torts Defamation Procedure



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9.20 Criminal Burden of Proof Is Proof Beyond Reasonable Doubt.

The most stringent standard of proof, proof beyond a reasonable doubt, is generally applicable in criminal proceedings [see *Evid Code* § 501; *Penal Code* § 1096].

Jury Instructions:

Obligation to Prove--More Likely True Than Not True, see *Judicial Council of California Civil Jury Instructions, CACI No. 200* (LexisNexis Matthew Bender).



Cross Reference:

Discussion of standard of proof in criminal actions, see *California Criminal Defense Practice*, Ch. 83, Evidence (Matthew Bender)

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofProof Beyond Reasonable Doubt



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9.21 Involuntary Commitment Requires Proof Beyond Reasonable Doubt.

In one case, the California Supreme Court has required the application of proof beyond a reasonable doubt when involuntary commitment to a mental hospital is involved [*Conservatorship of Roulet* (1979) 23 C3d 219, 223-230, 152 CR 425, 590 P2d 1 (also requiring unanimous jury verdict); *but see* *Weiner v. Fleischman* (1991) 54 C3d 476, 286 CR 40, 816 P2d 892 (apparently supporting clear and convincing standard)].

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofProof Beyond Reasonable DoubtHealthcare
LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare
LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults



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Chapter 10 Opening Statement

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.syn

AUTHOR: Ashok Ramani

§ 10.syn Synopsis to Chapter 10: Opening Statement

10.01 Scope.

10.02 Objective and Strategy.

10.03 CHECKLIST: Opening Statement Fundamentals.

10.04 Purpose of Opening Statement Is to Instruct Fact Finder About Party's Case and Focus on Key Themes.

10.05 Difference Between Opening Statement and Closing Argument.

10.06 Party Has Right to Make Opening Statement in Jury Trial, but at Court's Discretion in Bench Trial.

10.07 Order of Presenting Opening Statement.

10.07[1] Plaintiff Goes First.

10.07[2] Defendant May Make Statement at Start of Trial or Start of Defendant's Case, but Reserving Opening Statement Is Generally Unwise.

10.07[3] Waiving Opening Statement Is Discouraged.

10.08 Court May Place Limits on Statement.

10.08[1] Court May Limit Length and Scope of Opening Statement.

10.08[2] Court May Limit Enlargement of Opening Statement After Statement Is Concluded.

10.08[3] Court May Limit Use of Demonstrative Evidence.

10.09 CHECKLIST: Reviewing Opening Statement Strategies and Tactics.

10.10 Identify Trial Themes Early to Weave Into Opening Statement.

10.11 Use Opening Statement to Anticipate and Defuse Weaknesses.

10.12 Beware of "Overselling" Evidence.

10.13 Address Burden of Proof.

10.14 Prepare Simple Visual Aids and Timelines.

10.15 Request Mini-Openings If Appropriate.

10.15[1] Mini-Openings Are Intended to Break Trial Into Manageable Pieces.

10.15[2] Some Courts Allow Mini-Openings.

10.15[3] Example of Using Mini-Opening in Contract Case.

10.15[3][a] Parol Evidence and Negotiation.

10.15[3][b] Performance and Breach.

10.15[3][c] Damages.

10.16 CHECKLIST: Preparing Opening Statement Content.

10.17 Options and Strategy for Content of Opening Statement.

10.18 Counsel Must Present Coherent Theme.

10.19 Choose Format for Opening Statement.

10.19[1] Chronological Narrative.

10.19[2] Witness-by-Witness Presentation.

10.19[3] Focus on Key Themes.

10.20 Identify Key Persons and Entities Early in Opening Statement.

10.20[1] Introduce Client and Identify Facts That Will Appeal to Fact Finder.

10.20[2] Identify Important Fact Witnesses Other Than Clients and Experts.

10.21 Summarize Key Events.

10.22 Describe and Preview Key Documents.

10.23 Address Damages Directly.

10.24 [Reserved]

10.25 CHECKLIST: Presenting Opening Statement.

10.26 Present Opening Statement in Straightforward, Natural Style.

10.27 Take Advantage of Opportunity to Connect With Fact Finder.

10.27[1] Stand Where Jurors Can See You.

10.27[2] Make and Hold Eye Contact With Individual Jurors.

10.27[3] Vary Cadence of Speech.

10.27[4] Limit Hand Gestures.

10.27[5] Limit Pacing Around Courtroom.

10.28 Limit Use of Notes.

10.29 CHECKLIST: Objecting to Opening Statement and Responding to Objections.

10.30 Options and Strategy for Objecting to Opening Statement and Responding.

10.31 Object During Opponent's Opening Statement As Necessary.

10.31[1] Object to Preserve Record and to Avoid Prejudice.

10.31[2] Object Only If Confident You Will Win, or to Preserve Record.

10.31[3] List of Objections.

10.31[4] File Motions In Limine to Limit Need for Objections.

10.32 Remedies for Opening Statement Misconduct.

10.32[1] Counsel May Be Admonished and Jury Instructed.

10.32[2] Objecting Party May Move for Mistrial for Incurable Misconduct.

10.32[3] In Extreme Cases, Counsel May Be Held in Contempt.

10.32[4] Misconduct May Be Grounds for Appellate Reversal.

10.33 When Responding to Objections, Explain Good-Faith Basis for Statements.

Ashok Ramani n*

FOOTNOTES:

(n2)Footnote *. Mr. Ramani, contributing author to this chapter, is a partner and trial attorney at Keker & Van Nest LLP in San Francisco.



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Chapter 10 Opening Statement
I. STRATEGY

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.01

AUTHOR: Ashok Ramani

10.01 Scope.

This chapter addresses:

- Objectives and strategy for opening statements [see 10.02].
- Opening statement fundamentals, court control over statement, and requests to enlarge statement [see 10.03 -10.08].
- Strategies and tactics for crafting an opening statement [see 10.09 -10.14].
- Use of mini-openings, when appropriate [see 10.15].
- Opening statement content, including format [see 10.16 -10.23].
- Opening statement presentation [see 10.25 -10.28].
- Objecting to opening statement and ethical considerations [see 10.29 -10.31].
- Remedies for opening statement misconduct [see 10.32].
- Responding to objections during opening statement [see 10.33].

Core Statute:

CCP § 607



Cross Reference:

Extensive discussion of opening statements, see California Trial Guide, Unit 11, Opening Statement (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsObjections



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Chapter 10 Opening Statement
I. STRATEGY

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.02

AUTHOR: Ashok Ramani

10.02 Objective and Strategy.

The opening statement is a lawyer's first opportunity to tell the client's story directly to the fact finder. Many commentators believe cases are won or lost during opening statements. Anecdotal evidence and studies demonstrate that an effective opening statement can precondition the jury in favor of one side. Thus, opening statement is among the most important procedures at the trial lawyer's disposal.

Opening statement is when the jury first gets to hear what the case is about. Having sat through the mysterious process of voir dire, the jury expects to hear in a straightforward and organized fashion the facts that lawyers for all parties have been obliquely suggesting. A lively, entertaining presentation will go a long way to frame how the jury views the case. Accordingly, a lawyer who does not devote a significant part of trial preparation to opening statement wastes a key opportunity.

Because of opening statement's importance, it is not wise to waive the opportunity to make statement entirely. Doing that allows the other side to impose an unchallenged spin on the case's critical events that the fact finder will use as a frame of reference when considering the evidence. A lawyer who does not capitalize on this opportunity risks losing a key advantage in the trial process. Plaintiff's counsel, who normally has the burden of proof at trial, must present an opening statement that minimally establishes the facts required to support each cause of action of the case. Failure to do so exposes the plaintiff to a motion for non-suit. Defendants do not face a similar requirement. However, a defendant who does not give an opening statement immediately after the plaintiff's opening statement runs the risk the jury will be unalterably swayed by the only presentation of a factual summary and theories of the case it will have heard.

A trial lawyer's credibility is paramount, such that if the fact finder finds a lawyer trustworthy, that trust is reflected on the lawyer's client. The fact finder may penalize a lawyer who exaggerates what the evidence will show, particularly when savvy opposing counsel reminds the jury of this exaggeration repeatedly during closing argument. Counsel must be careful not to let a belief in the client's case or a desire to "spice things up" lead to making promises during opening statement that are cannot be fulfilled during trial.

Consider mini-openings (tailored opening statements that address discrete parts of the case) for long or complicated trials, especially when the trial naturally lends itself to being separated into discrete components. A mini-opening is

typically a shorter opening statement with a series of mini-opening statements throughout the trial at strategic points. This procedure requires either a stipulation approved by the court or an order from the court. It is a procedure coming into common use, and whether a court will go along with the procedure depends on the court's experience and understanding of the purpose. The mini-statements should remind the jury of what it is about to hear and where that fits into the factual story. These should not be mini-*arguments* inserted throughout the trial.

 Cross Reference:

Discussion of mini-openings, see 10.15.

Consider:

Many jury consultants believe that the plethora of television and motion pictures concerning legal trials, in both the criminal and the civil trial setting has preconditioned jurors to expect an opening statement. This militates further towards never waiving opening statement.

 Cross References:

Extensive discussion of opening statements including sample scripts, see California Trial Guide, Unit 11, Opening Statement (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 ProcedureTrialsOpening StatementsGeneral Overview



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Chapter 10 Opening Statement
II. OPENING STATEMENT FUNDAMENTALS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.03

AUTHOR: Ashok Ramani

10.03 CHECKLIST: Opening Statement Fundamentals.

- ☐ Identify a clear theme or themes that the opening statement expounds.

Discussion:

See 10.04

- ☐ Present a roadmap of the case's facts, while subtly framing the issues for closing argument without arguing the matter.

Discussion:

See 10.05

- ☐ Do not waive opening statement, and rarely reserve opening statement.

Discussion:

See 10.07

- ☐ Prepare to proceed with opening statement as soon as the jury is sworn.

- ☐ Verify in advance court time limits and court custom (e.g., some courts require counsel to argue from a podium that cannot be moved from between counsel table).

Discussion:

See 10.08

☐ Verify in advance the court's and opposing counsel's views toward the use demonstrative items in opening statements, especially nonargumentative demonstrative evidence.

Discussion:

See *10.08*

Legal Topics:

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

Civil ProcedureTrialsOpening StatementsGeneral Overview



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Chapter 10 Opening Statement
II. OPENING STATEMENT FUNDAMENTALS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.04

AUTHOR: Ashok Ramani

10.04 Purpose of Opening Statement Is to Instruct Fact Finder About Party's Case and Focus on Key Themes.

Opening statement is one of only two opportunities (closing argument being the other) during which the attorney may speak directly to the fact finder. It is paramount to use this time to teach the judge or jury about the client and the client's case. This is generally best done by coherently weaving a story around a limited number of trial themes, and supporting the overall theory of the case.

► **Cross References:**

Discussion of themes and formats, see *10.18, 10.19*.

Discussion of closing argument, see Ch. 15, Closing Argument.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsOpening StatementsGeneral Overview



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Chapter 10 Opening Statement
II. OPENING STATEMENT FUNDAMENTALS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.05

AUTHOR: Ashok Ramani

10.05 Difference Between Opening Statement and Closing Argument.

In presenting an opening statement, counsel must not argue the client's case, but rather present an outline--tied into documents and anticipated testimony--as to what the evidence will show at trial. Closing argument, by contrast, is more exhortative. Opening statement presents a thematic roadmap, while closing argument directly urges a particular result.



Warning:

Counsel must *never* state personal opinions during opening statement. Counsel must have a good-faith belief that evidence presented at trial will support facts that counsel states during opening statement [see *Mudrick v. Market S. R. Co. (1938) 11 C2d 724, 737-738, 81 P2d 950* (new trial is appropriate if counsel represented existence of facts counsel knew could not be proved)].



Cross Reference:

Discussion of closing argument, see Ch. 15, Closing Argument.

Legal Topics:

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

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview



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Chapter 10 Opening Statement
II. OPENING STATEMENT FUNDAMENTALS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.06

AUTHOR: Ashok Ramani

10.06 Party Has Right to Make Opening Statement in Jury Trial, but at Court's Discretion in Bench Trial.

Counsel has the right to make an opening statement in a jury trial [*CCP § 607*]. Prohibiting opening statement in jury trial is an abuse of discretion [*Shippy v. Peninsula Rapid Transit Co. (1925) 197 C 290, 294, 240 P 785*] . In bench trials, the court may choose not to hear opening statements [see *Gunn v. Superior Court (1946) 76 CA2d 203, 205, 173 P2d 328*] .

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview



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Chapter 10 Opening Statement
II. OPENING STATEMENT FUNDAMENTALS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.07

AUTHOR: Ashok Ramani

10.07 Order of Presenting Opening Statement.

10.07[1] Plaintiff Goes First. Because the plaintiff typically bears the burden of proof, the plaintiff generally presents his or her opening statement first [*CCP* § 607].

Exception:

This tradition can be reversed in cases in which the only issue to try is an affirmative defense--in that circumstance, the defendant's counsel presents his or her opening statement first. Court practice can vary as to who proceeds first in a declaratory judgment action.

► **Cross Reference:**

Discussion of burden of proof, see Ch. 9, Burden of Proof and Persuasion.

Mini-openings can result in different parties leading off different segments of the trial. For example, in an insurance case, the plaintiff might proceed first on the existence and terms of the insurance policy, and the defendant might proceed first on any defenses to coverage, with the plaintiff again proceeding first on damages.

► **Cross Reference:**

Discussion of mini-openings, see 10.15.

10.07[2] Defendant May Make Statement at Start of Trial or Start of Defendant's Case, but Reserving Opening Statement Is Generally Unwise. The defendant has the choice to present opening statement immediately following the plaintiff's opening, or alternatively after the plaintiff rests and before the defendant presents evidence [*CCP* § 607]. It is generally unwise to reserve opening statement, because it leaves the plaintiff's version of events unchallenged for the duration of plaintiffs' case, and naturally frames the case in the fact finder's mind in the plaintiff's favor.



Strategic Point--Defendant:

One reason to reserve opening statement is to allow defense counsel to evaluate the plaintiff's evidence and frame his or her case accordingly. Generally, this approach is disfavored, as counsel should make these strategic decisions in advance of trial, and be prepared from the outset to anticipate the plaintiff's case and present the strongest defenses.

10.07[3] Waiving Opening Statement Is Discouraged. Generally, waiving the right to opening statement is not a good idea. The only reason to waive opening statement is if counsel has nothing positive to say about his or her client's case. Such a case--were it to exist--should not be brought to trial.

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 Trials Opening Statements General Overview Evidence Procedural Considerations Burdens of Proof Allocation



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Chapter 10 Opening Statement
II. OPENING STATEMENT FUNDAMENTALS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.08

AUTHOR: Ashok Ramani

10.08 Court May Place Limits on Statement.

10.08[1] Court May Limit Length and Scope of Opening Statement. The trial court has inherent discretion to set time and subject limitations on opening statements [*Williams v. Seymour (1929) 102 CA 230, 231, 282 P 819*] .



Strategic Point:

Counsel who appears before a trial judge for the first time should be sure to ask at the pretrial conference about the judge's typical practices and consult local attorneys' knowledge, so that counsel does not prepare a four-hour opening statement complete with graphics for a judge who limits opening statement to half an hour with no visual aids.

If the trial judge limits time, attempt to clarify with the judge whether the limits apply to both parties, whether counsel can reserve time in case opposing counsel exceeds limits, and whether new matter brought up on the reply by the plaintiff would permit defendant to reopen to state facts that will be shown at trial that apply to the position stated. However, keep in mind that the opening statement is not *argument*, and theoretically there would be no need to reply or respond to a reply.

Although most judges give counsel reasonably free reign to structure and present opening statements in jury trials, bench trials and judicial tutorials are often a different matter. Many judges do not allow opening statements or closing arguments in bench trials. And because a judicial tutorial is intended to educate the court about a particular topic, the court will often specify the structure the tutorial should take. This structure often disallows any argument by counsel, and some courts even forbid counsel from presenting anything at all, instead relying on an expert witness's narrative.



Cross Reference:

Discussion of court's authority to limit opening statements in bench trials, see *10.06*.

10.08[2] Court May Limit Enlargement of Opening Statement After Statement Is Concluded. Whether to

permit counsel to enlarge an opening statement after it has been delivered (for example, when the defendant makes a motion for a nonsuit on the plaintiff's opening statement, and the plaintiff seeks to "reopen" to state more facts that will support the case and will be offered at trial) is primarily within the discretion of the trial court. The court's discretion in this situation should be exercised liberally so that a plaintiff who has a cause of action should not be denied the opportunity to present it to the jury merely because of a failure to state in detail all facts counsel proposes to prove [*Rodin v. American Can Co.* (1955) 133 CA2d 524, 534-535, 284 P2d 530 (court should have permitted statement to be enlarged after motion for nonsuit)].



Cross Reference:

Discussion of nonsuit, see *Ch. 12, Motion for Nonsuit and Other Motions During Trial, 12.03 -12.07.*

10.08[3] Court May Limit Use of Demonstrative Evidence. Counsel should verify in advance the court's view of the use of graphics, documents, charts, and other demonstrative items to be used in opening statements, and in particular, the use of non-argumentative demonstrative evidence in the opening statements. Counsel must ensure that the opposition has seen and agreed to the use of the items in advance.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewEvidenceDemonstrative EvidenceGeneral Overview



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Chapter 10 Opening Statement
III. REVIEWING OPENING STATEMENT STRATEGIES AND TACTICS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.09

AUTHOR: Ashok Ramani

10.09 CHECKLIST: Reviewing Opening Statement Strategies and Tactics.

- ☐ Identify important themes and weave them throughout opening statement, but do not exaggerate what the evidence will show.

Discussion:

See 10.10

- ☐ Ask for mini-openings when appropriate by splitting the case into smaller components.

Discussion:

See 10.15

- ☐ Use the opening statement to anticipate and defuse weaknesses, but do not exaggerate what the evidence will show.

Discussion:

See 10.11, 10.12

- ☐ Address the burden of proof.

Discussion:

See 10.13

Legal Topics:

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

Civil ProcedureTrialsOpening StatementsGeneral Overview



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AUTHOR: Ashok Ramani

10.10 Identify Trial Themes Early to Weave Into Opening Statement.

Counsel should identify trial themes well in advance of trial. Reiterate these themes throughout opening statement, so that the fact finder will have a framework to evaluate the evidence.



Strategic Point:

A theme should be identified early enough to be used throughout discovery, or if identified after discovery commences, then to be used throughout remaining discovery. All trials need a theme, or the jury (or fact finder in a court trial) will not be able to follow the "story."



Cross Reference:

Discussion of importance of coherent themes, see *10.18*.

Legal Topics:

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

10.11 Use Opening Statement to Anticipate and Defuse Weaknesses.

Opening statement, like direct examination, provides an opportunity to present harmful facts in a relatively favorable way. Anticipation of weaknesses can bolster counsel's credibility with the fact finder while simultaneously taking the sting out of opposing counsel's presentation.



Strategic Point:

Counsel must carefully evaluate whether opposing counsel will seize on the weakness anticipated and defused. Address obvious weaknesses, but avoid educating opposing counsel on how to attack counsel's case. Bear in mind that the presentation of evidence on opening statement is not "argument," and the opportunity to explain the evidence is difficult in the context of a non-argumentative opening statement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsOpening StatementsGeneral Overview



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AUTHOR: Ashok Ramani

10.12 Beware of "Overselling" Evidence.

It can be tempting to add dramatic flourishes to what may be mundane facts, or to promise the jury what counsel hopes a particular witness will testify. This is not a good strategy, because it can easily backfire, damage trial counsel's credibility, and as a result weaken the client's case. Experienced trial lawyers often state that a fact finder's verdict--particularly a jury's--reflects not only the trial lawyer's skills, but also the lawyer's perceived honesty. It is to the lawyer's and party's detriment to make promises during opening statement that are not later fulfilled, or cannot be established with evidence, resulting in damage to the party's credibility. There are plenty of rhetorical tools other than exaggeration with which to state a case with conviction. Counsel should not promise what cannot be delivered.



Strategic Point:

Take careful notes of your opponent's opening statement, in checklist format. As the trial proceeds, be sure to check off each of the representations and promises made. If any boxes remain unchecked once the evidence closes, remind the jury of the promises opposing counsel made but failed to fulfill. Invariably, one of the first daily transcripts requested of the court reporter is the opening statement of opposing counsel. Doing so provides a precise record of those representations and promises.

Legal Topics:

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

10.13 Address Burden of Proof.

Some trial lawyers believe that burden of proof is critical to convey, while others believe it has little influence. A more reasoned view is that counsel should emphasize in opening statement which party has the burden, particularly if the burden is clear-and-convincing or otherwise above a preponderance of the evidence standard.



Warning:

Some courts may consider discussion of the burden of proof to be an impermissible legal argument, and will not allow it. This should be clarified with the judge in advance.



Cross Reference:

Discussion of burden of proof, see Ch. 9, Burden of Proof and Persuasion.

Legal Topics:

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

Civil ProcedureTrialsOpening StatementsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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AUTHOR: Ashok Ramani

10.14 Prepare Simple Visual Aids and Timelines.

Although animations and other professional presentations can be effective, visual aids for opening statement need not be more complex than enlargements or simple diagrams created on standard software. Also, do not hesitate to use multiple media, including simple things like writing key points on a large sheet of paper. Common visual aids include:

- A list of important witnesses, sometimes with pictures.
- A timeline of critical events.
- An illustration of complex procedures, such as a medical procedure.



Strategic Point:

It can actually be very effective to use opposing counsel's visual aids to point out how and why the other side's case theory is flawed.

Be aware that visual aids in an opening statement are particularly subject to attack as being "argumentative." Counsel should try to stipulate with opposing counsel to the use of aids, consider using jointly prepared aids, or endeavor to make visual aids "argument-neutral" so that they can be used. Also, counsel should make sure to first clear the use of any visual aids with the court, to avoid the embarrassment of bringing aids to the courtroom, attempting to have them used, and being told in front of the jury that they cannot be used.

Legal Topics:

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

Civil Procedure Trials Opening Statements General Overview Evidence Demonstrative Evidence General Overview



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1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.15

AUTHOR: Ashok Ramani

10.15 Request Mini-Openings If Appropriate.

10.15[1] Mini-Openings Are Intended to Break Trial Into Manageable Pieces. As the name implies, "mini-openings" are opening statements that focus on a discrete part of a case. Mini-openings primarily are useful to demarcate separate substantive areas in a trial, particularly complex civil matters such as environmental litigation that naturally segregate into easily identifiable modules.



Strategic Point:

Think carefully about whether your case would benefit from a mini-opening. Simply because a case breaks down into separate substantive topics is not a reason to use this device--for example, a defendant in a complex negligence matter may prefer to have duty, breach, and causation all argued jointly to show the standard of care is illusive, let alone executing that standard.

Note that mini-openings can result in different parties leading off different segments of the trial.

10.15[2] Some Courts Allow Mini-Openings. Mini-openings are increasingly accepted by some courts for certain types of cases. Mini-openings are useful when the trial involves several discrete transactions, or parts, that make up the whole, and especially when the order of witnesses permits. However, if the witnesses are being called randomly, for example to accommodate many witnesses' availability, mini-statements may not make sense and can cause confusion.



Strategic Points:

- Check local court rules and ask during the pretrial conference whether the court would allow mini-openings.

- This underscores the need to become familiar with the proclivities of specific trial judges by discussing with other attorneys their experiences before them.

10.15[3] Example of Using Mini-Opening in Contract Case.

10.15[3][a] Parol Evidence and Negotiation. Relating to parol evidence and negotiation, the mini-openings should focus on each side's version of oral and written negotiations, explain the contract drafts, and highlight the evidence as to what disputed terms should mean.

10.15[3][b] Performance and Breach. In discussing contract performance and breach, the mini-openings should present proof of exemplary or insufficient contract performance, and describe the witnesses and documents that support the plaintiff's breach theory and the defendant's breach rebuttal or defenses.

10.15[3][c] Damages. Discussing contract damages, these mini-openings should focus on the various types of contract damages sought, such as incidental, consequential, and liquidated damages, and introduce any expert witnesses and the witnesses' damages theories.



Strategic Point:

This point demonstrates why mini-openings are not common: the witnesses in each of these areas would likely overlap, and the court would generally not want the same witnesses recalled multiple times.

Legal Topics:

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

Civil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewContracts LawBreachGeneral OverviewContracts LawPerformanceGeneral OverviewEvidenceDocumentary EvidenceParol Evidence



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IV. PREPARING OPENING STATEMENT CONTENT

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.16

AUTHOR: Ashok Ramani

10.16 CHECKLIST: Preparing Opening Statement Content.

- ☐ Work out a strong theme or themes before outlining the opening statement.

Discussion:

See 10.18

- ☐ Decide on an opening statement format from among three primary formats:

- ☐ Chronological narrative.

Discussion:

See 10.19[1]

- ☐ Focus on witness-by-witness presentation of evidence.

Discussion:

See 10.19[2]

- ☐ Focus on key themes.

Discussion:

See 10.19[3]

- ☐ Introduce key witnesses, summarize key events, preview key documents, and address damages.

Discussion:

See *10.20 -10.23*

Legal Topics:

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

10.17 Options and Strategy for Content of Opening Statement.

The key to an effective opening statement is an engaging presentation that emphasizes counsel's key trial themes. There are a number of different formats, but three primary examples include:

- A chronological narrative.
- A witness-by-witness recitation of the testimony.
- A thematic approach.

Hybrids are of course possible. Whichever format is chosen, counsel should generally introduce his or her client and key witnesses, describe (and if possible show) key documents, and deal directly with damages.



Cross Reference:

Scripts of opening statements that include introductions, explain the trial process to the jury and evidentiary issue, and defenses and damages, see *California Trial Guide*, §§ 11.20 -11.204 (Matthew Bender).

Legal Topics:

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

10.18 Counsel Must Present Coherent Theme.

An opening statement without a theme or theory of the case is like to a boat without a rudder--both will meander aimlessly and reach their destination only by luck. Particularly because opening statement is counsel's first chance to speak to the fact finder, and only chance to precondition the fact finder as to how to view the yet-to-be-presented evidence, it is imperative that the opening statement instill in the fact finder a sense of a strong theme or central theory.

As to the number of themes, fewer is generally better. Counsel should cull through the typically numerous and occasionally contradictory theories formed over a case's development and select only the best for trial presentation.



Strategic Point:

One way to identify key trial themes is the "spouse/friend/kid" test. Trial counsel should be able to clearly explain a trial theme to a non-lawyer spouse, friend, or child in a sentence or two.

Legal Topics:

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AUTHOR: Ashok Ramani

10.19 Choose Format for Opening Statement.

10.19[1] Chronological Narrative. A chronological narrative is often the default choice for opening statement. It makes for a logical presentation, but is not appropriate in all cases, particularly if the events that come first in time are not the most important events.

10.19[2] Witness-by-Witness Presentation. A common way to organize the opening statement is to walk through what each witness, in order, will say on the stand. This approach is easy to prepare, but is rarely compelling for the jury.

10.19[3] Focus on Key Themes. The most effective opening statements organize the evidence around important case themes. For example, a wrongful death plaintiff in an industrial accident case may want to focus the opening statement on the defendant employer's sacrifice of employees' safety in favor of profits, addressing the key facts in the context of that theme.

Legal Topics:

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AUTHOR: Ashok Ramani

10.20 Identify Key Persons and Entities Early in Opening Statement.

10.20[1] Introduce Client and Identify Facts That Will Appeal to Fact Finder. The trial is about the client, not the lawyer. The fact finder wants to know who the case is about, and so counsel should normally introduce the client during opening statement.

10.20[2] Identify Important Fact Witnesses Other Than Clients and Experts. Opening statement presents an opportunity to describe favorable witnesses that the fact finder will meet during the course of the trial. Use this opportunity to emphasize anticipated favorable testimony and important witness attributes. For example, in a traffic accident case, when introducing an eyewitness, do not simply state the person's name but, if the information is helpful, describe how far the witness was from the accident scene, the witness's perfect eyesight, and facts supporting the witness's lack of bias.



Cross Reference:

Discussion of visual aids, see *10.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Opening Statements General Overview



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IV. PREPARING OPENING STATEMENT CONTENT

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AUTHOR: Ashok Ramani

10.21 Summarize Key Events.

Counsel should avoid providing too many details, thereby confusing the fact finder. Keep to the major events, and disclose them in the fashion appropriate for the presentation format selected. The purpose of the statement is to inculcate in the jury counsel's simple, persuasive themes, and not to overwhelm the jury with counsel's superior knowledge and intellect in a way that leaves them confused. A jury provided a roadmap of how to get to where counsel wants the jury to go, in the absence of a competing roadmap from the other side, is likely to follow the one map they are given.



Cross Reference:

Discussion of opening statement formats, see *10.19*.

Legal Topics:

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

10.22 Describe and Preview Key Documents.

Civil cases are often won or lost on key documents. Ideally, show the jury the key documents--both helpful and harmful--and explain the documents' importance.



Warning:

A minority of courts forbids showing the jury a document before its receipt in evidence, even with stipulations. In this circumstance, explain what the document will show and (with the court's permission) create a visual aid with simple document highlights (title, key language).



Strategic Point:

Consider the advisability of moving documents into evidence before the opening statements, either on a motion in limine or in a pretrial proceeding. Documents admitted based on declarations or live testimony in a pretrial hearing can be used at trial. Motions to admit documents before trial are rare, but the motion itself may clarify the evidentiary objections (and permit a more effective presentation when the foundation for admissibility is laid during trial) or demonstrate the lack of merit in the opposition to the admissibility of the evidence.

Legal Topics:

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

Civil Procedure Trials Opening Statements General Overview Evidence Documentary Evidence General Overview



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AUTHOR: Ashok Ramani

10.23 Address Damages Directly.

The plaintiff should condition the jury to the concept of a damages award. The larger the damages award requested by the plaintiff, the more important this conditioning will be, early in the trial.

The defendant may ask for no award, or may explain why a low award is appropriate, depending of the strength of the liability case.

Legal Topics:

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

Civil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureRemediesDamagesGeneral Overview



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[Reserved]

10.24[Reserved]



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V. PRESENTING OPENING STATEMENT

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AUTHOR: Ashok Ramani

10.25 CHECKLIST: Presenting Opening Statement.

☐ Be yourself; use your own style. The fact finder will see through an adopted style.

Discussion:

See 10.26

☐ Be mindful of your body positioning, eye contact, speech cadence, and hand gestures. Limit pacing.

Discussion:

See 10.27[1] -[5]

☐ Limit the use of notes.

Discussion:

See 10.28

Legal Topics:

For related research and practice materials, see the following legal topics:
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V. PRESENTING OPENING STATEMENT

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AUTHOR: Ashok Ramani

10.26 Present Opening Statement in Straightforward, Natural Style.

Counsel should talk to the jury in a natural, comfortable manner. Counsel should not pretend to be someone other than who he or she is. The primary rule is always to be one's self. A lawyer's put-on act will wear thin over the course of a trial and alienate the jury. This is not to say that counsel should not vary the demeanor and pace of the presentation as needed, but do not act as though on a stage. Counsel should talk as if explaining the case to a friend.

With the ubiquity of television dramas surrounding courtroom activity, trials, and lawyers, jurors are conditioned to expect short, succinct, dramatic statements from lawyers during trials. Counsel should attempt to make any opening statement fit the expectation the jurors will have.

Keep in mind in preparing the opening statement that the trial attorney's credibility has a significant bearing on the outcome of the case. Presenting an opening statement in a manner that is factually accurate is important, but the statement must also be made in a manner that gains the trust of the jurors to whom it is presented.

Legal Topics:

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

10.27 Take Advantage of Opportunity to Connect With Fact Finder.

10.27[1] Stand Where Jurors Can See You. Some courts allow trial counsel to stand wherever they choose during opening statement; some courts require trial counsel to stand behind a podium, although the podium can be moved to in front of the jury; some courts require trial counsel to deliver opening statements from behind the podium as positioned between counsel tables. As a general rule, the closer counsel can get to the jury, the better. Of course, it is possible to be too close to the jury; do not lean on the jury box or hover over individual jurors.

For bench trials, these considerations are less important, and the podium or even counsel table should suffice.

10.27[2] Make and Hold Eye Contact With Individual Jurors. In talking to the jury, the preferred course is to make individual eye contact with a juror for a few seconds, and then move on. A good rule of thumb is to hold eye contact with one juror for half a sentence, then proceed to another juror.

As with invading the jury's personal space, locking on, or avoiding, eye contact is undesirable. Looking over the top of the second row of jurors, akin to a politician speaking to a large crowd, causes counsel to appear distant, uninterested, or both.

10.27[3] Vary Cadence of Speech. The same tone of speech will seem dull to the jury. Change the lilt and emphasis of speech, timed to particular moments in the narrative. Counsel should use limited gestures like striking the hands together, for example, to punctuate a car crash, but do so only when appropriate and sparingly.

10.27[4] Limit Hand Gestures. Excessive hand gestures can be distracting to the jury and make the speaker look harried and unpolished. A useful approach to the use of hand gestures is to imagine a box from the stomach to the middle of the chest that extends roughly a foot in front, and six inches to either side of counsel's body. Then, most hand gestures should be confined to that imaginary box.

10.27[5] Limit Pacing Around Courtroom. Pacing around the courtroom can be distracting to the jury, make it hard for the jury to hear what counsel is saying, and cause counsel to turn his or her back to the jury.

Legal Topics:

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

10.28 Limit Use of Notes.

The use of notes can be comforting to counsel, but often serve as a barrier to counsel ability to talk naturally with the jury. Not every trial lawyer is capable of delivering a lengthy opening statement purely from memory, and it is acceptable to refer to a checklist or an outline occasionally.



Strategic Point:

Some lawyers write out their opening statement word-for-word, while others try to avoid notes altogether. A reasonable compromise is to use an outline of key points.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsOpening StatementsGeneral Overview



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VI. OBJECTING TO OPENING STATEMENT AND RESPONDING TO OBJECTIONS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.29

AUTHOR: Ashok Ramani

10.29 CHECKLIST: Objecting to Opening Statement and Responding to Objections.

☐ Object as necessary, but object only if likely to prevail.

Discussion:

See 10.31[1] -[3]

☐ Failure to object waives the right to complain later in the trial or on appeal, except in rare cases of extreme misconduct.

Discussion:

See 10.31[1]

☐ Consider filing motions in limine to preserve controversial topics likely to arise in opening statement

Discussion:

See 10.31[4]

☐ Typical remedy for improper opening statement is admonishment to the jury; infrequently, courts may grant mistrial or contempt.

Discussion:

See 10.32[1] -[4]

☐ When responding to opening statement objection, explain why statement is consistent with the

evidence and permissible.

Discussion:

See 10.33

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedureTrialsMotions for MistrialCivil
ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsObjectionsCivil
ProcedureAppealsReviewabilityPreservation for Review



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1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.30

AUTHOR: Ashok Ramani

10.30 Options and Strategy for Objecting to Opening Statement and Responding.

In general, counsel should proceed cautiously in objecting to the opposing party's opening statement. Generally object only when confident that the court will sustain the objection. Motions in limine are often a better way to anticipate controversial issues and preserve the record without the risk of appearing to the judge and jury to be obstructionist.



Cross Reference:

Discussion of motions in limine, see *Ch. 4, Final Pretrial Conference, 4.20 -4.32.*

When responding to an objection during opening statement, explain to the court that the statements are made in good faith, consistent with the evidence, and permissible. Whether or not the court sustains an objection, always thank the court, and proceed without indicating whether the ruling helped or hindered your presentation. In most cases, jurors will not know what the objection was about and will not reach a conclusion one way or the other as to its impact.

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsObjections



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VI. OBJECTING TO OPENING STATEMENT AND RESPONDING TO OBJECTIONS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.31

AUTHOR: Ashok Ramani

10.31 Object During Opponent's Opening Statement As Necessary.

10.31[1] Object to Preserve Record and to Avoid Prejudice. It is appropriate to object during opposing counsel's opening statement if he or she makes an appeal to jury prejudice, argues the case, or makes reference to inadmissible evidence.



Strategic Point:

In the case of an opponent arguing during opening statement, and an objection that is overruled, counsel should consider requesting to approach the bench or, during the next recess, making a motion to strike the statements that are argumentative. If particularly egregious, counsel may make a motion for a nonsuit for misconduct, and in the alternative securing the right to argue during the responsive opening statement or reply to the opposing statement.



Warnings:

- Failure to object to opening statement misconduct will result in waiver, except in the most unusual and egregious instances [see *Horn v. Atchison, T. & S. F. R. Co. (1964) 61 C2d 602, 609-610, 39 CR 721, 394 P2d 561* ; but see *Kolaric v. Kaufman (1968) 261 CA2d 20, 28, 67 CR 729* (no waiver for failure to object because counsel's statements were calculated to prejudice the jury against the plaintiffs on the basis of immutable characteristics)].

- Counsel must *timely* object; objecting well after counsel made the offending statement does not suffice [see, e.g., *Horn v. Atchison, T. & S. F. R. Co. (1964) 61 C2d 602, 610, 39 CR 721, 394 P2d 561* (refusing to consider objection asserted for first time in mistrial motion)].

10.31[2] Object Only If Confident You Will Win, or to Preserve Record. Counsel should object during opposing counsel's opening statement only if there is a good chance that the objection will be sustained, or to preserve the objection in the record. Objecting during opening statement can seem rude to the jurors. And because the remedy for a sustained objection is typically an admonishment to the jury, counsel runs the risk that the jury will pay closer attention to the offending statement, rendering the objection pointless. The key is to think seriously about the consequences before objecting.



Strategic Point:

Trial counsel should object only if there is a sound basis that trial counsel can articulate clearly, or when trial counsel believes failure to object could jeopardize appeal options. These circumstances tend to correlate highly.

If counsel is aware of the opposing counsel's predilections during trials and knows or believes that counsel will present an objectionable statement, then a motion in limine is warranted. Whether the motion is granted, it will alert the court to the issue and permit a reasonable chance that objections during trial will be entertained.

10.31[3] List of Objections. A partial list of objections includes:

- An appeal to the jurors' sympathy.
- Addressing jurors repeatedly by name.
- Referring to the parties' financial status.
- An appeal to the jurors' self-interest.
- Derogatory remarks about the opposing parties, witnesses, or counsel.
- Referring to a party's insurance coverage.
- Referring to settlement negotiations.
- Referring to evidence that counsel knows will not be introduced.
- Misstating the law.
- Argument.
- Improper or unapproved use of graphics and visuals, or graphics that are argumentative.



Cross Reference:

Discussion, case law, and scripts of how to make and respond to objections during opening statement, see *California Trial Guide*, § 11.10[1], [2] (Matthew Bender).

10.31[4] File Motions In Limine to Limit Need for Objections. It is usually preferable to anticipate and eliminate controversial issues before trial by the use of motions in limine, so that the judge has an opportunity to consider the issue carefully, rather than making an objection, which requires the judge to rule on the spot.

**Strategic point:**

The objecting attorney is reasonably assured of a sustained objection if opposing counsel violates a motion in limine during opening statement. If the motion is denied, the issue is preserved for appeal [see *People v. Barajas* (1983) 145 CA3d 804, 809, 193 CR 750] .

**Cross Reference:**

Discussion of motions in limine, see *Ch. 4, Final Pretrial Conference*, 4.20 -4.32.

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsObjectionsCivil ProcedureAppealsReviewabilityPreservation for Review



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Cathcart Durie McGee Prather

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Chapter 10 Opening Statement

VI. OBJECTING TO OPENING STATEMENT AND RESPONDING TO OBJECTIONS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.32

AUTHOR: Ashok Ramani

10.32 Remedies for Opening Statement Misconduct.

10.32[1] Counsel May Be Admonished and Jury Instructed. Admonishing the jury is the most common remedy for opening statement misconduct, and may prevent reversal [*see Deevy v. Tassi (1942) 21 C2d 109, 123, 130 P2d 389*]. Counsel must usually object to trigger this remedy; relying on the court's sua sponte admonishment is unwise.

Cross Reference:

Discussion of waiver for failure to object timely, see *10.31[1]*.

10.32[2] Objecting Party May Move for Mistrial for Incurable Misconduct. The circumstances that trigger a mistrial are exceptional, and require misconduct, such as reference to a parties' immutable characteristics [*see Kolaric v. Kaufman (1968) 261 CA2d 20, 28, 67 CR 729*]. Ordinarily, it is only when promises of proof in counsel's opening statements are inflammatory in character and calculated to blind the jury to the following lack of proof that they will be found to be prejudicial [*see Lafrenz v. Stoddard (1942) 50 CA2d 1, 9, 122 P2d 374*]. In these rare instances, the party seeking mistrial need not have objected during the opening statement to preserve their rights.



Warning:

Such flagrant violations rarely occur. It is not a prudent practice to hope that the court finds incurable misconduct to excuse a failure to object.

Cross References:

Discussion of waiver for failure to object timely, see *10.32[1]*.

Discussion of mistrials, see Ch. 22, Mistrial.

10.32[3] In Extreme Cases, Counsel May Be Held in Contempt. In cases of extreme conduct, counsel may be held in contempt. However, no contempt will be found if the court determines that the attorney accused of misconduct acted in good faith [*see Hawk v. Superior Court (1974) 42 CA3d 108, 121, 116 CR 713*].

 Cross Reference:

Discussion of contempt and procedure, see Ch. 23, Contempt.

10.32[4] Misconduct May Be Grounds for Appellate Reversal. Misconduct in opening statement, such as referring to inadmissible evidence and continuing throughout trial, is grounds for reversal [*see Love v. Wolf* (1964) 226 CA2d 378, 394, 38 CR 183]. The party seeking reversal must have timely objected to preserve the point, unless the misconduct was so egregious that waiver cannot have occurred [*see Grimshaw v. Ford Motor Co.* (1981) 119 CA3d 757, 798, 174 CR 348]. The totality of the evidence and appropriate cautionary instructions to the jury may prevent reversal on grounds of opening statement misconduct [*see Deevy v. Tassi* (1942) 21 C2d 109, 123, 130 P2d 389].

 Cross Reference:

Discussion of waiver for failure to object timely, see 10.31[1].

Legal Topics:

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

Civil ProcedureTrialsMotions for MistrialCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsObjectionsCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review



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Chapter 10 Opening Statement

VI. OBJECTING TO OPENING STATEMENT AND RESPONDING TO OBJECTIONS

1-10 MB Practice Guide: Trial & Post-Trial Civil Proc 10.33

AUTHOR: Ashok Ramani

10.33 When Responding to Objections, Explain Good-Faith Basis for Statements.

When responding to objections from the other party about opening statement, urge that opening statements made in good faith and consistent with the evidence are not misconduct. Permissible comments during opening statements made in good faith include:

- Invoking sympathy if the statement is consistent with the evidence [*see Roemer v. Retail Credit Co. (1975) 44 CA3d 926, 941, 119 CR 82*] .
- A party's financial status when wealth or poverty is an issue in the case [*see Hale v. San Bernardino Valley Traction Co. (1909) 156 C 713, 715, 106 P 83*] .
- Showing the opposing party in a bad light that is consistent with the evidence [*see Roemer v. Retail Credit Co. (1975) 44 CA3d 926, 941, 119 CR 82*] .



Cross Reference:

Additional discussion of permissible commentary during opening statement, see *California Trial Guide*, § 11.10[3] (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureTrialsOpening StatementsObjections



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Chapter 11 Questioning Witnesses and Objections

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.syn

§ 11.syn Synopsis to Chapter 11: Questioning Witnesses and Objections

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Chapter 11 Questioning Witnesses and Objections
I. STRATEGY

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.01

11.01 Scope.

This chapter covers:

- Excluding witnesses from the courtroom [see 11.03].
- Placing a witness under oath, determining who may testify, and disqualifying a witness for lack of competency or personal knowledge [see 11.09].
- Court control over order of proof and examination [see 11.16].
- Conducting direct and redirect examination of a witness [see 11.20].
- Conducting cross and re-cross examination of a witness [see 11.27].
- Court's or jury's examination of a witness [see 11.33].
- Excusing and recalling a witness and reopening a case [see 11.37].
- Entering exhibits into evidence [see 11.43].
- Using and objecting to depositions and other discovery documents during examination [see 11.52].
- Impeaching and rehabilitating a witness's credibility [see 11.59].
- Making and responding to objections and offers of proof [see 11.70].
- Admitting and objecting to relevant evidence [see 11.80].
- Admitting and objecting to opinion evidence [see 11.93].
- Admitting and objecting to hearsay evidence [see 11.101].

- Admitting and objecting to writings and secondary evidence [*see 11.105*].
- Admitting and objecting to demonstrative evidence [*see 11.109*].
- Admitting evidence without a witness [*see 11.113*].

Core Statutes:

Evid Code § 1 et seq.

Legal Topics:

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

EvidenceCompetencyGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of ProofEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyPresentation of Evidence



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Chapter 11 Questioning Witnesses and Objections
I. STRATEGY

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.02

11.02 Objective and Strategy.

In a civil trial, with the discovery and trial preparation completed, the overall objective and strategy should include presentation of the "story" of your case whether it is the plaintiff's case or defendant's case. The principal goal is to use each witness to tell their part of the story, in plain, simple and clear testimony, to delineate the inconsistencies or inaccuracies of opposing witnesses, and to impeach opposing witnesses whose testimony would otherwise damage counsel's own witnesses. Counsel should take care to avoid going too far with any witness. Asking one question too many, or trying to get too much of the story from a witness when other witnesses and documentary evidence will do so more effectively is a potential pitfall. Finally, asking a question to which counsel neither knows the answer nor has a good idea what the answer will be is the most dangerous chance one can take with a witness.

 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:
EvidenceTestimonyExaminationGeneral Overview



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Chapter 11 Questioning Witnesses and Objections
II. EXCLUDING WITNESSES FROM COURTROOM DURING TRIAL

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.03

11.03 CHECKLIST: Excluding Witnesses From Courtroom During Trial

- ☐ Determine whether to make motion to exclude witnesses from courtroom.

Authority:

Evid Code § 777(a)

Discussion:

See 11.05

- ☐ Make motion to exclude witnesses before trial begins or during trial.

Authority:

Evid Code § 777(a)

Discussion:

See 11.06

Form:

See 11.118

- ☐ Court may not exclude parties from the courtroom except under extraordinary circumstances.

Authority:

Evid Code § 777(b)

Discussion:

See 11.07

- ☐ If witness violates exclusion order, seek contempt order.

Authority:

People v. Willingham (1969) 271 CA2d 562, 76 CR 760

Discussion:

See 11.08

☐ If witness violates exclusion order, witness may still testify unless party or counsel knowingly caused the witness to disobey order.

Authority:

People v. Valdez, 177 CA3d 680, 691-696, 223 CR 149

Discussion:

See 11.08

Legal Topics:

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

EvidenceTestimonySequestration



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Chapter 11 Questioning Witnesses and Objections
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11.04 Options and Strategies for Excluding Witnesses From Courtroom.

Counsel should always consider whether to have witnesses excluded from the courtroom during trial, to prevent witnesses from hearing each others' testimony, and thus "tailoring" their own testimony as a result, whether innocently or otherwise. More often than not, the choice will be to exclude witnesses, but there are times when you might think your own witnesses will benefit from being in the courtroom more than those on the other side.

Excluding witnesses is an exception to the rule that counsel should always be prepared to submit a writing to the court on a motion or other procedural point. Parties so commonly seek to exclude witnesses that a written motion is not generally necessary. Counsel should bring the issue up during the final pretrial conference. Note that the court has discretion to allow witnesses in the courtroom, although it is rare for the court to exercise that discretion if a party objects.



Strategic Point--Transcripts:

Counsel should note that in most trials, and particularly complex cases where daily transcripts or software access to rough transcripts are ordered as a rule, witnesses may have access to these transcripts. Coaching a witness who has been excluded by providing them with transcripts may constitute contempt where the court has issued an order precluding witnesses [see 11.08]. Counsel should seek to have the order excluding witnesses expressly preclude the use of transcripts and notes to advise the witness of testimony they do not see or hear.



Strategic Point--Prepared Motion:

Rather than relying on an oral motion, counsel may feel it is helpful to have a standard in limine motion prepared to have all non-party witnesses excluded from the courtroom until their testimony has been completed. This can be presented at the pretrial conference, or when in limine motions are due. This motion can be stipulated to by opposing counsel or ordered by the court. If a trial entails significant technical issues, the parties may stipulate that testifying experts and consultants can be present while other experts testify.



Cross Reference:

Discussion of pretrial conference, see Ch. 4, Final Pretrial Conference.

Legal Topics:

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

EvidenceTestimonySequestration



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11.05 Witness May Be Excluded From Courtroom During Trial.

The court may exclude from the courtroom any witness not at the time under examination so that the witness cannot hear the testimony of other witnesses [*Evid Code* § 777(a)]. This is intended to prevent tailored testimony and aid in the detection of dishonest testimony [*People v. Valdez* (1986) 177 CA3d 680, 687, 223 CR 149, 152] . The court's power to exclude witnesses is discretionary [*People v. Persky* (1959) 167 CA2d 134, 334 P2d 219] .

Expert witnesses may also be excluded [see *People v. Valdez* (1986) 177 CA3d 680, 688, 223 CR 149] .

Consider:

Most judges will allow experts to be present during the trial on a showing of necessity, including assisting attorneys to prepare examination of witnesses. However, there may be situations in which a party does not want the opposing party's expert present. The presence of experts during the testimony of other experts may raise different considerations, both militating in favor and against the presence of the opposing experts.



Cross References:

Discussion of excluding witnesses from courtroom, see *California Trial Guide*, § 20.12 (Matthew Bender).

Law Revision Commission comments and case authority interpreting *Evid Code* § 777, see Cotchett, *California Courtroom Evidence*, 16.43 (Matthew Bender).

Legal Topics:

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



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11.06 Make Motion to Exclude Witness at Pretrial Conference, Before Trial Starts, or During Trial.

A motion to exclude witnesses can be made any time before or during trial. Although there are no specific deadlines for making a motion to exclude witnesses, the motion should normally be made at the pretrial conference so that witnesses will be excluded from hearing the opening statements in addition to the testimony. The motion can also be made when in limine motions are due. The motion is typically oral, but if necessary, be prepared to submit a short memorandum. The motion should state the basis [*e.g.*, *Evid Code* § 777] and, if the court is not inclined to exclude witnesses, submit a statement by declaration or offer of proof showing an articulable reason why witnesses should be excluded.

➡ **Cross References:**

Form of motion to exclude, see *11.118*.

Discussion of pretrial conference, see Ch. 4, Final Pretrial Conference.

Discussion of form of motion and response, see *California Trial Guide*, § 20.12 (Matthew Bender).

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedureTrialsGeneral
OverviewEvidenceTestimonySequestration



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11.07 Court May Not Exclude Certain Witnesses.

The court normally may not exclude a party, and if the party is a person other than a natural person, an officer or employee designated by its attorney is entitled to be present [*Evid Code* § 777(b), (c); *see, e.g.*, *People v. Gonzalez* (2006) 38 C4th 932, 950, 44 CR3d 237, 135 P3d 649 (deputy district attorney could designate detective as officer or employee who was entitled to be present)].

Exception:

In extraordinary situations, the court has discretion to exclude a party from the courtroom [*see CCP* § 128(a)(3)]. For example, a trial judge may exclude a plaintiff who is unable to assist counsel and whose presence prejudices the defendant [*see Province v. Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1686, 25 CR2d 667].

Legal Topics:

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



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11.08 Violation of Exclusion Order Is Punishable by Contempt, but Witness May Still Testify.

If a witness disobeys an order excluding him or her from the courtroom, that disobedience is punishable as contempt. However, it does not constitute a ground for excluding the witness's testimony [*People v. Willingham* (1969) 271 CA2d 562, 76 CR 760] .



Warning:

The exclusion order applies to counsel in dealing with witnesses. If there is an order excluding witnesses, counsel cannot circumvent it by sharing transcripts of testimony with witnesses.



Cross Reference:

Discussion of contempt, see Ch. 23, Contempt.

If a party or counsel knowingly caused the witness to disobey the court's order, the witness may be barred from testifying for that party [*People v. Valdez*, 177 CA3d 680, 691-696, 223 CR 149] .



Cross Reference:

Discussion of contempt, see Ch. 23, Contempt.

Legal Topics:

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

Civil Procedure Sanctions Contempt General Overview Evidence Testimony Sequestration



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11.09 CHECKLIST: Placing Witness Under Oath, Determining Who May Testify, and Disqualifying Witness for Lack of Competency of Personal Knowledge.

- ☐ Oath or affirmation is required before oral testimony may be taken.

Authority:

Evid Code § 710; CCP § 2094

Discussion:

See 11.11

- ☐ Failure to testify truthfully is subject to perjury charge.

Authority:

Pen. Code § 118(a)

Discussion:

See 11.12

- ☐ Every person is presumed to be qualified to testify absent a showing to the contrary.

Authority:

Evid Code § 700

Discussion:

See 11.13

- ☐ Witness may be disqualified for lack of competency.

Authority:*Evid Code § 701(a)***Discussion:***See 11.14*☐ Witness cannot testify if he/she has no personal knowledge of the matter.**Authority:***Evid Code § 702(a)***Discussion:***See 11.15***Legal Topics:**

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

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral
OverviewEvidenceCompetencyGeneral OverviewEvidenceCompetencyAffirmations & OathsEvidenceInferences &
PresumptionsPresumptionsEvidenceTestimonyLay WitnessesPersonal Knowledge



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11.10 Options and Strategies.

If a witness is put on the stand by the opposing party, and counsel knows, from pretrial discovery or other evidence, that the witness is either unqualified or lacks personal knowledge of the matter, counsel may request an opportunity to voir dire the witness to elicit grounds to disqualify the witness. Normally, the best approach to preventing a witness from testifying is by means of a motion in limine [*see* 4.20 et seq.] However, there may be strategic reasons counsel would not want to divulge the basis for attacking a witness' credibility, lack of knowledge or qualification, not the least of which is letting an opponent put a witness on the stand who cannot add to the case and who can be demonstrably undermined on either voir dire or cross-examination.

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineExclusion of EvidenceEvidenceCompetencyGeneral
OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsHearings Out of Jury's Presence



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11.11 Requirement for Oath or Affirmation.

11.11[1] Every Witness Must Take Oath or Affirmation Before Oral Testimony. Before testifying, every witness must take an oath or make an affirmation or declaration in a form required by law [*Evid Code* § 710].

Exception:

Subject to the court's discretion, a child under 10 or a dependent person with a substantial cognitive impairment may be required only to promise to tell the truth [*Evid Code* § 710].

➤ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 710, see Cotchett, *California Courtroom Evidence*, 16.07 (Matthew Bender).

11.11[2] "Oath" Defined. Although there is no statutory definition of "oath," the use of that term in other statutory language indicates that an oath is a solemn declaration making a promise or swearing as to the truth of testimony given [see, e.g., *Evid Code* § 751; see also *CCP* § 2094]. Generally, the term "oath" includes the terms "affirmation" and "declaration" [*CC* § 14; *CCP* § 17]. The difference between an oath and an affirmation is one of form, based originally on religious beliefs including those concerning the propriety of making an oath invoking the name of a deity. In common usage, a witness taking an oath swears by God or some deity that he or she is telling the truth, whereas a witness making an affirmation affirms, without swearing to any deity, that he or she is telling the truth [see *CCP* § 2094].

11.11[3] "Affidavit" and "Declaration" Distinguished. Affidavits or declarations under penalty of perjury, unlike oaths or affirmations by witnesses, officers, or others giving oral promises, are writings, and verify the truth of written, rather than oral, statements. An affidavit is a written declaration under oath, made without notice to the adverse party [*CCP* § 2003]. A declaration under penalty of perjury is a written statement declaring under penalty of perjury, rather than swearing by oath, that a written statement is true [see *CCP* § 2015.5].

11.11[4] Persons Who May Administer Oaths. Every court, judge or retired judge, clerk of any court, justice or retired justice, notary public, and officer or person authorized to take testimony in any action or proceeding or to decide

on evidence is authorized to administer oaths or affirmations [*CCP* § 2093; *CCP* §§ 128(a)(7), 177(4), 179; *Gov Code* §§ 1225, 8205(a)(3)]. Shorthand reporters certified under *B&P Code* § 8020 *et seq.* may also administer oaths [*CCP* § 2093].

Members of the legislature, executive officers, county officers and their deputies, former judges other than those retired for disability or against whom a formal disciplinary proceeding was pending at the time of retirement or resignation, and mayors also have the general power to administer oaths and affirmations [*Gov Code* §§ 1225, 24057, 40603].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial

OfficersJudgesDiscretionEvidenceCompetencyAffirmations & OathsGovernmentsCourtsClerks of Court



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11.12 Failure to Testify Truthfully Is Subject to Perjury Charge.

Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may be administered, willfully and contrary to that oath states as true any material matter which he or she knows to be false, is guilty of perjury [*Pen Code* § 118(a)].

It is no defense that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if the accused caused the officer to certify that the oath had been taken or administered [*Pen Code* § 121].

A person is not guilty of perjury if proof of falsity rests solely on contradiction by testimony of a single person other than the perjurer. Proof of falsity may be established by direct or indirect evidence [*Pen Code* § 118(b)].

Legal Topics:

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

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryElementsEvidenceCompetencyAffirmations & Oaths



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11.13 Every Person Is Presumed to Be Qualified to Testify.

11.13[1] Every Person Is Qualified to Be Witness. Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter [*Evid Code § 700*].

Jury Instructions:

Witnesses, see *Judicial Council of California Civil Jury Instructions, CACI No. 107* (LexisNexis Matthew Bender).

➤ Cross References:

Discussion of disqualified person by statute, see *11.14*.

Discussion of lack of personal knowledge to testify, see *11.15*.

Discussion of relevance, see *11.82*.

Discussion of privileges, see *11.85[1]*.

➤ Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code § 700*, see Cotchett, *California Courtroom Evidence, 16.01* (Matthew Bender).

11.13[2] Experts May Testify. If an issue in a case is not within the common knowledge of laypersons, the plaintiff must introduce expert opinion evidence in order to establish a prima facie case [*Miller v. Los Angeles County Flood Control Dist. (1973) 8 C3d 689, 702, 106 CR 1, 505 P2d 193*]. A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to as an expert on the subject to which the testimony relates [*Evid Code § 720*].

Jury Instructions:

Expert Witness Testimony, see *Judicial Council of California Civil Jury Instructions, CACI No. 219* (LexisNexis Matthew Bender).

Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 720, see Cotchett, *California Courtroom Evidence*, 16.10 (Matthew Bender).

Discussion of expert witness testimony, see *California Trial Guide*, § 60.05 (Matthew Bender).

11.13[3] Attorneys May Testify. Attorneys are not disqualified to be witnesses and are competent to testify in the trial of a case as a witness for any party. This is also true when the lawyer is counsel of record for a party in the case, even though testifying may require disqualification of the attorney as counsel for the party. Thus, a lawyer who has relevant information may be compelled to testify even if it is detrimental to his or her client unless the information is privileged [*Romeo v. Jumbo Market* (1967) 247 CA2d 817, 820-821, 56 CR 26] .



Strategic Point:

Jurors have preconceived ideas about trials, either from their own experience, or more commonly, from television and motion pictures. The role of counsel to which they are accustomed does not include acting as trial witnesses, and putting counsel on the stand, unless absolutely necessary, risks raising more questions with the jury than would normally be advisable. Moreover, to the extent that the jury does not credit the attorney's testimony, that lack of trust will permeate the entire case. This type of testimony should be avoided unless absolutely necessary.

An attorney has an ethical obligation to refrain from acting as an advocate before a jury that will hear testimony from the attorney unless (1) the testimony relates to an uncontested matter, (2) the testimony relates to the nature and value of legal services rendered in the case, or (3) the attorney has the informed, written consent of the client [*Cal Rules Prof Conduct*, Rule 5-210]. The attorney must withdraw if he or she knows or should know that continued employment will result in violation of this rule [see *Cal Rules Prof Conduct*, Rule 3-700(B)(2)]. It isn't unethical to testify; however it might be unethical to continue to represent the client.

A party seeking to disqualify opposing counsel on the ground that opposing counsel will be called as a witness in the case must proceed at the first reasonable opportunity by proper motion to achieve that end. If that party fails to do so, it is an abuse of discretion for the trial court to grant the motion to disqualify [*White v. Superior Court* (1979) 98 CA3d 51, 55-56, 159 CR 278] .

11.13[4] Judges, Arbitrators, and Mediators May Testify.

11.13[4][a] Trial Judges May Testify. Trial judges are not disqualified to be witnesses and are competent to testify in the trial of a case as a witness for any party [see *CCP* § 170].

Judge's Perspective:

Although permitted, this situation is rare because a judge will generally self-disqualify in any case where the judge or a close family member has knowledge of the facts of the case [see *CCP* § 170.1(a)].

Cross Reference:

Discussion of disqualification of judge, see 11.13[4][b].

11.13[4][b] Judge May Not Decide Proceeding About Which He or She Has Personal Knowledge. Although judges may testify in trials, a judge is disqualified to decide a proceeding if he or she has personal knowledge of

disputed evidentiary facts concerning that particular proceeding [CCP § 170.1(a)(1)(A)].

A judge is deemed to have personal knowledge if the judge or the judge's spouse is, to the judge's knowledge, likely to be a material witness in the proceeding [CCP § 170.1(a)(1)(B)]. A judge is also deemed to have personal knowledge if the judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding on any matter involved in the action or proceeding [CCP § 170.1(a)(2)].

However, the trial judge may testify if none of the parties objects [Evid Code § 703(d)]. Before the judge can be called to testify, the judge must, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he or she has concerning any fact or matter about which he or she will be called to testify [Evid Code § 703(a)]. If a party objects, the judge may not testify in the trial as a witness and is required to declare a mistrial and order the action assigned for trial to another judge [Evid Code § 703(b)]. Calling the judge to testify is deemed a consent to granting a motion for mistrial, and an objection to calling the judge is deemed a motion for mistrial [Evid Code § 703(c)].

Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 703, see Cotchett, *California Courtroom Evidence*, 16.04 (Matthew Bender).

11.13[4][c] Judge, Arbitrator, or Mediator May Not Testify Regarding Prior Proceeding. A person presiding at any judicial or quasi-judicial proceeding, or an arbitrator or mediator, may not testify in any subsequent civil proceeding as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (1) give rise to civil or criminal contempt, (2) constitute a crime, (3) be the subject of investigation by the State Bar or the Commission on Judicial Performance, or (4) give rise to disqualification proceedings under CCP § 170.1(a)(1) or (6) [Evid Code § 703.5]. All statements made in mediations are privileged, and cannot be used subsequently during trial [see CCP §§ 1775.10, 1775.12].

11.13[5] Jurors May Testify. Jurors are not necessarily disqualified to be witnesses and are, therefore, competent to testify in the trial of a case as a witness for any party [see *Evid Code* § 704]. However, this is highly unusual. Prospective jurors are questioned on voir dire about whether the juror has heard of, or has knowledge of, the facts or events, or is familiar with the places or property mentioned, in the case [see Cal Rules Ct, Stds Jud Admin, Std 3.25(c)(7)]. If a prospective juror answers in the affirmative, further voir dire would likely disclose the juror's knowledge of the facts, and he or she would probably be challenged for cause under CCP § 602(7) or (8) [CCP § 225(b)(1)(c) (challenge for cause)].

Nevertheless, a juror sworn and impaneled in a trial may be compelled to testify in that trial as a witness in the absence of objection by a party [Evid Code § 704(d)]. However, before the juror may be called to testify, the juror must, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he or she has concerning any fact or matter about which he or she will be called to testify [Evid Code § 704(a)]. Against the objection of a party, the juror may not testify, and on that objection, the court must declare a mistrial and order the action assigned for trial before another jury [Evid Code § 704(b)]. Calling a juror to testify is deemed consent to granting a motion for mistrial, and objecting to the calling of the juror is deemed a motion for mistrial [Evid Code § 704(c)].

Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 704, see Cotchett, *California Courtroom Evidence*, 16.06 (Matthew Bender).

Discussion of juror as witness, see *California Trial Guide*, § 22.10[3][d] (Matthew Bender).

11.13[6] Prisoners May Testify. A court in which an action or special proceeding is pending may order the production of prisoners before the court or the prisoner's examination in jail for the purpose of deposition [CCP § 1995]. The production of the prisoner may be required only if the witness is imprisoned in a jail in the county in which the action or proceeding is pending. In all other cases, the examination of the prisoner, when allowed, must be taken on deposition [CCP § 1997]. The order may be made only on the motion of a party, on affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality [CCP § 1996].

Legal Topics:

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

EvidenceCompetencyGeneral

OverviewEvidenceCompetencyAttorneysEvidenceCompetencyJudgesEvidenceCompetencyJurorsGeneral

OverviewEvidenceTestimonyExpertsGeneral Overview



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11.14 Witness May Be Disqualified for Lack of Competency.

11.14[1] Witness Is Disqualified If Incapable of Expressing Self Concerning the Matter, or If Incapable of Understanding Duty to Tell Truth. A person is disqualified to be a witness if he or she is [*Evid Code* § 701(a)]:

- Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by a person who can understand the witness; or
- Incapable of understanding the duty to tell the truth.

Example:

A witness who was delusional and could not tell the difference between truth and lies was not competent to testify [*People v. Lyons* (1998) 10 CA4th 837, 842-844, 13 CR2d 112] .

Distinguish:

Inconsistencies in testimony or a failure to recollect do not disqualify a witness; instead, these issues go to credibility for the trier of fact [*People v. Mincey* (1992) 2 C4th 408, 444, 6 CR2d 882, 827 P2d 388] .

Consider:

In the case of a witness with mild dementia, such that the witness appears lucid and purports to understand the difference between truth and lies, the witness may not be disqualified unless his or her mental condition can be demonstrated to the court's satisfaction. Use of videotaped deposition testimony in connection with a motion in limine, or, if necessary, voir dire of the witness out of the jury's presence, may be required to demonstrate the witness' lack of qualification

➡ **Cross References:**

Discussion of interpreters, see Ch. 8, Interpreters.

Law Revision Commission comments and case authority interpreting *Evid Code* § 701, see Cotchett,

California Courtroom Evidence, 16.02 (Matthew Bender).

11.14[2] Competency of Child Witness Is Within Trial Court's Discretion. Extreme youth is not per se sufficient to disqualify a witness [see *Evid Code § 700*]. A child under the age of 10 may possess sufficient understanding of the nature of an oath and sufficient moral sensibility to have the capacity to take an oath as a competent witness [see *People v. Burton (1961) 55 C2d 328, 341, 11 CR 65, 359 P2d 433*]. A child need not have a detailed knowledge of the nature of the oath, as long as he or she realizes that some consequence will follow for not telling the truth [*People v. Burton (1961) 55 C2d 328, 341-342, 11 CR 65, 359 P2d 433*]. The oath may not be dispensed with in the case of a child witness, even if in camera testimony is otherwise authorized [*In re Heather H. (1988) 200 CA3d 91, 95-96, 246 CR 38*].

Example:

A four-year-old child was competent to testify regarding her observation of her mother's murder [*People v. Dennis (1998) 17 C4th 468, 525-527, 71 CR2d 680, 950 P2d 1035*].

Whether a child is competent to be a witness is within the trial judge's discretion [*People v. Trolinder (1953) 121 CA2d 819, 823, 264 P2d 601*].

 Judge's Perspective:

If possible, introduce the child to the courtroom and the judge before court is in session. In this way procedures can be explained to the child that should make the child more comfortable in the giving of testimony and improve the chances that the child will qualify as a witness.



Strategic Point:

Be careful in the handling of child witnesses. The younger the child, the more careful the handling required. Jurors are generally sympathetic to all except the most hardened children. Most courts will allow the use of leading questions, even on direct, of children, particularly very young children.

 Cross Reference:

Discussion of posing questions to child witness, see *California Trial Guide, § 20.15 (Matthew Bender)*.

11.14[3] Mental or Physical Limitations Do Not Necessarily Prevent Witness From Testifying. Mental or physical limitations on a witness's ability to communicate do not necessarily render the witness incompetent to testify [*People v. Tran (1996) 47 CA4th 759, 770, 54 CR2d 905*].

Examples:

- When a witness could not speak, but could answer yes or no questions by tapping once for yes and twice for no, the court held that the defense was not deprived of a meaningful opportunity to cross-examine the witness [*People v. Tran (1996) 47 CA4th 759, 770, 54 CR2d 905*].

- Witness had cerebral palsy and speech difficulties that made it difficult to express himself, but could testify by use of leading questions to clarify testimony [*People v. Augustin (2003) 112 CA4th 444, 449-450, 5 CR3d 171*].

11.14[4] Party Challenging Witness's Competency Has Burden of Proof. The party challenging a witness's competency has the burden of proving that the witness is not competent to testify [*People v. Mincey (1992) 2 C4th 408, 444, 6 CR2d 882, 827 P2d 388*; *People v. Augustin (2003) 112 CA4th 444, 447, 5 CR3d 171*].

**Warning:**

Failure to object at trial to a witness's competency waives the issue on appeal [*Cramer v. Tyars* (1979) 23 C3d 131, 140, 151 CR 653, 588 P2d 793 ; *People v. Augustin* (2003) 112 CA4th 444, 447, 5 CR3d 171] .

11.14[5] Court May Conduct Competency Hearing in or Out of Jury's Presence. The court may voir dire the prospective witness for competency to testify in or out of the presence of the jury [*Evid Code* § 402(b)]. Conducting voir dire in the presence of the jury raises the issue of judicial endorsement of the witness's testimony, but is cured by the appropriate admonishment to the jury that issues of credibility and weight of the evidence are issues for the jury [see *People v. Marshall* (1992) 13 C4th 799, 834, 55 CR2d 347, 919 P2d 1280] .

If voir dire of the witness is conducted outside the jury's presence, the court may reserve challenges to the competency of the witness until the conclusion of the witness's direct examination [*Evid Code* § 701(b)].

Legal Topics:

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

Civil ProcedureJudicial

OfficersJudgesDiscretionEvidenceCompetencyDisabilityChildrenEvidenceCompetencyDisabilityMental

IncapacityEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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Chapter 11 Questioning Witnesses and Objections

III. PLACING WITNESS UNDER OATH, DETERMINING WHO MAY TESTIFY, AND DISQUALIFYING WITNESS FOR LACK OF COMPETENCY OR PERSONAL KNOWLEDGE

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.15

11.15 Witness Cannot Testify If Witness Has No Personal Knowledge of Matter.

The testimony of a witness concerning a matter is inadmissible unless the witness has personal knowledge of the matter. Against the objection of a party, personal knowledge must be shown before the witness may testify concerning the matter [*Evid Code § 702(a)*]. A witness's personal knowledge of a matter may be shown by any otherwise admissible evidence, including his or her own testimony [*Evid Code § 702(b)*].

Exception:

The requirement that a witness have personal knowledge of the matter is not applicable to the opinion testimony of an expert witness [*see Evid Code § 701*].



Cross Reference:

Discussion of form of objection and response, see *California Trial Guide*, § 22.11[1] (Matthew Bender).

To have personal knowledge, a witness must have the capacity to perceive and recollect. The capacity to perceive and recollect is a condition for the admissibility of a witness's testimony on a certain matter, rather than a prerequisite for the witness's competency [*see People v. Dennis (1998) 17 C4th 468, 525, 71 CR2d 680, 950 P2d 1035*].



Strategic Point:

Unlike the issue of competency, which goes to the witness's ability to communicate and understand the duty to tell the truth, personal knowledge depends on the witness's capacity to perceive and recollect. When it is obvious that a witness has no personal knowledge on a relevant topic, counsel should object to the witness taking the stand at all, and force opposing counsel to submit an offer of proof. This may dispose of the witness before irrelevant and/or prejudicial evidence is exposed to the jury. In other circumstances, a witness may have personal knowledge of events and should testify, but that does not mean the witness may stray into matters without personal knowledge. Counsel should closely monitor the examination and object at the first instance of questioning on which the witness has no personal knowledge.

Legal Topics:

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

Evidence Testimony Lay Witnesses Personal Knowledge



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IV. COURT CONTROL OF ORDER OF PROOF AND EXAMINATION

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.16

11.16 CHECKLIST: Court Control of Order of Proof and Examination.

- ☐ Court regulates order of proof and phases of examination.

Authority:

Evid Code § 320

Discussion:

See 11.17

- ☐ Court may use continuances or take witnesses out of order to address emergencies or expedite trial.

Authority:

Cal Rules Ct, Rule 3.1332(c)

Discussion:

See 11.18

- ☐ Court controls mode of examination.

Authority:

Evid Code § 765(a)

Discussion:

See 11.19

Legal Topics:

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

Civil Procedure Pretrial Matters Continuances Evidence Testimony Presentation of Evidence



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11.17 Court Regulates Order of Proof and Phases of Examination.

Except as otherwise provided by law, the court in its discretion regulates the order of proof [*Evid Code* § 320].

The examination of a witness proceeds in the following order [*Evid Code* § 772(a)]:

- Direct examination;
- Cross-examination;
- Redirect examination;
- Recross-examination; and
- Continuing thereafter by redirect and recross-examination.

Unless for good cause the court otherwise directs, each phase of the examination of a witness must be concluded before the next phase begins [*Evid Code* § 772(b)]. A party may, in the discretion of the court, interrupt cross-examination, redirect examination, or recross-examination of a witness to examine the witness on a matter not within the scope of a previous examination of the witness [*Evid Code* § 772(c)].



Cross Reference:

Legislative Committee comments interpreting *Evid Code* § 772, see Cotchett, *California Courtroom Evidence*, 16.38 (Matthew Bender).

If several defendants who have separate defenses appear by different counsel, the court must determine their relative order in the evidence and argument [*Evid Code* § 607(8)].

Legal Topics:

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

EvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyLay WitnessesPersonal

KnowledgeEvidenceTestimonyPresentation of Evidence



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11.18 Court May Use Continuances or Take Witnesses Out of Order to Address Emergencies or Expedite Trial.

A court may grant a continuance only on an affirmative showing of good cause requiring the continuance [*see e.g., Forrest v. Department of Corporations (2007) 150 CA4th 183, 199-202, 58 CR3d 466*]. 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 when 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.
 - ☐ 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 motion for continuance of trial must be made on noticed motion accompanied by supporting declarations [*Cal Rules Ct, Rule 3.1332(b)*].



Cross Reference:

Discussion and form of motion for continuance, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 30, Continuances.

A party may call a witness out of order as a matter of convenience and courtesy during the presentation of the other party's case [see *People v. Mobil Oil Corp.* (1983) 143 CA3d 261, 269, 192 CR 155] .

Legal Topics:

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

Civil ProcedurePretrial MattersContinuancesEvidenceTestimonyPresentation of Evidence



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11.19 Court Controls Mode of Examination.

The court exercises reasonable control over the mode of interrogation of a witness to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment [*Evid Code* § 765(a)].

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 765, see Cotchett, *California Courtroom Evidence*, 16.31 (Matthew Bender).

Discussion of objections to form of questions, and responses thereto, see *California Trial Guide*, § 20.15 (Matthew Bender).

With a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court must take special care to protect that person from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court also takes special care to ensure that questions are stated in a form appropriate to the age or cognitive level of the witness. The court may, in the interests of justice, on objection by a party, forbid the asking of a question in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness [*Evid Code* § 765(b)].

Example:

In an acrimonious child support proceeding involving allegations of physical and verbal abuse, the trial court properly refused to permit the father to examine the children, ages 12 and 15, about their change of residence and their knowledge of their parents' alleged oral modification of child custody when the court interrogated the children in chambers pursuant to its authority under *Evid Code* § 765. The court was concerned that some testimony by the children might later negatively affect their relationship with their parents [*In re Marriage of Okum* (1987) 195 CA3d 176, 183, 240 CR 458] .

Legal Topics:

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

EvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence



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Chapter 11 Questioning Witnesses and Objections
V. CONDUCTING DIRECT AND REDIRECT EXAMINATION OF WITNESS

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.20

11.20 CHECKLIST: Conducting Direct and Redirect Examination of Witness.

☐ Using leading questions on direct examination.

Authority:

Evid Code § 767(a)(1)

Discussion:

See 11.23

☐ Refreshing memory requires production of writing.

Authority:

Evid Code § 771

Discussion:

See 11.24

☐ Witness need not be shown writing before examination.

Authority:

Evid Code § 768,

Discussion:

See 11.25

☐ Conduct redirect examination when appropriate.

Authority:

Evid Code § 762

Discussion:

See 11.26

Legal Topics:

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

EvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationDirect
ExaminationEvidenceTestimonyRefreshing RecollectionGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.21

11.21 Options and Strategies.

Direct examination provides an opportunity for the jury or trier of fact to hear counsel's story from a believable source [see *Elkins v. Superior Court* (2007) 41 C4th 1337, 1356-1359, 63 CR3d 483, 163 P3d 160 (witnesses' oral testimony, as opposed to affidavits, supplies valuable evidence relevant to credibility)]. Counsel should avoid leading questions on direct, first because they are not permitted, but second, and perhaps more importantly, because the fact finder will not accept testimony from the attorney through the attorney's questions as well as they will accept the witness' statements. Conversely, on cross-examination, the most effective approach tends to be one in which counsel seeks to have the adverse witness agree with or corroborate counsel's case as much as possible. Short, clear leading questions, based on the documents and prior deposition testimony of the witness prevent the witness from straying. The key to effective direct and cross-examination is preparation.

Legal Topics:

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



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11.22 "Direct Examination" Defined.

Direct examination is the first examination of a witness on a matter that is not within the scope of a previous examination of the witness [*Evid Code* § 760].

Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 701, see Cotchett, *California Courtroom Evidence*, 16.02 (Matthew Bender).

Legal Topics:

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



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.23

11.23 Using Leading Questions on Direct Examination.

11.23[1] Normally Do Not Use Leading Questions on Direct. A "leading question" suggests to the witness the answer that the examining party wants [*Evid Code* § 764]. Except under special circumstances when the interests of justice otherwise require, it is generally improper to ask a leading question of a fact witness on direct or redirect examination [*Evid Code* § 767(a)(1)].

Consider:

Beyond this definitional statement in the Evidence Code, there is little authority defining a "leading question." Not all questions calling for a "yes" or "no" answer are leading questions. For example, it is a leading question (suggestive) to ask: "The document placed before you is the agreement you wanted the defendant to sign, isn't it?" It is *not* a leading question to ask: "Is that document before you the document you wanted defendant to sign?" The difference is subtle, and judges will sometimes sustain objections based on leading the witness to any question that seeks a yes or no response, but not all yes or no questions are leading. Also, some counsel may attempt to avoid leading a witness by asking a suggestive question prefaced by "whether." For example: "Can you tell us whether or not you drafted that document in such a manner as to be able to use the language in the document to force defendant to provide you with the benefit of the bargain without any exposure on your part to loss or damage?" Technically, use of "whether" will avoid a sustainable objection for leading the witness. However, if the use of this technique is pronounced and prolonged, a court may be willing to listen to objections. Some counsel will ask a leading question, and then, when an objection is sustained, simply rephrase the question with "whether" in front of it. That technique should also be objectionable.

➡ Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 767, see Cotchett, *California Courtroom Evidence*, 16.33 (Matthew Bender).

Discussion of laying a foundation using leading questions on direct, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 1, § C (Matthew Bender).

11.23[2] Leading Questions Allowed on Direct Under Specified Exceptions.

11.23[2][a] Children and Dependent Persons. The court may, in the interests of justice, permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under *Pen Code* §§ 273a, 273d, 288.5, 368, 11165.1, or 11165.2 [*Evid Code* § 767(b)].

Example:

Direct examination of a witness by leading questions, although normally improper, is allowed in the discretion of the court when the situation make questions so framed necessary. Exercise of the trial court's discretion in allowing such questions will not be disturbed on appeal unless a palpable abuse appears [*Rethorst v Rethorst* (1968) 261 CA2d 713, 68 CR 263] .

 Cross References:

Discussion of use of leading questions on direct examination to children and impaired individuals, see *California Trial Guide*, § 20.15 (Matthew Bender).

Foundational elements for voir dire of child witness, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 3, § B (Matthew Bender).

11.23[2][b] Expert Witnesses. It is ordinarily permissible to ask an expert witness a leading question when his or her opinion is sought on a matter about which, by reason of his or her professional knowledge and skill, the expert has peculiar information [see *Chula v. Superior Court* (1952) 109 CA2d 24, 37, 240 P2d 398] .

 Cross Reference:

Discussion of use of leading questions on direct examination to expert witness, see *California Trial Guide*, § 20.15 (Matthew Bender).

11.23[2][c] Adverse Witnesses. A party to the record of any civil action, or a person identified with the party, may be called and examined as if under cross-examination by an adverse party at any time during the presentation of evidence by the party calling the witness [*Evid Code* § 776(a)]. In other words, leading questions may be used in direct examination of an adverse witness.

 Cross Reference:

Discussion of use of leading questions on direct examination to adverse witness, see *California Trial Guide*, § 20.15 (Matthew Bender).

11.23[2][d] Hostile Witnesses. When on direct examination a witness appears to be hostile--that is, inclined to tell as little as possible of what he or she actually knows--the court may allow the use of leading questions [*People v. Bliss* (1919) 41 CA 65, 66, 182 P 63] .

 Cross Reference:

Discussion of use of leading questions on direct examination to hostile witness, see *California Trial Guide*, § 20.15 (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceTestimonyExaminationDirect
ExaminationEvidenceTestimonyExaminationLeading QuestionsEvidenceTestimonyExpertsGeneral Overview



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11.24 Refreshing Memory Requires Production of Writing.

In general, if a witness, before or while testifying, uses a writing to refresh his or her memory as to any matter about which he or she testifies, the writing must be produced at the hearing at the request of an adverse party. Unless the writing is produced, the testimony of the witness concerning such matter must be stricken [*Evid Code § 771(a)*]. If the writing is produced at the hearing, the adverse party may inspect the writing, cross-examine the witness concerning it, and introduce in evidence any part of it that is pertinent to the testimony of the witness [*Evid Code § 771(b)*].

Exception:

Production of the writing is excused, and the testimony of the witness is not stricken, if the writing (1) is not in the possession or control of the witness or the party who produced his or her testimony concerning the matter; and (2) was not reasonably procurable by such party through the use of the court's process or other available means [*Evid Code § 771(c)*].

Consider:

The Evidence Code states that the writing must be produced at "the hearing." Most counsel believe that writings used to refresh a witness' memory for testimony during a deposition must be produced. It is unclear whether that means during the deposition, before a later trial at which the testimony is to be used, or at (i.e., "during") the actual trial or hearing.

➡ Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code § 771*, see Cotchett, *California Courtroom Evidence*, 16.37 (Matthew Bender).

Legal Topics:

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

Evidence Testimony Refreshing Recollection General Overview Evidence Testimony Refreshing Recollection Memory Aids Writings



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.25

11.25 Witness Need Not Be Shown Writing Before Examination.

In examining a witness concerning a writing, it is not necessary to show, read, or disclose any part of the writing [*Evid Code* § 768(a)]. If a writing is shown to a witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness [*Evid Code* § 768(b)].

Legal Topics:

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

EvidenceTestimonyRefreshing RecollectionMemory AidsWritingsEvidenceTestimonyRefreshing
RecollectionRefreshing Before Testimony



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.26

11.26 "Redirect Examination" Defined.

Redirect examination is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness [*Evid Code* § 762]. The principal purposes of redirect examination are to explain or rebut adverse testimony or inferences developed on cross-examination, and to rehabilitate a witness whose credibility has been impeached [*People v. Cleveland* (2004) 32 C4th 704, 746, 11 CR3d 236, 86 P3d 302] .



Warning:

Los Angeles Local Rule 8.86 provides that no consultation between a witness while on the stand and counsel will be permitted without prior permission of the court pursuant to a request made on the record. In other words, without court permission, counsel may not take breaks and counsel a witness whose testimony is not going well. Therefore, redirect examination is the time to explain or rebut adverse testimony [Los Angeles Super Ct Rules, Rule 8.86].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 762, see Cotchett, *California Courtroom Evidence*, 16.28 (Matthew Bender).

Once examined, a witness cannot be reexamined as to the same matter without leave of the court, but may be reexamined as to any new matter on which he or she was examined by another party to the action. Leave may be granted or withheld in the court's discretion [*Evid Code* § 774].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 774, see Cotchett, *California Courtroom Evidence*, 16.40 (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial

OfficersJudgesDiscretionEvidenceTestimonyCredibilityRehabilitationEvidenceTestimonyExaminationGeneral

Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.27

11.27 CHECKLIST: Conducting Cross and Re-Cross Examination of Witness.

☐ Conducting cross-examination.

Authority:

Evid Code § 761

Discussion:

See 11.29

☐ Object to cross-examination where it exceeds scope of direct examination.

Authority:

Burke v. Dillingham (1927) 84 CA 736, 741, 258 P 627

Discussion:

See 11.30

☐ Cross-examine expert witnesses.

Authority:

Evid Code § 721(a)

Discussion:

See 11.31

☐ Conduct re-cross examination.

Authority:

Evid Code § 763

Discussion:

See 11.32

Legal Topics:

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

EvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyExpertsGeneral Overview



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11.28 Options and Strategies.

A cross-examiner may bring out all the facts within the knowledge of a witness involving things testified to on direct and which are helpful to a thorough understanding of the testimony, or to elicit any matter which may tend to overcome, qualify or explain the direct testimony [*Behr v. County of Santa Cruz* (1959) 172 CA2d 697, 704, 342 P2d 987] .

Effective cross-examination can also assist the trier of fact in determining the weight to be given to testimony elicited on direct examination by testing the credibility, knowledge, and recollection of the witness [*Payette v. Sterle* (1962) 202 CA2d 372, 375, 21 CR 22] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExaminationCross-ExaminationGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.29

11.29 Conducting Cross-Examination.

11.29[1] "Cross-Examination" Defined. Cross-examination is the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness [*Evid Code* § 761].

11.29[2] Scope of Cross-Examination. A witness examined by one party may be cross-examined on any matter within the scope of the direct examination by each other party to the action in an order the court directs [*Evid Code* § 773(a)]. The cross-examination of a witness by any party whose interest is not adverse to the party calling the witness is subject to the same rules applicable to direct examination [*Evid Code* § 773(b)]. Thus, counsel cross-examining a witness who is not adverse to counsel's client may not lead the witness without first demonstrating that, on a particular issue, the witness is adverse.

Exception:

The limited cross-examination rule does not prevent questions on cross-examination as to matters affecting the accuracy or credibility of the witness [*Daggett v. Atchison, T. & S. F. R. Co. (1957) 48 C2d 655, 663-664, 313 P2d 557*] .

Legal Topics:

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

EvidenceTestimonyExaminationCross-ExaminationGeneral

OverviewEvidenceTestimonyExaminationCross-ExaminationScope



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11.30 Objecting to Cross-Examination As Exceeding Scope of Direct Examination.

Only the party calling the witness may object that the cross-examination exceeds its proper limitations. A co-defendant cannot object on that ground to questions asked of the plaintiff's witness when the plaintiff does not object [*Burke v. Dillingham* (1927) 84 CA 736, 741, 258 P 627] .

➡ **Cross Reference:**

Discussion of form of objection and response, see *California Trial Guide*, § 70.10 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsObjections & Offers of
ProofObjectionsEvidenceTestimonyExaminationCross-ExaminationScope



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.31

11.31 Cross-Examining Expert Witness.

An expert witness may be cross-examined to the same extent as any other witness and may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which the expert testimony relates, and (3) the matter on which the opinion is based and the reasons for the expert's opinion [*Evid Code* § 721(a); see *Lewis v. Johnson* (1939) 12 C2d 558, 562, 86 P2d 99] .

An expert witness testifying in the form of an opinion may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs [*Evid Code* § 721(b)]:

- The witness referred to, considered, or relied on the publication in arriving at or forming his or her opinion.
- The publication has been admitted in evidence.
- The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits [*Evid Code* § 721(b)].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 721, see Cotchett, *California Courtroom Evidence*, 16.11 (Matthew Bender).

Legal Topics:

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

EvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExpertsGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.32

11.32 Conducting Re-Cross Examination.

Recross-examination is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness [*Evid Code* § 763].

Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 763, see Cotchett, California Courtroom Evidence, 16.29 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExaminationCross-ExaminationGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.33

11.33 CHECKLIST: Court's or Jury's Examination of a Witness

☐ Courts are authorized to examine witnesses.

Authority:

Evid Code § 775

Discussion:

See 11.35

☐ Jury may question witnesses.

Authority:

People v. Majors (1998) 18 C4th 385, 406, 75 CR2d 684, 956 P2d 1137

Discussion:

See 11.36

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewEvidenceTestimonyExaminationGeneral
OverviewEvidenceTestimonyExaminationJudicial Interrogation



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11.34 Options and Strategies.

Court or jury examination of witnesses is one of the most debated areas of trial practice. Judges should not intervene to elicit a particular view through his or her own questioning, or to help incompetent counsel. On the other hand, a judge may see a glaring omission in counsel's questioning, coupled with a dramatic inability of opposing counsel to exploit the fact, such that the judge feels compelled to "set the record straight" by intervening. It is very difficult to succeed with an "objection" to the court's questions, but if necessary for the purpose of making a record, counsel should do so, preferably out of the presence of the jury.

Regarding jury asking questions, counsel needs to be careful with respect to the questions, the possible answers, and whether the question will be answered at all. The jurors' questions may not be relevant, admissible, or pertinent, and yet objecting to a jurors' questions is clearly not possible in the presence of the jury. Ask that the jury be excused and the matter taken up before the court. If a jury wants to ask a question but the court refuses to permit it, counsel should consider whether he or she can ask the question himself or herself to get the matter before the jury, as long as the parties have not "closed" their cases.

Legal Topics:

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

Civil Procedure Trials Jury Trials Jurors General Overview Evidence Testimony Examination General
Overview Evidence Testimony Examination Judicial Interrogation



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.35

11.35 Courts Are Authorized to Examine Witnesses.

11.35[1] Court May Examine Lay Witnesses. The court, on its own motion or on the motion of any party, may call witnesses and interrogate them as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced as if the witness were called and examined by an adverse party [*Evid Code* § 775]. Witnesses may be cross-examined by all parties to the action in the order the court directs.

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 775, see Cotchett, *California Courtroom Evidence*, 16.41 (Matthew Bender).

Discussion of examination of witness by court, see *California Trial Guide*, § 20.04 (Matthew Bender).

It is especially appropriate for a court to question witnesses when the judge is acting as a referee seeking answers to factual questions a reviewing court has posed, and thus no jury is involved [*In re Scott* (2003) 29 C4th 783, 818, 129 CR2d 605, 61 P3d 402] .

The court may not assume the role of either the prosecution or the defense. The court's questioning must be "temperate, nonargumentative, and scrupulously fair" and it may not convey to the jury the court's opinion of the witness's credibility [People v. Cook (2006) 39 C4th 566, 597, 47 CR3d 22].

11.35[2] Court May Examine Expert Witnesses. Any expert appointed by the court under *Evid Code* § 730 may be called and examined by the court or any party to the action. When the witness is called and examined by the court, the parties have the same right as in *Evid Code* § 775 to cross-examine the witness and object to the questions asked and the evidence adduced [*Evid Code* § 732].

Legal Topics:

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

EvidenceTestimonyExaminationJudicial InterrogationEvidenceTestimonyExpertsGeneral
OverviewEvidenceTestimonyLay WitnessesGeneral Overview



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11.36 Jurors May Question Witnesses.

In appropriate circumstances, there may be a benefit to allowing jurors to submit questions to witnesses under proper control by the court [*People v. Majors* (1998) 18 C4th 385, 406, 75 CR2d 684, 956 P2d 1137] .

► **Cross Reference:**

Discussion of examination of witness by jurors, see *Ch. 17, Dealing With the Jury*, 17.13 -17.18.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral Overview



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Chapter 11 Questioning Witnesses and Objections
VIII. EXCUSING AND RECALLING WITNESS AND REOPENING CASE

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.37

11.37 CHECKLIST: Excusing and Recalling Witness and Reopening Case.

- ☐ Witness leaving stand is generally excused from further testimony.

Discussion:

See 11.39

- ☐ Recall witnesses when appropriate.

Authority:

Evid Code § 778

Discussion:

See 11.40

- ☐ Seek leave of court to reexamine witnesses.

Authority:

Evid Code § 774

Discussion:

See 11.41

- ☐ Court may reopen a case.

Authority:

Evid Code § 775

Discussion:

See 11.42

Legal Topics:

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

EvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence



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11.38 Options and Strategies.

Some witnesses may not be allowed to present their entire testimony for numerous reasons, including lack of other evidence necessary as a preliminary fact [*see Evid. Code § 400 et seq.*]. If the witness is not a party, counsel should ask that they not be excused. If there are reasons why they need to be excused, counsel should seek to elicit the testimony provisionally, subject to being stricken if the appropriate relevance link is not subsequently established. A court should understand that in long trials or with witnesses traveling far, or being called out of order for the convenience of them or other witnesses, the party may need to provide testimony that otherwise might be objectionable until a proper foundation can be laid through other witnesses.

Legal Topics:

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

EvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.39

11.39 Witness Leaving Stand Is Generally Excused.

When a witness leaves the stand, he or she is generally excused from giving further testimony in the action.

Legal Topics:

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



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.40

11.40 Witness Can Be Recalled With Leave of Court.

A witness who has been excused from giving further testimony in the action cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion [*Evid Code* § 778]. Recall is not proper when a witness has been examined at length and no new line of examination is proposed [*Norton v. Blenkiron* (1934) 138 CA 66, 69, 31 P2d 807] .



Cross Reference:

Discussion of form of motion and response, see *California Trial Guide*, § 20.11 (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceTestimonyExaminationGeneral
OverviewEvidenceTestimonyPresentation of Evidence



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.41

11.41 Reexamination of Witness Is Allowed With Leave of Court.

A witness once examined cannot be reexamined as to the same matter without leave of the court, but may be reexamined as to any new matter on which he or she has been examined by another party to the action. Leave may be granted or withheld in the court's discretion [*Evid Code* § 774].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceTestimonyExaminationGeneral
OverviewEvidenceTestimonyPresentation of Evidence



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.42

11.42 Court May Reopen Case.

A trial court, sitting without a jury, not only may call witnesses on its own motion during trial pursuant to *Evid Code* § 775, but also may reopen the case for the taking of additional evidence even after submission of the case, if the court determines in its discretion that the interests of justice require doing so [*Taylor v. Bell* (1971) 21 CA3d 1002, 1007, 98 CR 855] .

A motion to reopen a case for further evidence can be granted only on a showing of good cause. Reopening is not a matter of a right, but rests on the sound discretion of the trial court [*Sanchez v. Bay General Hospital* (1981) 116 CA3d 776, 793, 172 CR 342] .



Cross Reference:

Discussion of motion to reopen, see 12.35 et seq.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsBench

TrialsEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyPresentation of Evidence



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11.43 CHECKLIST: Entering Exhibits Into Evidence.

- ☐ Exhibits may be entered during direct or cross-examination.

Discussion:

See 11.45

- ☐ Premark exhibits to the extent permitted by local practice.

Discussion:

See 11.46

- ☐ Lay foundation for exhibits.

Discussion:

See 11.47

- ☐ Show exhibit to opposing counsel, the court, and the witness.

Discussion:

See 11.48

- ☐ Request that exhibit be admitted into evidence once foundation is provided.

Discussion:

See 11.49

- ☐ Clearly state objections to exhibits at time exhibits are offered into evidence.

Authority:

Evid Code § 353

Discussion:

See 11.50

- ☐ Determine before trial the method of publishing exhibits to the jury.

Discussion:

See 11.51

Legal Topics:

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

EvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDocumentary EvidenceWritingsGeneral Overview



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11.44 Options and Strategy.

A useful method to prepare for introducing exhibits at trial is to create a list of the foundation elements for each exhibit for ready reference during trial. A very common objection to exhibits is "lack of foundation," and having the elements listed in the trial notebook aids responding to the objection or determining what further questions need to be asked.

Be sure to check the trial courtroom well ahead of time for any electronic aids to assist publishing the exhibits to the jury and tailor the presentation accordingly. If large exhibits are needed, consult the court for local practices.



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11.45 Exhibits May Be Entered During Direct or Cross-Examination.

The majority of exhibits will be admitted into evidence during direct examination when a witness is called to the stand for the specific purpose of providing the foundation for admitting the evidence. It is accepted practice to admit exhibits during cross-examination if the exhibits pertain to the direct examination; however the examiner must observe all foundational requirements and must do so with an often reluctant witness that may not readily supply all of the facts for the foundation [Imwinkelried, et al., California Evidentiary Foundations, Ch. 1, § D (Matthew Bender)].



Cross Reference:

Complete discussion of laying foundation, see Imwinkelried, et al., California Evidentiary Foundations (Matthew Bender).

Legal Topics:

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

EvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDocumentary EvidenceWritingsGeneral
OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationDirect
Examination



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11.46 Ordinarily Pre-Mark Exhibits During Pretrial Conference.

In civil actions, exhibits are generally pre-marked during the final pretrial conference and filed with the court. Using this method, court proceedings are more efficient and objections to the evidence are addressed before the actual trial begins.

Example--Los Angeles County:

At least five days before the final status conference, the parties must exchange and file lists of pre-marked exhibits [Los Angeles Super Ct Rules, Rules 7.9(h), (i)(6), 8.60. All exhibits must be pre-numbered before counsel or a witness makes any reference to them [Los Angeles Super Ct Rules, Rule 8.60].

➡ Cross Reference:

Discussion of pre-marking exhibits and objections to them, see *Ch. 4, Final Pretrial Conference, 4.16*.

Legal Topics:

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

Civil Procedure
Pretrial Matters
Conferences
Final Pretrial Conferences
Evidence
Demonstrative Evidence
Foundational Requirements
Evidence
Documentary Evidence
Writings
General Overview



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11.47 Type of Exhibit Determines Its Foundation.

The evidentiary foundation for admitting an exhibit depends on the type of exhibit, the witness, and the purpose for which the exhibit is being used. At a minimum, the exhibit must be authenticated. Other issues may arise if the exhibit is not an original writing, and hearsay exceptions may need to be addressed if the proponent is offering a written exhibit for the truth of the matter asserted in its contents.

► **Cross References:**

Discussion and foundations regarding authentication, see *11.107*.

Discussion and foundations for secondary evidence, see *11.108*.

Discussion and foundations for hearsay exceptions, see *11.104*.

Complete discussion of authentication, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 4, Logical Relevance; Personal Knowledge and Authentication (Matthew Bender).

Legal Topics:

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

EvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative
EvidenceFoundational RequirementsEvidenceDocumentary EvidenceWritingsGeneral Overview



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11.48 Show Exhibits to Opposing Counsel, Court, and Witness.

To the extent the exhibits have been pre-marked and reviewed by parties before trial, showing the exhibit to opposing counsel may not be necessary, but the exhibits should be given to counsel if requested. Depending on the court, the judge may require that all exhibits be reviewed by the court before submitting them to the witness. When presenting the exhibit to the witness for authentication, be sure to clearly state the exhibit number or letter for the record.

Legal Topics:

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

EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceFoundational
RequirementsEvidenceDocumentary EvidenceWritingsGeneral Overview



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11.49 Counsel Must Request That Exhibit Be Admitted Into Evidence Once Foundation Is Provided.

After laying the proper foundation for the exhibit, and absent an objection or after the objection has been overruled, request that the court admit the exhibit into evidence. Counsel must affirmatively move for the evidence to be admitted into evidence.



Strategic Point--Record Keeping:

Keep a running list of exhibits that have been admitted into evidence. The court clerk will maintain the court's list of exhibits admitted, but it is the better practice to act as a check on the court and to monitor whether anything has been missed, or if opposing counsel has failed to admit a crucial exhibit. Counsel should review the list carefully before resting his or her case.

Legal Topics:

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

EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceFoundational

RequirementsEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceProcedural

ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewGovernmentsCourtsClerks of Court



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11.50 Clearly State Objection to Exhibit When It Is Offered Into Evidence.

Counsel opposing the admission of an exhibit into evidence must timely object [*Evid Code* § 353(a)]. The most common objection is "lack of foundation." However, other objections may be appropriate, such as secondary evidence or hearsay.



Strategic Point--Objector:

If the exhibit was the subject of a motion in limine that was denied, restate for the record during trial the basis for the objection. If the exhibit is highly prejudicial or inadmissible on other grounds, object before the exhibit is shown to the witness and ask the court to review the matter out of the presence of the jury. As to a "lack of foundation" objection, understand that a sustained objection does not end the matter, and the party offering the exhibit may have an opportunity to again lay a proper foundation, because courts favor the admission of all relevant and permissible evidence. However, counsel need not explain the missing foundational elements, and the court may sustain the objection without identifying the missing elements. The party proposing the evidence is charged with knowing how to introduce that evidence. Yet, if the court overrules the objection, be sure to state on the record for appeal what foundational element is missing and why.



Strategic Point--Proponent:

If the court sustains a "lack of foundation" objection to the exhibit, review the foundational elements and reexamine the witness. The court or opposing counsel may explain what element is missing, and reexamination may cure the defect. If the attempt to cure is unsuccessful, be sure to make an offer of proof on the record for appeal.



Cross Reference:

Discussion of secondary evidence and hearsay, see Cotchett, *California Courtroom Evidence*, Ch. 21 Hearsay Rule and Exceptions; Ch. 23, *Secondary Evidence* (Matthew Bender).

Discussion of laying foundation, see Imwinkelried, et al., Ch. 1, *California Evidentiary Foundations*

(Matthew Bender).

Legal Topics:

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

EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceFoundational
RequirementsEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceProcedural ConsiderationsObjections
& Offers of ProofObjections



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11.51 Determine Before Trial Method for Publishing Exhibit to Jury.

The method for publishing exhibits to the jury depends on the type of exhibit and the regular practices of the court. There may be courtroom aids for showing the exhibit, such as television monitors, overhead projectors, or video equipment. Some exhibits may be so large that the jury must be taken outside to view the exhibit (for example, a car involved in an accident) or too fragile to be distributed amongst the jurors. Determine ahead of trial what method the court may use to prevent the disruption of examination.

Legal Topics:

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

EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceFoundational Requirements



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X. USING AND OBJECTING TO DEPOSITIONS AND OTHER DISCOVERY DOCUMENTS DURING
EXAMINATION

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.52

11.52 CHECKLIST: Using and Objecting to Depositions and Other Discovery Documents During Examination.

- ☐ Use depositions and other discovery documents during examination.

Authority:

CCP § 2025.620

Discussion:

See 11.54

- ☐ Lodge and introduce depositions and other documents into evidence during trial.

Authority:

Cal Rules Ct, Rule 2.550(b)(3); CCP § 2025.620

Discussion:

See 11.54[2]

- ☐ Notify the court of intent to use videotape or audiotape during trial.

Authority:

CCP §§ 2025.620, 2025.340(m)

Discussion:

See 11.54[3]

- ☐ Depose witness in case of postponement.

Authority:

CCP § 596

Discussion:

See 11.54[4]

- ☐ Impeach witness using deposition.

Authority:

CCP § 2025.620(a)

Discussion:

See 11.54[5]

- ☐ In limited civil case, offer deposition in lieu of testimony.

Authority:

CCP § 98

Discussion:

See 11.54[6]

- ☐ Use electronic aids for depositions.

Discussion:

See 11.54[7]

- ☐ Object to use of depositions during examination.

Authority:

Robinson v. North American Life & Cas. Co. (1963) 215 CA2d 111, 116, 30 CR 57

Discussion:

See 11.55

- ☐ Jurors may not take deposition into jury room.

Authority:

CCP § 612

Discussion:

See 11.56

- ☐ Use interrogatories at trial.

Authority:

CCP § 2030.410

Discussion:

See 11.57

☐ Use request for admissions at trial.

Authority:

CCP § 2033.410

Discussion:

See 11.58

Legal Topics:

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

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil

ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil

ProcedureDiscoveryMethodsWritten DepositionsEvidenceProcedural ConsiderationsPreliminary

QuestionsAdmissibility of EvidenceGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.53

11.53 Options and Strategies.

Counsel should be extremely careful in using deposition testimony at trial. Reading transcripts to a jury can be the most mind-numbing experience for a jury. Rarely will they remember any of it. If it is absolutely necessary, and that is the only justifiable use of a deposition transcript at trial, due to the absence, unavailability or death of a witness, then counsel should take great care to shorten the transcript to be used. Any testimony, read or provided by videotape, that is more than five to seven minutes risks being overlooked.

Many judges will seek to have the transcript edited by both parties, so that the transcript can be presented in one reading, or one playing of the videotape. Counsel opposing a party who seeks to use video or written transcripts will often attempt to include voluminous background questions, or their redirect examination, interspersed with the portions counsel wishes to use. As a strategic matter, counsel should seek the court's approval to present only the portions counsel wants in the record, and to require the other side to present other portions as it sees fit. At the same time, combining the excerpts both sides want to use will avoid the appearance that either side is omitting something important. Nevertheless, short and simple should be the guideline.

Legal Topics:

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

Civil Procedure Trials Depositions Evidence Procedural Considerations Preliminary Questions Admissibility of Evidence General Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.54

11.54 Using Depositions and Other Discovery Documents During Examination.

11.54[1] Determining Availability of Using Deposition at Trial. At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under *CCP § 2025.410*, as far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following provisions [*CCP § 2025.620*]:

- Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code [*CCP § 2025.620(a)*].
- An adverse party may use for any purpose a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under *CCP § 2025.230* of a party. It is not ground for objection to the use of a deposition of a party under this provision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing [*CCP § 2025.620(b)*].
- Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following [*CCP § 2025.620(c)*]:
 - ☐ The deponent resides more than 150 miles from the place of the trial or other hearing.
 - ☐ The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is any of the following:
 - Exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant.

- Disqualified from testifying.
 - Dead or unable to attend or testify because of existing physical or mental illness or infirmity.
 - Absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process.
 - Absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.
 - Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.
 - Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under *CCP* § 2025.220 reserved the right to use the deposition at trial, and if that party has complied with *CCP* § 2025.340(m) [*CCP* § 2025.620(d)].
- A party may offer in evidence all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced [*CCP* § 2025.620(e)].
- Substitution of parties does not affect the right to use depositions previously taken [*CCP* § 2025.620(f)].

When an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, all depositions taken and filed in the initial action may be used in the subsequent action as if originally taken in that subsequent action. A deposition previously taken may also be used as permitted by the Evidence Code [*CCP* § 2025.620(g)].

Cross Reference:

Discussion of using deposition testimony at trial, see *California Trial Guide*, § 20.30 (Matthew Bender).

11.54[2] Lodging and Introducing Depositions and Other Documents Into Evidence During Trial.

11.54[2][a] Lodging and General Principles of Use. A "lodged" record is temporarily placed or deposited with the court but not filed [*Cal Rules Ct, Rule 2.550(b)(3)*]. A deposition is testimony taken under oath before the trial and preserved in writing. In order to introduce deposition testimony into evidence, it must be read into the record. The jury is to consider that testimony as if it had been given from the witness stand. Subject to the requirements of *CCP* § 2025.620, a party may offer in evidence all or any part of a deposition. If the party introduces only part of the deposition, any party may introduce any other parts that are relevant to the parts introduced [*CCP* § 2025.620(e)].

A deposition should be marked for identification so that if it is not permitted to be read into evidence, it will be part of the record on appeal [*Wulferdinger v. Pickwick Stages Sys. (1930) 105 CA 509, 288 P 93*].

Cross References:

Discussion of introducing deposition testimony, see *California Trial Guide*, § 20.30[1][c] (Matthew Bender).

Discussion of use of deposition testimony at trial, see Cotchett, *California Courtroom Evidence*, 25.01

(Matthew Bender).

11.54[2][b] Use of Deposition by a Party. Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness [*CCP* § 2025.620(a)]. Since it is not necessary to show the prior inconsistent or contradictory statement to the witness [*see Evid Code* §§ 768, 769], counsel can read the deposition into the record. It is not necessary to ask the witness whether he or she recalls the deposition being taken and the questions being asked and answered in the manner shown in the transcript [*but see* 11.55]. Note, however, that certain local rules may require obtaining permission from the court to use a deposition, first [*see, e.g.,* Los Angeles Super Ct Rules, Rule 8.70 (leave of court required before reading into evidence any portion of any depositions, interrogatories, or requests for admission, pages and lines must be identified, and opposing counsel must be given a reasonable opportunity to read and interpose any objections)]. Thus, it is good practice to lodge the transcript with the court, provide the witness and opposing counsel with copies, and then when needed, announce that it will be read and identify the pages and lines, inclusively, that will be read.

11.54[2][c] Use of Deposition of a Party by an Adverse Party. An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent or designee under *CCP* § 2025.230 of a party [*CCP* § 2025.620(b)]. The availability of the deponent, or whether the deponent has or will testify is not an objection, and therefore counsel may read the deposition into the record, whether the party to the action is on the stand or not [*but see* 11.55]. Note that certain local rules may require obtaining permission from the court to use a deposition, first [*see, e.g.,* Los Angeles Super Ct Rules, Rule 8.70]. Thus, it is good practice to lodge the transcript with the court, provide the witness and opposing counsel with copies, and then when needed, announce that it will be read and identify the pages and lines, inclusively, that will be read.

11.54[2][d] Use of Deposition of Any Person or Organization, Not an Adverse Party, by a Party. Any party may use for any purpose the deposition of any person or organization, if the court makes certain findings [*CCP* § 2025.620(c); *see* 11.55]. Before counsel uses a deposition of a non-party witness, either person or organization, counsel should make sure that the procedure for using depositions in such cases is permissible under the local rules, that local procedures and particularly those of the court, are followed and that appropriate foundations for the use of the deposition are presented to the court.

11.54[3] Party Must Notify Court of Intent to Use Videotape or Audiotape. A party intending to offer an audio or video recording of a deposition in evidence under *CCP* § 2025.620 must notify the court and all parties in writing of that intent and of the parts of the deposition to be offered; that notice must be given within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording [*CCP* § 2025.340(m)]. Objections to all or part of the deposition must be made in writing. The court may permit further designations of testimony and objections as justice may require. With respect to the parts of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version of the deposition recording be prepared for use at the trial or hearing [*CCP* § 2025.340(m)]. The original audio or video record of the deposition is preserved unaltered. If no stenographic record of the deposition testimony has previously been made, the party offering an audio or video recording of that testimony under *CCP* § 2025.620 must accompany that offer with a stenographic transcript prepared from that recording [*CCP* § 2025.340(m)].



Cross Reference:

Foundational elements for admitting videotape or audiotape, see Imwinkelried, et al., California Evidentiary Foundations, Ch. 4, § I (Matthew Bender).

11.54[4] Deposing Witness in Case of Postponement. The party obtaining a postponement of a trial, if required by the adverse party, must consent that the testimony of any witness of the adverse party who is in attendance, be taken by deposition before a judge or clerk of the court in which the case is pending, or before a notary public. The testimony

may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced [CCP § 596].

11.54[5] Impeaching With Deposition. Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code [CCP § 2025.620(a)].



Cross References:

Discussion of impeaching a witness, see 11.59 et seq.

Discussion of use of deposition for impeachment, see Cotchett, *California Courtroom Evidence*, 25.01 (Matthew Bender).

11.54[6] In Limited Civil Case, Offer Deposition in Lieu of Testimony. In a limited civil case, a party may, in lieu of presenting direct testimony, offer the prepared testimony of relevant witnesses in the form of affidavits or declarations under penalty of perjury [CCP § 98]. The prepared testimony may include, but need not be limited to, the opinions of expert witnesses and testimony authenticating documentary evidence. To the extent the contents of the prepared testimony would have been admissible had the witness testified orally, the prepared testimony is received as evidence in the case, provided that either of the following applies:

- A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately before trial [CCP § 98(a)].
- The statement is in the form of all or part of a deposition in the case, and the party against whom it is offered had an opportunity to participate in the deposition [CCP § 98(b)].

The court determines whether the affidavit or declaration will be read into the record in lieu of oral testimony or admitted as a documentary exhibit [CCP § 98].

11.54[7] Electronic Aids for Depositions. Using electronic aids can help introduce deposition testimony to the jury.



Strategic Point--Software Programs:

Many software programs are available for creating visual aids. Current software packages, independently or in conjunction with trial graphics consultants, can be used to make deposition testimony more attractive and to avoid putting the jury to sleep. These packages will permit the video and audio deposition to be displayed simultaneously with the written transcript on a large screen, which helps maintain juror attention. Documents referenced in the testimony can also be displayed along side the video record of the transcript, and can include the written transcript as well. These programs have become extremely useful, and can be combined with trial outlining or issue defining and outlining functions to aid in trial preparation. Counsel should use such graphics presentations with other tools including software slide presentations, traditional blow-up charts of key documents, graphic timeline charts for complicated stories, and simple blackboard and chalk tools to create a compelling multi-media presentation that will focus the jury on counsel's case.

Legal Topics:

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

Civil ProcedureTrialsDepositionsEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDemonstrative
EvidenceRecordingsEvidenceDemonstrative EvidenceVisual Formats



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EXAMINATION

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.55

11.55 Objecting to Use of Depositions During Examination.

A deposition should be read at the trial to give the adverse party an opportunity to object to the items in the deposition that are excludable [*Robinson v. North American Life & Cas. Co. (1963) 215 CA2d 111, 116, 30 CR 57*]. The court should inspect the deposition and hear objections out of the jury's presence [*Estate of Martin (1915) 170 C 657, 665, 151 P 138*].

At trial, when a deposition is offered in evidence, objections to the admissibility of testimony are controlled by the rules of evidence and are properly made before the reading of the deposition. Either party may have excluded from the deposition parts that would be inadmissible if the witness were present and examined in person [*Kritser v. Kuttruff (1961) 197 CA2d 102, 106, 16 CR 872*].

Legal Topics:

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

Civil ProcedureTrialsDepositionsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections



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11.56 Jurors May Not Take Deposition Into Jury Room.

The jury may not take depositions with them to the jury room on retiring for deliberation [*CCP* § 612; *Castor v. Bernstein* (1906) 2 CA 703, 705, 84 P 244]. The court is bound by *CCP* § 612 even without an objection [*Quiring v. Zamboni* (1957) 148 CA2d 890, 894, 307 P2d 650].

Exception:

The practice of allowing pleadings to be taken to the jury room is not a safe or proper one, but when no prejudice or injury is caused by allowing them to be taken, the error is not grounds for reversal [*Powley v. Swensen* (1905) 146 C 471, 481-482, 80 P 722].

Legal Topics:

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

Civil ProcedureTrialsDepositionsCivil ProcedureTrialsJury TrialsJury Deliberations



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11.57 Using Interrogatories at Trial.

At the trial or any other hearing in the action, as far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory against the responding party [CCP § 2030.410]. It is not a ground for objection to the use of an answer to an interrogatory that the responding party is available to testify, has testified, or will testify at the trial or other hearing.

Interrogatories and their responses are not filed with the court [CCP § 2030.280(a)]. Instead, the propounding party must retain both the original of the interrogatories, with the original proof of service affixed to them, and the original of the sworn response until six months after final disposition of the action. At that time, both originals may be destroyed, unless the court on motion of any party and for good cause shown orders that the originals be preserved for a longer period [CCP § 2030.280(b)].



Cross Reference:

Discussion of using interrogatories at trial, see *California Trial Guide*, § 20.50 (Matthew Bender).

Legal Topics:

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

Civil Procedure Discovery Methods Interrogatories General Overview Evidence Demonstrative Evidence Foundational Requirements



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.58

11.58 Using Request for Admissions at Trial.

Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission under *CCP* § 2033.300 [*CCP* § 2033.410(a); see, e.g., *New Albertsons, Inc. v. Superior Court* (2008) 168 CA4th 1403, 1418-1434, 86 CR3d 457]. However, any admission made by a party is binding only on that party and is made for the purpose of the pending action only; it is not an admission by that party for any other purpose, and it must not be used in any manner against that party in any other proceeding [*CCP* § 2033.410(b)].

Requests for admissions and the responses to them are not to be filed with the court [*CCP* § 2033.270(a)]. Instead, the party requesting admissions retains both the original of the requests for admission, with the original proof of service affixed to them, and the original of the sworn response until six months after final disposition of the action. At that time, both originals may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period [*CCP* § 2033.270(b)].

Cross Reference:

Discussion of using request for admission at trial and establishing facts admitted in response to request for admission, see *California Trial Guide*, § 20.51 (Matthew Bender).

Legal Topics:

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

Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil

ProcedureDiscoveryMethodsAdmissionsEffectEvidenceDemonstrative EvidenceFoundational Requirements



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11.59 CHECKLIST: Impeaching and Rehabilitating Witness's Credibility.

☐ Assess a witness's credibility.

Authority:

Evid Code § 780

Discussion:

See 11.61[1]

☐ Impeach witness to question his or her credibility.

Authority:

Evid Code § 780; People v. Sam (1969) 71 C2d 194, 77 CR 804, 454 P2d 700

Discussion:

See 11.61[2]

☐ Any party may attack the credibility of a witness.

Authority:

Evid Code § 785

Discussion:

See 11.62

☐ Traits of character other than honesty or veracity are inadmissible.

Authority:

Evid Code § 786

Discussion:

See 11.63

- ☐ Specific instances of conduct are inadmissible in civil cases.

Authority:

Evid Code § 787

Discussion:

See 11.64

- ☐ Religious belief is inadmissible.

Authority:

Evid Code § 789

Discussion:

See 11.65

- ☐ Prove the nonexistence of a fact testified to by the witness.

Authority:

Evid Code § 780(i)

Discussion:

See 11.66

- ☐ Use evidence to prove bias.

Authority:

People v. De Leon (1968) 260 CA2d 143, 67 CR 45

Discussion:

See 11.67

- ☐ Use prior consistent and inconsistent statements of witnesses.

Authority:

Evid Code § 791

Discussion:

See 11.68

- ☐ Use good character evidence if character is attacked.

Authority:

Evid Code § 790

Discussion:

See 11.69

Legal Topics:

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

EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad
Character for TruthfulnessGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad Character for
TruthfulnessSpecific InstancesEvidenceTestimonyCredibilityImpeachmentReligious
BeliefsEvidenceTestimonyCredibilityRehabilitation



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11.60 Options and Strategies.

Whether counsel has information that can impeach a witness that is known to the other side will determine the best use of the information. Counsel should consider whether the information is something that should be used at trial to surprise the witness on the stand, or whether it should be used in pre-trial motions, or during discovery proceedings such as depositions. Counsel should also consider carefully all of the foundational information and evidence that needs to be presented and admitted to make the impeaching material admissible.

Counsel should also consider carefully whether the matter truly impeaches the witness, or whether it is merely matter that casts a slightly different light on the witness. Pulling a "smoking gun" out of a file and using it with flourish when it is not truly "smoking" can backfire. Conversely, if a witness has been impeached, counsel should consider carefully whether the matter is something that can truly be rectified through rehabilitation. In a carefully prepared case, damaging and potentially impeaching evidence should be dealt with on direct examination where possible to lessen the impact of impeachment and to minimize the need for rehabilitation.

Legal Topics:

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

EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityRehabilitation



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11.61 Basis of Credibility.

11.61[1] Determining Credibility. Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his or her testimony at the hearing, including but not limited to any of the following [*Evid Code § 780*]:

- The witness's demeanor while testifying and the manner in which he or she testifies [*Evid Code § 780(a)*].
- The character of the witness's testimony [*Evid Code § 780(b)*].
- The extent of the witness's capacity to perceive, recollect, or communicate any matter about which he or she testifies [*Evid Code § 780(c)*].
- The extent of the witness's opportunity to perceive any matter about which he or she testifies [*Evid Code § 780(d)*].
- The witness's character for honesty or veracity or their opposites [*Evid Code § 780(e)*].
- The existence or nonexistence of the witness's bias, interest, or other motive [*Evid Code § 780(f)*].
- A statement previously made by the witness that is consistent with his or her testimony at the hearing [*Evid Code § 780(g)*].
- A statement made by the witness that is inconsistent with any part of his or her testimony at the hearing [*Evid Code § 780(h)*].
- The existence or nonexistence of any fact testified to by the witness [*Evid Code § 780(i)*].
- The witness's attitude toward the action in which he or she testifies or toward the giving of testimony

[*Evid Code* § 780(j)].

- The witness's admission of untruthfulness [*Evid Code* § 780(k)].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 780, see Cotchett, *California Courtroom Evidence*, 16.45 (Matthew Bender).

11.61[2] Scope and Effect of Impeaching Evidence. Impeachment is the process of challenging or impugning the credibility of a witness [*People v. Sam* (1969) 71 C2d 194, 77 CR 804, 454 P2d 700] . Under *Evid Code* § 780, there is no specific limitation on the use of impeaching evidence on the ground that it is "collateral," and the admission of such evidence is discretionary with the trial court [*People v. Eisenberg* (1968) 266 CA2d 606, 72 CR 390] . *Evid Code* § 780 permits the jury to consider particular matters in testing the credibility of a witness, but does not require that any and all questions relative to credibility be allowed on cross-examination. It was intended to continue the rule that the scope of the presentation of matters affecting credibility is in large measure within the discretion of the trial judge, but did not make mandatory the admission of such evidence [*People v. Alfaro* (1976) 61 CA3d 414, 132 CR 356] .

Even if testimony is uncontradicted, the trier of fact may believe and accept part of it and disbelieve the remainder [*People v. Anderson* (1966) 243 CA2d 243, 52 CR 201] .

Legal Topics:

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

EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBias, Motive & PrejudiceEvidenceTestimonyCredibilityImpeachmentContradictionEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent Statements



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11.62 Any Party May Attack Credibility of Witness.

The credibility of a witness may be attacked or supported by any party, including the party calling the witness [*Evid Code* § 785]. One of the purposes of *Evid Code* § 785, relating to attacking the credibility of a witness, is to allow a party to use and impeach a hostile witness that the party called [*People v. Chacon* (1968) 69 C2d 765, 73 CR 10, 447 P2d 106 , *overruled in part on other grounds*, *People v. Doolin* (2009) 45 C4th 390, 2009 Cal LEXIS 2, *50] .



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 785, see Cotchett, *California Courtroom Evidence*, 16.48 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityOne's Own WitnessesGeneral Overview



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11.63 Traits of Character Other Than Honesty or Veracity Are Inadmissible.

Evidence of traits of a witness's character other than honesty or veracity or their opposites is inadmissible to attack or support the credibility of a witness [*Evid Code* § 786].

Cal Const art I, § 28, effected a pro tanto repeal of *Evid Code* § 786 to the extent it excluded evidence of a witness's conduct offered to attack or support the credibility of the witness, except as exclusion is ordered pursuant to *Evid Code* § 352. Thus, in a criminal prosecution the admission of evidence of a prosecution witness's past reliability as a police informant, and the prosecutor's reference to it in closing argument, was not error or misconduct. *People v. Harris* (1989) 47 C3d 1047, 1094, 255 CR 352, 767 P2d 619 .

Legal Topics:

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

EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessSpecific Instances



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11.64 Specific Instances of Conduct Are Inadmissible in Civil Cases, but Prior Conviction May Be Admissible for Impeachment.

Subject to *Evid Code* § 788, evidence of specific instances of a witness's conduct relevant only as tending to prove a trait of his or her character is inadmissible to attack or support the credibility of the witness [*Evid Code* § 787]. *Evid Code* § 788 provides that for the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he or she has been convicted of a felony unless:

- A pardon based on the witness's innocence was granted by the jurisdiction in which he or she was convicted [*Evid Code* § 788(a)].
- A certificate of rehabilitation and pardon was granted under the provisions of Chapter 3.5 (commencing with *Section 4852.01*) of *Title 6 of Part 3 of the Penal Code* [*Evid Code* § 788(b)].
- The accusatory pleading against the witness was dismissed under the provisions of *Pen Code* § 1203.4. However, this exception does not apply to a criminal trial in which the witness is being prosecuted for a subsequent offense [*Evid Code* § 788(c)].
- The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in *Evid Code* § 788(b) or (c) [*Evid Code* § 788(d)].

Felony convictions are admissible if the felonious conduct is "probative of a witness's veracity" [*Holley v. J&S Sweeping Co. (1983) 143 CA3d 588, 594, 192 CR 74*] .

Conviction of a crime other than a felony may be admissible for impeachment if it involves dishonesty or moral turpitude [*People v. Castro (1985) 38 C3d 301, 313-317, 211 CR 719, 696 P2d 111*] .

On timely and specific objection, the judge has discretion under *Evid Code* § 352 to exclude evidence of a witness's felony conviction when the probative value of the evidence is outweighed by the risk of undue prejudice [*People v. Castro (1985) 38 C3d 301, 312-313, 211 CR 719, 696 P2d 111*] . In ruling on the objection the court considers various factors including the nature of the offense, how long ago it occurred, the witness's age at the time of the conviction, and

the nature of the witness's present involvement in the case, i.e. whether the witness is a party or merely a witness.

Cross Reference:

Admissibility of felony convictions and a list of crimes of moral turpitude, see Cotchett, *California Courtroom Evidence*, 16.51 (Matthew Bender).

Legal Topics:

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

EvidenceTestimonyCredibilityImpeachmentGeneral

OverviewEvidenceTestimonyCredibilityImpeachmentConvictionsAdmissibilityEvidenceTestimonyCredibilityImpeachmentConvictions



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11.65 Religious Belief Is Inadmissible.

Evidence of a witness's religious belief--or lack thereof--is inadmissible to attack or support the credibility of a witness [Evid Code § 789].

Legal Topics:

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



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11.66 Proving Nonexistence of Fact Testified to by Witness.

Although *Evid Code* §§ 787 and 788 prohibit the use of character evidence other than honesty or veracity for the purpose of attacking the credibility of a witness, evidence of a specific instance of a witness's conduct may become admissible to impeach the witness pursuant to *Evid Code* § 780(i) by proving false some part of his or her testimony [*Andrews v. City & County of San Francisco* (1988) 205 CA3d 938, 946-948, 252 CR 716] .

Evid Code § 780 does not give litigants an unbridled right to prove the nonexistence of any fact a witness has testified to. Rather, it provides that the court or the jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his or her testimony at the hearing, and it specifies in several subdivisions categories of evidence that might be relevant for this purpose including, in *Evid Code* § 780(i), the existence or nonexistence of any fact testified to by the witness [*People v. Earp* (1999) 20 C4th 826, 85 CR2d 857, 978 P2d 15] .

Exception:

The court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will [*Evid Code* § 352]:

- Necessitate undue consumption of time; or
- Create substantial danger of undue prejudice, confusing the issues, or misleading the jury.

Legal Topics:

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

EvidenceTestimonyCredibilityImpeachmentGeneral
OverviewEvidenceTestimonyCredibilityImpeachmentContradiction



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.67

11.67 Using Evidence to Prove Bias.

11.67[1] Proving Bias in Lay Witnesses. It is proper to cross-examine a witness to show bias, prejudice, interest, hostility or friendship toward a party that bears on the credibility of the witness's testimony [*People v. De Leon* (1968) 260 CA2d 143, 67 CR 45, disapproved on other grounds by *People v. De Santiago* (1969) 71 C2d 18, 76 CR 809, 453 P2d 353]. The question of the admissibility of evidence offered for the purpose of showing a witness' bias is left to the discretion of the court [*Grudt v. Los Angeles* (1970) 2 C3d 575, 86 CR 465, 468 P2d 825]. In the context of showing a witness's bias, the proper scope for the exercise of discretion by the trial court is in limiting cross-examination to a disclosure of facts that may show the existence of hostility, and rejecting matters that might be pertinent only to a justification of hostility on the part of the witness. It is the existence of the feeling that is material, not the right or wrong in the transaction that occasions it [*Grudt v. Los Angeles* (1970) 2 C3d 575, 86 CR 465, 468 P2d 825].

Example:

In an action for damages for injuries from an automobile accident, evidence that a plaintiff is being wholly or partially compensated for medical expenses may be relevant on the issue of motive in seeking medical help, and credibility as a witness and would be admissible under *Evid Code* § 780. However *Evid Code* § 352 gives the trial court broad discretion to exclude otherwise admissible evidence if its probative value is outweighed by substantial danger of undue prejudice, of confusing the issues, or of misleading the jury, such as issues relating to whether the plaintiff is "made whole" by insurance compensation [see *Garfield v. Russell* (1967) 251 CA2d 275, 59 CR 379].

11.67[2] Proving Bias in Expert Witnesses. The compensation and expenses paid or to be paid to an expert witness by the party calling the expert is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his or her testimony [*Evid Code* § 722(b)].

Example:

A medical expert may be asked questions about what percentage of his or her practice involves examining patients for the defense and how much compensation is derived from that work [*Allen v. Superior Court* (1984) 151 CA3d 447, 453, 198 CR 737].

Legal Topics:

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

[Evidence](#)[Testimony](#)[Credibility](#)[Impeachment](#)[Bias, Motive & Prejudice](#)[Evidence](#)[Testimony](#)[Experts](#)[General Overview](#)



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.68

11.68 Using Prior Consistent and Inconsistent Statements of Witnesses.

11.68[1] Prior Consistent Statements. Evidence of a statement previously made by a witness that is consistent with his or her testimony at the hearing is inadmissible to support the witness's credibility unless it is offered after:

- Evidence of a statement made by the witness that is inconsistent with any part of his or her testimony at the hearing has been admitted for the purpose of attacking his or her credibility, and the statement was made before the alleged inconsistent statement [*Evid Code* § 791(a)]; or
- An express or implied charge is made that the witness's testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen [*Evid Code* § 791(b)].

► **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 791, see Cotchett, *California Courtroom Evidence*, 16.54 (Matthew Bender).

Example--Admissible Prior Consistent Statements:

A witness's prior consistent statements were admissible under *Evid Code* § 791 to rehabilitate her and support her credibility after the defendant suggested on cross-examination that her testimony implicating the defendant was biased or fabricated because of threats of prosecution made by the police and the district attorney [*People v. Kennedy* (2005) 36 C4th 595, 31 CR3d 160, 115 P3d 472] .

Example--Inadmissible Prior Consistent Statements:

In an action for injuries from a traffic accident, the testimony of a witness about what the defendant driver had said immediately after the accident to another witness who, in turn, shortly thereafter related the conversation to the testifying witness, was not admissible as a prior consistent statement under *Evid Code* § 791 [*Box v. California Date Growers Assn.* (1976) 57 CA3d 266, 129 CR 146] .



Warning:

Evidence sought to be admitted under *Evid Code* § 791 relating to prior consistent statements may, under appropriate circumstances, be rejected on the ground of remoteness when offered in an attempt to rehabilitate a witness's testimony [*Morgan v. Stubblefield* (1972) 6 C3d 606, 100 CR 1, 493 P2d 465] .

11.68[2] Prior Inconsistent Statements. The court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his or her testimony at the hearing, including but not limited to a statement made by the witness that is inconsistent with any part of his or her testimony at the hearing [*Evid Code* § 780(h)].

In examining a witness concerning a statement or other conduct by the witness that is inconsistent with any part of his or her testimony at the hearing, it is not necessary to disclose any information concerning the statement or other conduct [*Evid Code* § 769]. *Evid Code* § 769 applies only to witnesses, not lawyers. Compelling reasons exist why opposing counsel should be permitted, during a trial, to examine the contents of a written or recorded statement before and during its use in the cross-examination of a witness [*Kadelbach v. Amaral* (1973) 31 CA3d 814, 107 CR 720] .

Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his or her testimony at the hearing will be excluded unless:

- The witness was so examined while testifying as to give him or her an opportunity to explain or to deny the statement [*Evid Code* § 770(a)]; or
- The witness has not been excused from giving further testimony in the action [*Evid Code* § 770(b)].

Testimony given and an asserted impeaching statement need not be contrary in terms; to render the impeaching statement admissible, it need only tend to contradict or disprove the testimony or any inference to be deduced from it [*People v. Woodberry* (1970) 10 CA3d 695, 89 CR 330] .

Silence can be an inconsistent statement within the meaning of *Evid Code* § 780 for purposes of impeachment of witnesses. Failure to assert a fact when it would have been natural to assert it amounts to an assertion of the nonexistence of the fact. There may be explanations indicating that the person had in truth no such belief, but the conduct is prima facie an inconsistency. However, a witness may not be impeached by showing that he or she omitted to state a fact or stated it less fully at a prior proceeding unless his or her attention was called to the matter at that time and was then asked to testify concerning the very facts embraced in the questions propounded at the trial [*People v. Lewis* (1986) 180 CA3d 816, 225 CR 782] .



Warning:

The rule that a witness may be impeached by a statement made that is inconsistent with any part of his or her testimony at the hearing does not permit a party to secure the admission of otherwise inadmissible evidence for the purpose of subsequently impeaching it [*Marocco v. Ford Motor Co.* (1970) 7 CA3d 84, 86 CR 526] .

Legal Topics:

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

EvidenceTestimonyCredibilityImpeachmentPrior Inconsistent StatementsEvidenceTestimonyCredibilityRehabilitation



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11.69 Good Character Is Admissible Only If Character Attacked.

Evidence of the good character of a witness is inadmissible to support his or her credibility unless evidence of the witness's bad character has been admitted for the purpose of attacking his or her credibility [*Evid Code* § 790].

► **Cross Reference:**

Discussion of character evidence, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 5, Limitations on Credibility Evidence (Matthew Bender).

Legal Topics:

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

EvidenceRelevanceCharacter EvidenceEvidenceTestimonyCredibilityGeneral

OverviewEvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityRehabilitation



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11.70 CHECKLIST: Making and Responding to Objections and Offers of Proof.

- ☐ Make objections that are timely and specific.

Authority:

Evid Code § 353(a)

Discussion:

See 11.72

- ☐ Preserve the record for appeal.

Authority:

People v. De Santiago (1969) 71 C2d 18, 76 CR 809, 453 P2d 353

Discussion:

See 11.73

- ☐ Use motions to strike.

Authority:

People v. Bailes (1982) 129 CA3d 265, 273, 180 CR 792

Discussion:

See 11.75

- ☐ Object to form of question.

Discussion:

See 11.76

- ☐ Object and response to objections based on lack of foundation.

Discussion:

See 11.77

- ☐ Object to witness testimony for lack of personal knowledge.

Authority:

Evid Code § 702

Discussion:

See 11.78

- ☐ Respond to objections by making offer of proof or rephrasing question.

Authority:

Evid Code § 354(a)

Discussion:

See 11.79

Legal Topics:

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

EvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of Proof



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11.71 Options and Strategies.

In preparing for trial, counsel will have considered each document identified, documents that will be used for impeachment, and all evidence of which counsel is aware both from the standpoint of admission of one's own evidence but also evidentiary questions concerning adverse evidence. For truly objectionable evidence or testimony, a motion in limine will preserve the record, keep evidence or testimony out, and, if denied, alert the court to the issue when the evidence is proffered. For evidence or testimony that counsel knows is going to be offered and which is objectionable, counsel should have a brief (one or two page) memorandum with authorities ready to use on a speaking objection.

In any trial, evidence, questions, or testimony may be offered that counsel feels is objectionable. With proper consideration to the appearance of an overly obstreperous performance which persistent and continuous objections, counsel will still need to make objections. They should be clear, short, complete, and in all cases whether sustained or overruled, accompanied by a gracious "thank you" to the court. Jurors know that counsel need to object (and are instructed on that by the court), but do not like counsel that fights with the court or appears to be wrong consistently.

Consider carefully when to object. Excessive objections can create the appearance that the objector is trying to keep out relevant evidence. Moreover, if the objection is overruled, the objection may call attention to the evidence. If opposing counsel can readily cure the defect giving rise to the objection, the objection may serve little purpose.

Legal Topics:

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

Civil Procedure
Pretrial Matters
Motions in Limine
General Overview
Evidence
Documentary Evidence
General Overview
Evidence
Procedural Considerations
Objections & Offers of Proof
Objections
Evidence
Testimony
Credibility
Impeachment
General Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.72

11.72 Make Timely and Specific Objection.

11.72[1] Timeliness of Objections. A proper objection must timely made [*Evid Code* § 353(a)]. A court is not compelled to strike out evidence received without a sufficiently specific objection, when the objection was practically available to the party before the admission of the evidence, and may refuse to do so in the exercise of a reasonable discretion [*Estate of De Laveaga* (1913) 165 C 607, 633, 133 P 307] . An objection made after the answer had been given is too late [*Harold v. Pugh* (1959) 174 CA2d 603, 609, 345 P.2d 112] .

11.72[2] Specificity of Objections. A proper objection must make clear the specific ground of the objection or motion [*Evid Code* § 353(a)]. No particular form of objection or motion is required; it is sufficient that the presentation contain a request to exclude specific evidence on the specific legal ground urged on appeal [*People v Morris* (1991) 53 C3d 152, 279 CR 720, 807 P2d 949] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsObjections & Offers of ProofObjections



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11.73 Preserving Record for Appeal.

Generally, questions relating to the admissibility of evidence will not be reviewed on appeal absent the specific and timely objection at trial on the ground sought to be urged on appeal [*People v. De Santiago* (1969) 71 C2d 18, 76 CR 809, 453 P2d 353] . A general objection to a question put to a witness is insufficient and is a waiver of the defect unless the question is objectionable from every standpoint and the answer inadmissible under any theory [*Baron v. Sanger Motor Sales* (1967) 249 CA2d 846, 57 CR 896] .



Cross Reference:

Discussion of proper objection, see 11.72.

Legal Topics:

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

Civil Procedure Appeals Reviewability Preservation for Review Evidence Procedural Considerations Objections & Offers of Proof Objections



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11.74 Effect of Erroneously Included and Erroneously Excluded Evidence.

11.74[1] Effect of Erroneous Admission of Evidence. A verdict or finding will not be set aside, nor will the judgment or decision based thereon be reversed, because of the erroneous admission of evidence unless:

- There is of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion [*Evid Code* § 353(a)]; and
- The court passing on the effect of the error is of the opinion that the admitted evidence should have been excluded on the ground stated, and that the error resulted in a miscarriage of justice [*Evid Code* § 353(b)].

➤ Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 353, see Cotchett, *California Courtroom Evidence*, 8.01 (Matthew Bender).

11.74[2] Effect of Erroneous Exclusion of Evidence. A verdict or finding will not be set aside, nor will the judgment or decision based thereon be reversed, because of the erroneous exclusion of evidence unless the court passing on the effect of the error is of the opinion that the error complained of resulted in a miscarriage of justice, and it appears of record that:

- The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means [*Evid Code* § 354(a)];
- The rulings of the court made compliance with *Evid Code* § 354(a) futile [*Evid Code* § 354(b)]; or
- The evidence was sought by questions asked during cross-examination or recross-examination [*Evid Code* § 354(c)].

**Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 354, see Cotchett, *California Courtroom Evidence*, 8.02 (Matthew Bender).

Legal Topics:

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

Civil Procedure Appeals Reviewability Preservation for Review Evidence Procedural Considerations Objections & Offers of Proof Objections Evidence Procedural Considerations Objections & Offers of Proof Offers of Proof



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.75

11.75 Motion to Strike.

11.75[1] Effect of Motion to Strike. A party can use a motion to strike objectionable evidence, rather than an objection. Its use is appropriate in three situations [*see Evid Code § 353(a)*]:

- When the question is proper but the witness's answer is improper.
- When the witness answers so rapidly that the opponent does not have a fair opportunity to object.
- When, after a witness has given apparently proper testimony, it develops that the testimony was improper.

Example:

A motion to strike is appropriate when a witness testifies on direct examination to something from personal knowledge, but on cross-examination it turns out the witness was testifying as to what someone else had said.

A motion to strike testimony in its entirety, which if successful establishes that no evidence was presented, operates as a sufficient formal objection to that testimony [*People v. Bailes (1982) 129 CA3d 265, 273-274, 180 CR 792*] .



Cross Reference:

Discussion of motion to strike, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 2, § D (Matthew Bender).

11.75[2] Make Timely Motion to Strike. If a witness answers a question before an attorney is able to object, an objection made immediately after the answer is given and accompanied by a motion to strike is sufficient [*Pinto v. Seely (1913) 22 CA 318, 325, 135 P 43*] . When the basis for an objection first becomes apparent after testimony is given, a motion to strike must be made in time to afford the proponent a reasonable opportunity to cure any deficiency or make other necessary changes in the examination. Failure to make a timely motion to strike inadmissible evidence acts as a waiver of the right to complain of the erroneous admission of evidence [*People v. Demetrulias (2006) 39 C4th*] .

1, 20-21, 45 CR3d 407, 137 P3d 229].



Strategic Point:

At times in a trial, a witness will answer either simultaneously or in the middle of counsel's objection. To preserve the record, counsel should state: "move to strike the answer to the extent it was given and is reflected in the reporter's transcript, for the purpose of interposing an objection", and then restate the objection. An unobjectionable question (such as "Do you know...?") may elicit a response that shows the witness is speculating, in which case counsel should move to strike the witness' answer for the purpose of interposing an objection, and then in stating the objection clarify that the "from the answer it is clear that the witness lacks personal knowledge of the facts...", or "from the answer it is apparent that the witness is speculating...". At least, while the proverbial bell has been rung, and the jury probably heard the answer, counsel may be able to get a limiting instruction from the court on the issue.

11.75[3] Make Specific Motion to Strike. A motion to strike must be directed specifically to the testimony to be stricken, particularly when only part of the testimony is objectionable. A motion to strike must contain a reasonable, definite, and specific statement of the proper ground for the motion [*People v. Holt* (1997) 15 C4th 619, 666, 63 CR2d 782, 937 P2d 213] .

Example:

When it appears that the opinion of a property valuation witness is based largely on improper considerations or incompetent and inadmissible matters, the testimony may be stricken. But when the opinion is based on both proper and improper considerations, the motion to strike may, in the exercise of the court's discretion, be denied and the matter left to the jury to determine the weight to be given the testimony [*San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 CA2d 889, 901-902, 63 CR 640] .

Legal Topics:

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

EvidenceProcedural ConsiderationsGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections



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11.76 Objecting to Form of Questions.

The following objections are among the most common objections to the form of the question asked:

- Leading question [*see Evid Code § 767*].
- Question calls for narrative [*see Evid Code § 352*].
- General question [*see Schuur v. Rodenback (1901) 133 C 85, 89, 65 P 298*].
- Vague, ambiguous, or unintelligible question [*see Evid Code §§ 352, 765*].
- Compound question [*see Evid Code §§ 352, 765*].
- Question assumes facts not in evidence [*see Evid Code §§ 352, 765*].
- Question misquotes witness or misstates evidence [*see Evid Code § 765(a)*].
- Question calls for speculation [*see Evid Code §§ 352, 701, 800, 801*].
- Argumentative question [*see Evid Code §§ 352, 765*].
- Insulting or harassing question [*see Evid Code §§ 352, 765*].
- Question already asked and answered [*see Evid Code §§ 352, 765*].
- Question is not reasonably likely to be understood by child [*see Evid Code § 765(a)*].



Cross References:

Discussion of making and responding to objections to form of question, see *California Trial Guide*, § 20.15 (Matthew Bender).

Discussion of objections to form of question, see California Courtroom Evidence, at topical index (Matthew Bender).

Legal Topics:

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

EvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceTestimonyExaminationLeading Questions



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11.77 Objecting and Responding to Objections Based on Lack of Foundation.

11.77[1] Making Objections Based on Lack of Foundation. The lack of a sufficient foundation must be raised by a specific objection, or the defect is waived [*Bank of Am. v. Taliaferro* (1956) 144 CA2d 578, 582, 301 P2d 393] . Bare statements such as "no proper foundation laid" or "the proper foundation has not been laid" are usually deemed insufficient where directed to the failure to establish the condition of admissibility of evidence conditionally admissible. Objections must be accompanied by a reasonable, definite statement of the objectionable grounds [*Baron v. Sanger Motor Sales* (1967) 249 CA2d 846, 57 CR 896] .

Consider:

Evidence that depends for its admissibility on the establishment of other preliminary evidence, or a preliminary fact, is inadmissible unless and until the preliminary fact is established [see *Evid Code* § 400 *et seq.*]. If the preliminary fact has not been established or admitted, then the evidence which relies on the preliminary fact lacks foundation [see 11.83[4] -[6]].

➤ Cross References:

Discussion of objections based on lack of foundation or other preliminary matters, see *California Trial Guide*, § 21.12 (Matthew Bender).

Complete discussion of laying foundation, see Imwinkelried, et al., *California Evidentiary Foundations* (Matthew Bender).

11.77[2] Responding to Objections Based on Lack of Foundation. Potential responses to an objection asserting the lack of an adequate foundational showing include arguing that the objection is insufficient because the objecting party has failed to specify the particular respects in which the foundational showing is deficient [see, e.g., *Baron v. Sanger Motor Sales* (1967) 249 CA2d 846, 856, 57 CR 896] . Alternatively, a response may be to offer to remedy the alleged deficiency by presenting additional evidence to establish required foundational facts or elements [*Evid Code* §§ 403(a), 405(a)].

➤ Cross Reference:

Discussion of responding to objections based on lack of foundation or other preliminary matters, see *California Trial Guide*, § 21.13 (Matthew Bender).

Legal Topics:

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

EvidenceDemonstrative EvidenceFoundational RequirementsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.78

11.78 Objecting to Witness for Lack of Personal Knowledge.

Other than opinion testimony by an expert witness, the testimony of a witness concerning a particular matter is inadmissible unless he or she has personal knowledge of the matter. Against the objection of a party, personal knowledge must be shown before the witness may testify concerning the matter [*Evid Code* § 702(a)]. A witness's personal knowledge of a matter may be shown by any otherwise admissible evidence, including the witness's own testimony [*Evid Code* § 702(b)].

If a timely objection is made that a witness lacks personal knowledge, the court may not receive his or her testimony subject to the condition that evidence of personal knowledge be supplied later in the trial. According to the Law Revision Commission Comment to *Evid Code* § 702, the provision thus limits the ordinary power of the court with respect to the order of proof [*Evid Code* § 702, Law Rev Comm'n Cmt].

► Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 702, see Cotchett, *California Courtroom Evidence*, 16.03 (Matthew Bender).

The Evidence Code requirement of personal knowledge includes the capacity to perceive accurately and the capacity to recollect what has been perceived. This standard points to two time frames: (1) the time of perception, and (2) the time of recollection [*People v. Manson* (1976) 61 CA3d 102, 137, 132 CR 265] .

► Cross Reference:

Discussion of form of objection and response to objection based on lack of personal knowledge, see *California Trial Guide*, § 22.11 (Matthew Bender).

Legal Topics:

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

EvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewEvidenceTestimonyLay WitnessesPersonal Knowledge



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11.79 Responding to Objections by Offers of Proof and Rephrasing Questions.

11.79[1] Making Offer of Proof. A verdict or finding will not be set aside, nor will the judgment or decision based thereon be reversed, because of the erroneous exclusion of evidence unless the court passing on the effect of the error is of the opinion that the error complained of resulted in a miscarriage of justice and it appears of record that, among other things, the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means [*Evid Code* § 354(a)]. An offer of proof is not required under the following circumstances:

- The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked or by any other means [*Evid Code* § 354(a)];
- The rulings of the court made compliance with *Evid Code* § 354(a) futile [*Evid Code* § 354(b)]; or
- The evidence was sought by questions asked during cross-examination or recross-examination [*Evid Code* § 354(c)].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 354, see Cotchett, *California Courtroom Evidence*, 8.02 (Matthew Bender).

Further, no offer of proof is necessary as a prerequisite to raising on appeal the prejudice resulting from ruling out a pertinent question on cross-examination [*People v. Coleman* (1970) 8 CA3d 722, 87 CR 554] . *Evid Code* § 354 does not compel a conclusion, absent an offer of proof, that curtailment of cross-examination may be considered on appeal when the evidence was sought by questions asked during cross-examination or recross-examination [*People v. Coleman* (1970) 8 CA3d 722, 87 CR 554] .

A party must make a specific offer of proof to preserve an evidentiary ruling for appeal. An offer of proof should give the trial court an opportunity to change or clarify its ruling and, in the event of appeal, would provide the reviewing court with the means of determining error and assessing prejudice. Accordingly, an offer of proof must be specific; it

must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued. However, when an entire class of evidence has been declared inadmissible or the trial court has intimated it will receive no evidence of a particular class or on a particular issue, an offer of proof is not a prerequisite to raising the question on appeal, and an offer, if made, may be broad and general [*People v. Schmies* (1996) 44 CA4th 38, 51 CR 2d 185] .



Cross References:

Discussion of offer of proof, see *California Trial Guide*, § 21.16 (Matthew Bender).

Discussion of offer of proof, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 2, § F (Matthew Bender).

11.79[2] Rephrasing Question. At trial, counsel has the opportunity to rephrase a question found to be objectionable [see *People v. Kronemyer* (1987) 189 CA3d 314, 335, 234 CR 442] .



Cross Reference:

Discussion of rephrasing objectionable questions, see *California Trial Guide*, § 20.15 (Matthew Bender).

Legal Topics:

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

Civil Procedure Appeals Reviewability Preservation for Review Evidence Procedural Considerations Objections & Offers of Proof Objections Evidence Procedural Considerations Objections & Offers of Proof Offers of Proof



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.80

11.80 CHECKLIST: Admitting and Objecting to Relevant Evidence.

- ☐ Determine the relevance of evidence.

Authority:

Evid Code § 350

Discussion:

See 11.82

- ☐ Seek determination on disputed fact at trial.

Authority:

Evid Code §§ 310, 402(a)

Discussion:

See 11.83

- ☐ Seek exclusion of relevant evidence if too prejudicial.

Authority:

Evid Code § 352

Discussion:

See 11.84

- ☐ Seek exclusion of relevant evidence for extrinsic social policy.

Discussion:

See 11.85

- ☐ Determine if a privilege exists.

Authority:

Evid Code §§ 900-1070

Discussion:

See 11.85[2]

- ☐ Determine if a privilege has been waived.

Authority:

Evid Code § 912(a)

Discussion:

See 11.85[3]

- ☐ Use evidence of character, habit, and custom when allowed.

Authority:

Evid Code § 1100

Discussion:

See 11.86

- ☐ Evidence related to mediation is generally inadmissible.

Authority:

Evid Code § 1119(a)

Discussion:

See 11.87

- ☐ Evidence of subsequent remedial measures is generally inadmissible.

Authority:

Evid Code § 1151

Discussion:

See 11.88

- ☐ Evidence of settlement negotiations and offers to compromise is generally inadmissible.

Authority:

Evid Code § 1152(a)

Discussion:

See 11.89

- ☐ Evidence of liability insurance is generally inadmissible.

Authority:

Evid Code § 1155

Discussion:

See 11.90

- ☐ Use expert testimony based on a new scientific technique.

Authority:

People v. Venegas (1998) 18 C4th 47, 76, 74 CR2d 262, 954 P2d 525 ; People v. Wash (1993) 6 C4th 215, 242, 24 CR2d 421, 861 P2d 1107

Discussion:

See 11.92

Legal Topics:

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

EvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral
OverviewEvidenceRelevanceGeneral OverviewEvidenceRelevanceConfusion, Prejudice & Waste of Time



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11.81 Options and Strategies.

Preparation for trial is key, and includes consideration of all known evidence. With respect to evidence that is either irrelevant or subject to a § 352 objection, motions in limine protect the record, can result in exclusion of evidence, but more often will alert the court to the issue when the evidence is offered. With respect to evidence that is only relevant if a preliminary fact is established, counsel may make a pre-trial motion under *Evid Code* §§ 402, 403 to have the court consider the preliminary fact evidence and rule on the admissibility of the challenged evidence.

Legal Topics:

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

Civil Procedure
Pretrial Matters
Motions in Limine
General Overview
Evidence
Procedural Considerations
Preliminary Questions
Admissibility of Evidence
General Overview
Evidence
Relevance
General Overview
Evidence
Relevance
Confusion, Prejudice & Waste of Time



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.82

11.82 Relevance.

11.82[1] "Relevancy" Defined. No evidence is admissible unless it is relevant [*Evid Code* § 350]. The term "relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action [*Evid Code* § 210].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 210 and 350, see Cotchett, *California Courtroom Evidence*, 2.23, 6.01 (Matthew Bender).

11.82[2] Trial Court Has Discretion to Decide Relevance of Evidence. The trial court has wide discretion in deciding relevance of evidence [*People v. Warner* (1969) 270 CA2d 900, 76 CR 160] . Among the factors a trial court must consider when it is requested to exercise its discretion to deprive a party of probative evidence include (1) a determination that the evidence is relevant to an issue that is in dispute, (2) a consideration of other proof on that issue available to the party that offers the evidence, and (3) that party's relatively greater need for the evidence if it must carry the burden of proof on the issue to which the evidence relates [*Thor v. Boska* (1974) 38 CA3d 558, 113 CR 296] .

11.82[3] Determining Relevance of Evidence. Evidence is relevant not only when it tends to prove or disprove the precise facts in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred [*People v. Warner* (1969) 270 CA2d 900, 76 CR 160] .

Relevance is the first rule of the admissibility of evidence, and the only test of relevance is logic and common sense [*Traxler v. Thompson* (1970) 4 CA3d 278, 84 CR 211] .

Relevant evidence, although not governed by a precise formula, is evidence that logically, naturally, and by reasonable inference tends to establish some fact, but an inference may not be drawn from another when the two are remote in time or too speculative [*People v. Simms* (1970) 10 CA3d 299, 89 CR 1] .

Example:

In a medical malpractice case, the trial court erred in permitting the doctor's counsel to discuss the

patient's residency status, when defense counsel portrayed the patient as an illegal alien. Instead, the trial court should have granted the patient's motion in limine to exclude reference to the patient residency status because it was not relevant to the issue of liability [*Hernandez v. Paicius* (2003) 109 CA4th 452, 134 CR2d 756] .

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceRelevanceGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.83

11.83 Seeking Determination on Disputed Fact at Trial.

11.83[1] Determination on Preliminary Fact Is Necessary When Existence of Preliminary Fact Is Disputed.

When the admissibility of proffered evidence depends on the existence or nonexistence of a preliminary fact [*see Evid Code § 401*] and the existence of that preliminary fact is disputed, its existence or nonexistence must be determined as provided in *Evid Code §§ 400-406* [*Evid Code §§ 310, 402(a)*].

Prerequisite:

The need for a determination on a preliminary fact generally arises because the other party objects to the admission at trial of the preliminary fact. The admission of the proffered evidence without presentation of the preliminary fact by the proferor is also the basis for objection.

➡ Cross Reference:

Discussion of objections to evidence, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 2, § C (Matthew Bender).

Distinguish:

A "preliminary fact" is a fact that must exist in order for evidence to be admissible [*Evid Code § 400*].

Examples:

Disputed preliminary facts for which determinations may be obtained include, but are not limited to, the following [*Evid Code §§ 400, 403(a)*; *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 CA3d 519, 530, 119 CR 559] :

- The relevance of proffered evidence.
- A witness's knowledge.
- The authenticity of a writing.

- The existence of a privilege.



Strategic Point:

Evid Code §§ 400-406 do not limit the right of a party to introduce evidence relevant to weight or credibility [*Evid Code* § 406].

11.83[2] Determination on Relevancy, Personal Knowledge, Authenticity, or Statement or Conduct of Person.

11.83[2][a] Proponent of Proffered Evidence Has Burden of Proof in Determination on Existence of Preliminary Fact. The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [*Evid Code* § 403(a)]:

- The relevance of the proffered evidence depends on the existence of the preliminary fact.
- The preliminary fact is the personal knowledge of a witness concerning the subject matter of his or her testimony.
- The preliminary fact is the authenticity of a writing.
- The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself or herself.

11.83[2][b] Court May Admit Evidence Conditional on Later Presentation of Preliminary Fact. Subject to *Evid Code* § 702, which requires a witness to have personal knowledge of the matter to which he or she testifies, the court may conditionally admit the proffered evidence on relevance, personal knowledge, authenticity, or the statement or conduct of a person, subject to evidence of the particular preliminary fact being supplied later in the course of the trial [*Evid Code* § 403(b)].



Cross Reference:

Personal knowledge of witnesses, see California Forms of Pleading and Practice, Ch. 551, Trial (Matthew Bender).

11.83[2][c] Conditional Admission of Proffered Evidence Requires Proper Instruction to Jury. If the court conditionally admits the proffered evidence on relevance, personal knowledge, authenticity, or the statement or conduct of a person, the court [*Evid Code* § 403(c)]:

- May, and on request must, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds the preliminary fact does exist.
- Must instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists.



Strategic Point:

Under *Evid Code* § 403(c), the court decides merely whether there has been a prima facie showing of the existence of the preliminary fact. Thus, the final decision as to its existence or nonexistence is made by

the jury.

Jury Instructions:

Witnesses, see *Judicial Council of California Civil Jury Instructions*, CACI No. 107 (LexisNexis Matthew Bender).

Evidence, see *Judicial Council of California Civil Jury Instructions*, CACI Nos. 200 -221 (LexisNexis Matthew Bender).

11.83[3] Person Claiming Privilege Against Self-Incrimination Has Burden of Proof in Determining Existence of Privilege. Whenever a person claims the privilege against self-incrimination [see *Evid Code* § 940], that person has the burden of showing that the proffered evidence might tend to incriminate him or her. The proffered evidence is inadmissible unless it clearly appears to the court that it cannot possibly have a tendency to incriminate the person claiming the privilege [*Evid Code* § 404].



Strategic Point:

This provision appears to place the burden of proof on the opponent to establish only any tendency of the proffered evidence to incriminate the party asserting the privilege, after which the party propounding admission of the evidence must clearly establish that there is no possibility of a tendency toward the proscribed incrimination.



Cross Reference:

Discussion of privileges, see California Forms of Pleading and Practice, Ch. 191, Discovery: Privileges and Other Discovery Limitations (Matthew Bender).

11.83[4] Court Decides Burden of Proof in Determining Other Disputed Preliminary Facts. For determinations on disputed preliminary facts not governed by *Evid Code* § 403 or *Evid Code* § 404, the court must indicate which party has the burden of producing evidence [see *Evid Code* § 110] and the burden of proof [see *Evid Code* § 115] on the issue as implied by the rule of law under which the question arises. The court must determine the existence or nonexistence of the preliminary fact and admit or exclude the proffered evidence as required by the rule of law under which the question arises [*Evid Code* § 405(a)].



Warning:

If the preliminary fact is also a fact in issue, the jury must not be informed of the court's determination as to the existence or nonexistence of the preliminary fact [*Evid Code* § 405(b)(1)]. If the proffered evidence is admitted, the jury must not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact [*Evid Code* § 405(b)(2)].



Strategic Point:

In accordance with the prior paragraph, under *Evid Code* § 405, as distinguished from the determination of a preliminary fact under *Evid Code* § 403, the court alone decides the foundational question on a preliminary fact that is also a fact in issue.



Cross Reference:

Discussion of burden of proof, see Ch. 9, Burden of Proof and Persuasion.

11.83[5] Court Has Discretion to Hear Determination of Preliminary Fact Without Jury. The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury [*Evid Code* § 402]. Thus, the court has discretion to decide the admissibility of evidence within the presence of the jury [*People v. Mattison* (1971) 4 C3d 177, 187, 93 CR 185, 481 P2d 193 (admissibility of dying declaration); *Mize v. Atchison, T. & S.F. Ry.* (1975) 46 CA3d 436, 448, 120 CR 787 (preliminary facts in support of claim of lawyer-client and work-product privilege)].

Exception:

When there is a danger that hearing evidence of a preliminary fact will have a prejudicial effect on the jury, the court should conduct the hearing outside its presence [see *People ex rel. Dep't of Public Works v. Glen Arms Estate, Inc.* (1964) 230 CA2d 841, 863-864, 41 CR 303 (determination of whether statement constituted offer of compromise or was admission against interest)].

11.83[6] Court Generally Need Not Make Specific Finding. A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite to it, and a separate or formal finding is unnecessary unless required by statute [*Evid Code* § 402(c)].

11.83[7] Opposing Existence of Preliminary Fact at Trial. In a jury trial, the party disputing the existence of any preliminary fact may argue that the determination should be conducted out of the hearing of the jury because there is a danger that hearing evidence of the preliminary fact will have a prejudicial effect on the jury. Furthermore, the party may request that the court exercise its discretion to make the determination out of the hearing of the jury in the event that doing so may be advantageous for another reason.

The party who has disputed the existence of a preliminary fact may oppose a determination that the preliminary fact concerning relevance, personal knowledge, authenticity, or the statement or conduct of a person exists by:

- Contesting the validity of evidence, including the credibility of witnesses giving testimony, submitted at the hearing by the proponent of proffered evidence in support of the contention that a preliminary fact concerning relevance, personal knowledge, authenticity, or the statement or conduct of a person does exist.
- Presenting evidence tending to show that the preliminary fact does not exist.

Consider:

Although the court does not in effect determine finally whether the preliminary fact exists, but rather, whether the proponent's evidence of the existence of the preliminary fact establishes a *prima facie* showing that the preliminary fact exists [see *Evid Code* § 402, Assembly Comm Cmt].

- Arguing that the profferrer has failed to meet the burden of showing the existence of the preliminary fact.
- If the court admits the proffered evidence:
 - ☐ Arguing that either or both:
 - Insufficiency of the evidence of the preliminary fact or
 - Possible prejudice of subsequent withdrawal of proffered evidence in the event the court at trial determines that a jury could not reasonably find that the preliminary fact exists warrants an immediate ruling on admissibility, rather than a conditional ruling.

- ☐ Request that the court instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds the preliminary fact does exist.



Strategic Point:

The trial allows a second chance to disprove the existence of the preliminary fact, because the jury's determination is independent of the court's. Counsel in opposition to the admission of the proffered evidence should therefore contest at trial the existence of the preliminary fact and argue before the jury that it should find the fact does not exist. This is quite subtle and tricky, because you must argue that the conditional fact does not exist and then ask the jury to disregard evidence that was conditionally admitted.

- ☐ Request after the presentation of evidence that the court find that a jury could not reasonably find that the preliminary fact exists, following which the court must instruct the jury to disregard the proffered evidence.

The party who has disputed the existence of a privilege against self-incrimination may oppose a determination that the party claiming it is entitled to the privilege by arguing that the proffered evidence clearly does not have any tendency to incriminate the person claiming the privilege.

The party who has disputed the existence of a preliminary fact may oppose a determination that other types of preliminary facts exist by:

- Arguing that the proferor of the existence of the preliminary fact has the burdens of production and proof of the existence of the preliminary fact.
- Contesting the validity of the proponent's evidence submitted at the hearing by the proponent of proffered evidence in support of the contention that the particular preliminary fact.
- Presenting evidence tending to show that the preliminary fact does not exist.
- Arguing that the proferor has failed to meet the burden of showing the existence of the preliminary fact.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceExistence of PrivilegesEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceWitness QualificationsEvidenceRelevanceGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.84

11.84 Excluding Relevant Evidence That Is Too Prejudicial.

11.84[1] Exclusion Is at Court's Discretion. The trial court has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will [*Evid Code* § 352]:

- Necessitate undue consumption of time; or
- Create substantial danger of undue prejudice, confusing the issues, or misleading the jury.

Evid Code § 352 expresses a rule recognized by statute and in several California decisions [*Adkins v. Brett* (1920) 184 C 252, 258, 193 P 251 (the matter of excluding prejudicial evidence is largely one of discretion on the part of the trial judge); *Moody v. Peirano* (1906) 4 CA 411, 418, 88 P 380 (trial judge has wide discretion in determining whether evidence of a collateral nature is admissible)].

➤ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 352, see Cotchett, *California Courtroom Evidence*, 7.01 (Matthew Bender).

11.84[2] Excluding Relevant Evidence in Civil Cases.

11.84[2][a] Undue Consumption of Time. A trial judge has wide discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time [California Sch. Employees Ass'n v. Sunnyvale Elementary Sch. Dist. (1973) 36 CA3d 46, 70, 111 CR 433].

11.84[2][b] Confusion. Unless the probative value of offered evidence fairly outweighs the potential confusion caused by collateral issues, the trial court's determination against its admissibility will not be interfered with [Thompson v. County of Los Angeles (2006) 142 CA4th 154, 171-172, 47 CR3d 702].

11.84[2][c] Prejudice. The trial court may exclude relevant evidence when its probative value is substantially outweighed by its prejudicial effect [*Evid Code* § 352]. The prejudice applies to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual, and that has very little effect on the issues. In applying *Evid*

Code § 352, "prejudicial" is not synonymous with "damaging" [People v. Karis (1988) 46 C3d 612, 638, 250 CR 659, 758 P2d 1189].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceRelevanceConfusion, Prejudice & Waste of Time



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.85

11.85 Excluding Relevant Evidence Based on Privilege.

11.85[1] "Privilege" Defined. A privilege is an exclusionary rule based on public policy that exempts a person from testifying. The public policy is to protect personal relationships or other interests when the protection of confidentiality is considered to be more important than the need for the evidence.

► **Cross Reference:**

Discussion of purpose of privilege, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 10, *Statutory Privileges and Similar Doctrines* (Matthew Bender).

Except as otherwise provided by statute [see *Mitchell v. Superior Court* (1984) 37 C3d 268, 274, n3, 208 CR 152, 690 P2d 625] :

- No person has a privilege to refuse to be a witness [*Evid Code* § 911(a)].
- No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing [*Evid Code* § 911(b)].
- No person has a privilege that another will not be a witness or will not disclose any matter or will not produce any writing, object, or other thing [*Evid Code* § 911(c)]

► **Cross References:**

Discussion of privileges, see *California Trial Guide*, § 51.01 (Matthew Bender).

Discussion of differences between privileged communications and privileged information, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 10, § B (Matthew Bender).

Law Revision Commission comments and case authority interpreting the various privileges contained in the Evid Code, see Cotchett, *California Courtroom Evidence*, 18.01 -18.121 (Matthew Bender).

11.85[2] Applicable Privileges.

11.85[2][a] Privilege Against Self-Incrimination. A person has a privilege to refuse to disclose any matter that may tend to incriminate him or her [*Evid Code* § 940].

11.85[2][b] Lawyer-Client Privilege. With some exceptions, a client, whether or not a party, has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication between client and lawyer if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder of the privilege, or the person who was the lawyer at the time of the confidential communication. But that person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure [*Evid Code* § 954]. The holder of the privilege is the client if the client has no guardian or conservator; a guardian or conservator of the client if the client has a guardian or conservator; the personal representative of the client if the client is dead, including a personal representative appointed pursuant to *Prob C* § 12252; or a successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence [*Evid Code* § 953].

Exceptions:

There are specific statutory exceptions to the lawyer-client privilege:

- There is no privilege if the services of the lawyer were sought or obtained to enable or aid someone to commit or plan to commit a crime or fraud [*Evid Code* § 956].
- There is no 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 reasonably believes is likely to result in the death of, or substantial bodily harm to, a person [*Evid Code* § 956.5].

There are additional exceptions to this privilege [*see Evid Code* §§ 957-962].

➡ Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 953-962, *see* Cotchett, *California Courtroom Evidence*, 18.22 -18.32 (Matthew Bender).

Discussion of making and responding to objections based on lawyer-client privilege, *see California Trial Guide*, § 51.10 (Matthew Bender).

11.85[2][c] Privilege Not to Testify Against Spouse. Except as otherwise provided by statute, a married person has a privilege not to testify against his or her spouse in any proceeding [*Evid Code* § 970].

Exceptions:

There are specific statutory exceptions to the spousal privilege:

- A proceeding brought by or on behalf of one spouse against the other spouse [*Evid Code* § 972(a)].
- A proceeding to commit or otherwise place the spouse or the spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition [*Evid Code* § 972(b)].
- A proceeding brought by or on behalf of a spouse to establish his or her competence [*Evid Code* § 972(c)].

There are additional exceptions to this privilege [see *Evid Code* §§ 972(d)-(g), 973(b)].

◆ Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 970-973, see Cotchett, *California Courtroom Evidence*, 18.33 -18.36 (Matthew Bender).

Discussion of privilege not to testify against spouse, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 3, § E (Matthew Bender).

11.85[2][d] Confidential Marital Communications Privilege. Except as otherwise provided, a spouse (or his or her guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another person from disclosing, a communication if the spouse claims the privilege and the communication was made in confidence between that person and the other spouse while they were husband and wife [*Evid Code* § 980].

Exceptions:

There are specific statutory exceptions to the marital communications privilege:

- There is no privilege if the communication was made, in whole or in part, to enable or aid someone to commit or plan to commit a crime or a fraud [*Evid Code* § 981].
- There is no privilege in a proceeding to commit either spouse or otherwise place the spouse or his or her property, or both, under the control of another person because of his or her alleged mental or physical condition [*Evid Code* § 982].
- There is no privilege in a proceeding brought by or on behalf of either spouse to establish his or her competence [*Evid Code* § 983].

There are additional exceptions to this privilege [see *Evid Code* §§ 984-987].

◆ Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 980-987, see Cotchett, *California Courtroom Evidence*, 18.37 -18.44 (Matthew Bender).

Discussion of making and responding to objections based on the confidential marital communications privilege, see *California Trial Guide*, § 51.13 (Matthew Bender).

11.85[2][e] Physician-Patient Privilege. With specified exceptions, a patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication between patient and physician if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder of the privilege, or the person who was the physician at the time of the confidential communication. That person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure [*Evid Code* § 994]. The holder of the privilege is the patient when there is no guardian or conservator, a guardian or conservator of the patient if there is one, or the personal representative of the patient if the patient is dead [*Evid Code* § 993].

Exceptions:

There are specific statutory exceptions to the physician-patient privilege:

- There is no privilege as to a communication relevant to an issue concerning the condition of the patient if the issue has been tendered by the patient, any party claiming through or under the patient, any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party, or the plaintiff in an action brought under CCP § 376 or 377 for damages for the injury or death of the patient [*Evid Code* § 996].

- There is no privilege if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort [*Evid Code* § 997].

There are additional exceptions to this privilege [*see Evid Code* §§ 998-1007].

Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 993-1007, see Cotchett, *California Courtroom Evidence*, 18.48 -18.62 (Matthew Bender).

Discussion of making and responding to objections based on physician-patient privilege, see *California Trial Guide*, § 51.11 (Matthew Bender).

11.85[2][f] Psychotherapist-Patient Privilege. With specified exceptions, a patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder of the privilege, or the person who was the psychotherapist at the time of the confidential communication, but the person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure [*Evid Code* § 1014]. The holder of the privilege is the patient when he has no guardian or conservator; a guardian or conservator of the patient if there is one, or the personal representative of the patient if the patient is dead [*Evid Code* § 1013].

Exceptions:

There are specific statutory exceptions to the psychotherapist-patient privilege:

- There is no privilege as to a communication relevant to an issue concerning the mental or emotional condition of the patient if that issue has been tendered by the patient, any party claiming through or under the patient, any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party, or the plaintiff in an action brought under CCP § 376 or 377 for damages for the injury or death of the patient [*Evid Code* § 1016].

- There is no privilege if the services of the psychotherapist were sought or obtained to enable or aid someone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort [*Evid Code* § 1018].

There are additional exceptions to this privilege [*see Evid Code* §§ 1019-1027].

Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 1013-1027, see Cotchett, *California Courtroom Evidence*, 18.67 -18.82 (Matthew Bender).

Discussion of making and responding to objections based on psychotherapist-patient privilege, see *California Trial Guide*, § 51.12 (Matthew Bender).

11.85[2][g] Clergy-Penitent Privilege. Subject to *Evid Code* § 912 regarding waivers of privileges, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another person from disclosing, a penitential communication if he or she claims the privilege [*Evid Code* § 1033]. A member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege [*Evid Code* § 1034].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 1033, 1034, see Cotchett, *California Courtroom Evidence*, 18.87, 18.88 (Matthew Bender).

Discussion of making and responding to objections based on clergy-penitent privilege, see *California Trial Guide*, § 51.14 (Matthew Bender).

11.85[2][h] Sexual Assault Victim-Counselor Privilege. A victim of a sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication between the victim and a sexual assault counselor if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder of the privilege, or the person who was the sexual assault counselor at the time of the confidential communication, but that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure [*Evid Code* § 1035.8]. The holder of this privilege is the victim when that person has no guardian or conservator, a guardian or conservator of the victim when the victim has a guardian or conservator, or the personal representative of the victim if the victim is dead [*Evid Code* § 1035.6].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 1035.6, 1035.8, see Cotchett, *California Courtroom Evidence*, 18.92, 18.93 (Matthew Bender).

11.85[2][i] Domestic Violence Victim-Counselor Privilege. A victim of domestic violence, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another person from disclosing, a confidential communication between the victim and a domestic violence counselor if the privilege is claimed by the holder of the privilege, a person who is authorized to claim the privilege by the holder of the privilege, or the person who was the domestic violence counselor at the time of the confidential communication [*Evid Code* § 1037.5]. However, that person may not claim the privilege if there is no holder of the privilege in existence or if he or she is otherwise instructed by a person authorized to permit disclosure. The holder of the privilege is the victim when he or she has no guardian or conservator or a guardian or conservator of the victim if the victim has one [*Evid Code* § 1037.4].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 1037.4, 1037.5, see Cotchett, *California Courtroom Evidence*, 18.100, 18.101 (Matthew Bender).

11.85[3] Waiving Privilege. Generally, a person's right to claim the lawyer-client privilege, confidential marital communications privilege, physician-patient privilege, psychotherapist-patient privilege, penitent privilege, clergy privilege, sexual assault counselor-victim privilege, or domestic violence counselor-victim privilege is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, disclosed a significant part of the communication or consented to disclosure made by another person. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege [*Evid Code* § 912(a)].

Where two or more people are joint holders of a lawyer-client privilege, physician-patient privilege, psychotherapist-patient privilege, sexual assault counselor-victim privilege, or domestic violence counselor-victim privilege, a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege. In the case of the privilege for confidential marital communications, a waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to claim the privilege [*Evid Code* § 912(b)].

A disclosure that is itself privileged is not a waiver of any privilege [*Evid Code* § 912(c)].

A disclosure in confidence of a communication that is protected by the lawyer-client privilege, physician-patient privilege, psychotherapist-patient privilege, sexual assault counselor-victim privilege, or domestic violence counselor-victim privilege, when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault counselor, or domestic violence counselor was consulted, is not a waiver of the privilege [*Evid Code* § 912(d)].

Exception:

The statutory language of *Evid Code* § 912 indicates that it requires looking at the words and conduct of the holder of the privilege to determine whether a waiver has occurred. Waiver does not include accidental, inadvertent disclosure of privileged information by an attorney [*State Comp. Ins. Fund v WPS, Inc.* (1999) 70 CA4th 644, 82 CR2d 799]. The privilege extends to communications that are intended to be confidential if they are made to attorneys, family members, business associates, or agents of the party or attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant [*California Oak Foundation v. County of Tehama* (2009) 174 CA4th 1217, 1222-1223, 94 CR3d 902] .

 Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 912, see Cotchett, *California Courtroom Evidence*, 18.08 (Matthew Bender).

Foundations for establishing waivers, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 10, § D (Matthew Bender).

11.85[4] Commenting on or Inferences From Exercise of Privilege. If in a proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption will arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding [*Evid Code* § 913(a)]. The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, instructs the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding [*Evid Code* § 913(b)].

 Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 913, see Cotchett, *California Courtroom Evidence*, 18.09 (Matthew Bender).

Discussion of commenting on assertion of privilege, see *California Trial Guide*, § 51.01[6][g] (Matthew Bender).

11.85[5] Presumption That Certain Communications Are Confidential. When a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault victim-counselor, or domestic violence victim-counselor relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential [*Evid Code* § 917(a)]. A communication between persons in such a relationship does not lose its privileged character just because it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication [*Evid Code* § 917(b)].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 917, see Cotchett, *California Courtroom Evidence*, 18.13 (Matthew Bender).

Legal Topics:

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

EvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesClergy CommunicationsGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesMarital PrivilegesGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceExistence of Privileges



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11.86 Excluding Evidence of Character, Habit, and Custom.

Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his or her character [*Evid Code § 1100*].

With specified exceptions, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion [*Evid Code § 1101(a)*]. However, *Evid Code § 1101* does not prohibit the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act [*Evid Code § 1101(b)*]. Nothing in *Evid Code § 1101* affects the admissibility of evidence offered to support or attack the credibility of a witness [*Evid Code § 1101(c)*].

Except as provided in *Evid Code §§ 1102* and *1103*, evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his or her conduct on a specified occasion [*Evid Code § 1104*].

Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom [*Evid Code § 1105*].

Relevant character evidence is admissible in civil cases, except in those situations where it is offered to prove conduct, or quality of conduct, on a specific occasion, and evidence of a person's character or a trait of his or her character is relevant when offered on the issue of his or her credibility as a witness, or as circumstantial evidence of his conduct in conformity with that character or trait of character, or when his or her character or a trait of his or her character is an ultimate fact in dispute in the action [*Carr v. Pacific Tel. Co.* (1972) 26 CA3d 537, 103 CR 120] .



Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code §§ 1100-1105*, see Cotchett, *California Courtroom Evidence*, 19.01 -19.06 (Matthew Bender).

Discussion of evidence of character, habit, or custom, see *California Trial Guide*, §§ 51.01 -51.03 (Matthew Bender); or Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 6, §§ B, C (Matthew Bender).

Discussion of making and responding to objections regarding use of evidence of character, habit, or custom, see *California Trial Guide*, §§ 51.10-51.11 (Matthew Bender).

Legal Topics:

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

EvidenceRelevanceCharacter EvidenceEvidenceRelevanceRoutine Practices



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11.87 Excluding Evidence Related to Mediation.

Subject to specified exceptions, no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence will not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given [*Evid Code § 1119(a)*; see also *CCP §§ 1775.10, 1775.12*]. No writing that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing will not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given [*Evid Code § 1119(b)*; see, e.g., *Wimsatt v. Superior Court* (2007) 152 CA4th 137, 150-158, 61 CR3d 200]. All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation remain confidential [*Evid Code § 1119(c)*]. Communications between a party and a party's attorney during a mediation are not protected under *Evid Code § 1119* [*Porter v. Wyner* (2010) 183 CA4th 949, 959-965, 107 CR3d 653 ; *Cassel v. Superior Court* (2009) 179 CA4th 152, 158-163, 101 CR3d 501] .

Exceptions:

Otherwise admissible evidence or subject to discovery outside of a mediation or a mediation consultation does not become inadmissible or protected from disclosure just because of its introduction or use in a mediation or a mediation consultation [*Evid Code § 1120(a)*]. Also, the Evidence Code provisions regarding evidence related to mediation do not limit any of the following:

- The admissibility of an agreement to mediate a dispute [*Evid Code § 1120(b)(1)*].
- The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action [*Evid Code § 1120(b)(2)*].
- Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute [*Evid Code § 1120(b)(3)*].

Exceptions:

A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made

inadmissible or protected from disclosure if the agreement is signed by the settling parties and any of the following conditions are satisfied [*Evid Code* § 1123; see, e.g., *Rael v. Davis* (2008) 166 CA4th 1608, 1619-1620, 83 CR3d 745] :

- The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- The agreement provides that it is enforceable or binding or words to that effect.
- All parties to the agreement expressly agree to its disclosure.
- The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

Examples--Admissible Evidence:

In a mediation in a medical malpractice action, the defendant doctor consented to settle the case for \$125,000. The plaintiffs unconditionally agreed. When the doctor was told that the plaintiffs had accepted the offer, the doctor withdrew the offer and left the mediation. In a later trial for breach of the settlement agreement, the doctor could not rely on *Evid Code* § 1119 to keep the mediation out of evidence [*Simmons v. Ghaderi* (2006) 143 CA4th 410, 420-422, 49 CR3d 342].

When a retired judge was appointed by a former employee's representative and an employer's representative to sit as one of three members on an employer's review board, which at the employee's request held a hearing on the propriety of the employee's termination and made a recommendation to the employer as to whether the termination decision should be upheld, the hearing was not a mediation because the board did not assist the employee and the employer in reaching a mutually agreeable, binding decision. Hence, the board member could not claim a privilege under *Evid Code* § 1119 in refusing to disclose information about the hearing through discovery in subsequent litigation to which the board member was not a party [*Saeta v. Superior Court* (2004) 117 CA4th 261, 268-269, 11 CR3d 610].

Example--Inadmissible Evidence:

Because a writing constitutes evidence, any writing that discloses what has been characterized as "the substance of mediation"--negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute--qualifies as evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation, and is undiscoverable under *Evid Code* § 1119(a) [*Rojas v Superior Court* (2004) 33 C4th 407, 416-417, 15 CR3d 643, 92 P3d 260].

Additional Evidence Code provisions cover evidence related to mediation [see *Evid Code* §§ 1119-1128], as well as provisions of the Code of Civil Procedure [see *CCP* §§ 1775.10, 1775.12].

Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 1119-1128, see Cotchett, *California Courtroom Evidence*, 20.05 -20.14 (Matthew Bender).

Discussion of evidence of related to mediation, see *California Trial Guide*, § 50.34 (Matthew Bender).

Legal Topics:

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



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11.88 Exclusion of Evidence of Subsequent Remedial Measures.

When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of those subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event [*Evid Code § 1151*]. The policy of encouraging safety measures is the primary reason for the rule providing, in an action based on negligence or culpable conduct, for the exclusion of evidence of remedial measures taken after the occurrence of the event leading to the action [*Sanchez v. Bagues & Sons Mortuaries* (1969) 271 CA2d 188, 76 CR 372] .

Exception--Impeachment Purposes:

Although evidence of precautions taken and repairs made after the happening of an accident is not admissible to show a negligent condition at the time of the accident, that evidence may be admitted to impeach the testimony of a witness who has testified that the condition prior to the accident was not a dangerous one [*Love v. Wolf* (1967) 249 CA2d 822, 58 CR 42] . This principle has been extended to preclude "remedial" measures taken to alter the language of contracts, such as insurance policies [see *McKee v. State Farm Fire & Cas. Co.* (1983) 145 CA3d 772, 778, 193 CR 745] .

Exception--Showing Control and Duty:

In an action by a subcontractor's employee against the general contractor to recover for injuries sustained in a fall while pouring concrete, though evidence that after plaintiff's injury defendant's carpenters installed handrails at the place of the accident was not admissible to prove defendant's negligence, evidence was properly limited and received on the issue of control of the premises and as to whose duty it was under the contract to take such safety measures [*Morehouse v. Taubman Co.* (1970) 5 CA3d 548, 85 CR 308] .

Exception--Proving Strict Liability:

In an action for damages for personal injuries received by plaintiff in an accident allegedly caused by the breaking of a defective aluminum gearbox in the vehicle in which he was riding, tried on a theory of strict liability in tort, the trial court did not err in admitting evidence that, after the accident, defendant manufacturer of the vehicle had ceased to use aluminum in manufacturing its gearboxes and had changed to iron, which plaintiff's experts testified was less likely to fail. *Evid Code § 1151* excludes evidence of subsequent remedial or precautionary measures only when such evidence is offered to prove negligence or culpable conduct, and a plaintiff may recover on a strict liability theory if he or she establishes that a

product was defective, and need not show that the manufacturer breached a duty of due care. The public policy reason for the rule set forth in the statute, of encouraging persons to make repairs after an accident, does not apply in the products liability field, because it is in the economic self-interest of a manufacturer to improve and repair defective products [*Ault v. International Harvester Co. (1974) 13 C3d 113, 117 CR 812, 528 P2d 1148*] .

Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code § 1151*, see Cotchett, *California Courtroom Evidence*, 20.16 (Matthew Bender).

Foundational elements for subsequent remedial measures, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 10, § L (Matthew Bender).

Legal Topics:

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

EvidenceRelevanceSubsequent Remedial MeasuresEvidenceTestimonyCredibilityImpeachmentGeneral OverviewTortsStrict LiabilityGeneral Overview



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11.89 Exclusion of Evidence of Settlement Negotiations and Offers to Compromise.

Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it [*Evid Code § 1152(a)*].

If evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of *Ins Code § 790.03(h)*, at the request of the party against whom the evidence is admitted or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage is also admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of *Ins Code § 790.03(h)*, evidence of settlement offers will not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal [*Evid Code § 1152(b)*].

Exception:

Evid Code § 1152 does not affect the admissibility of evidence of any of the following:

- Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim [*Evid Code § 1152(c)(1)*].
- A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty [*Evid Code § 1152(c)(2)*].

Evidence that a person accepted, or offered or promised to accept, a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it [*Evid Code § 1154*]. Offers to compromise a claim, as well as conduct and statements occurring in the course of negotiations for the settlement of a claim, are inadmissible to prove either the validity or invalidity of the claim; the exclusion of that evidence is based on the public policy in favor of the settlement of disputes without litigation [*Zhou v. Unisource Worldwide, Inc. (2007) 157 CA4th 1471, 1475, 69 CR3d 273*] .

 Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 1152-1154, see Cotchett, *California Courtroom Evidence*, 20.17 -20.22 (Matthew Bender).

Foundational elements for settlement negotiations and offers to compromise, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 10, § M (Matthew Bender).

Discussion of mediation privilege and *Evid Code* § 1119 and *CCP* §§ 1775.10, 1775.12, see 11.87.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevanceCompromise & Settlement Negotiations



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11.90 Exclusion of Evidence of Liability Insurance.

Evidence that a person was, at the time harm was suffered by another person, insured against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing [*Evid Code § 1155*].

Exceptions:

- In a personal injury action, evidence of a statement about insurance coverage can be admissible when the probative value of the evidence outweighs the prejudicial effect of the statement, such as with an admission of fault [*Menefee v. Williams* (1968) 259 CA2d 56, 62, 66 CR 108] .

- In an action against an insured defendant to recover for personal injuries sustained in an automobile accident, answers by the plaintiff in response to questioning, indicating that the defendant was insured, did not constitute error when the answers were unexpected, unresponsive, or incidental and the court properly admonished the jury [*Hart v. Wielt* (1970) 4 CA3d 224, 230-231, 84 CR 220] .

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code § 1155*, see Cotchett, *California Courtroom Evidence*, 20.23 (Matthew Bender).

Discussion of evidence related to liability insurance, see *California Trial Guide*, § 50.32 (Matthew Bender).

Legal Topics:

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



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11.91 Other Evidence Affected or Excluded by Other Policy Considerations.

Additional types of evidence are affected or excluded by extrinsic policies:

- Records of medical or dental study of in-hospital staff committee [*Evid Code § 1156*].
- Medical or psychiatric studies undertaken by quality assurance committee [*Evid Code § 1156.1*].
- Exemption from discovery of proceedings and records of specified committees and bodies [*Evid Code § 1157*].
- Proceedings or records of nonprofit medical care foundation or professional standards review organization [*Evid Code § 1157.5*].
- Proceedings and records of mental health quality assurance committees [*Evid Code § 1157.6*].
- Proceedings and records of committee reporting on specialty health care services [*Evid Code § 1157.7*].
- Inspection and copying of records upon patient's written authorization [*Evid Code § 1158*].
- Admissibility of live animal experimentation evidence in motor vehicle product liability action [*Evid Code § 1159*].
- Statement of benevolence [*Evid Code § 1160*].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code §§ 1156-1160*, see Cotchett, *California Courtroom Evidence*, 20.24 -20.32 (Matthew Bender).

- State and federal tax returns [*see Firestone v. Hoffman* (2006) 140 CA4th 1408, 1419-1420, 45

CR3d 534].

Legal Topics:

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

EvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral
OverviewEvidenceRelevanceGeneral Overview



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11.92 Using Expert Testimony Based on New Scientific Technique.

The *Kelly-Frye* rule governs the admissibility of expert testimony based on scientific tests. The *Kelly-Frye* rule requires the proponent of expert testimony based on the application of a new scientific technique to meet three requirements [*People v. Venegas* (1998) 18 C4th 47, 76, 74 CR2d 262, 954 P2d 525 ; *People v. Wash* (1993) 6 C4th 215, 242, 24 CR2d 421, 861 P2d 1107] :

1. The technique or method is sufficiently established to have gained general acceptance in its field;
2. Testimony about the technique and its application is offered by a properly qualified expert; and
3. Correct scientific procedures have been used in the particular case.



Warning:

Kelly-Frye applies to California state courts only. The U.S. Supreme Court rejected the *Frye* rule and held that the admissibility of scientific evidence in federal court is determined by the more liberal standard contained in Fed R Evid 702 [*Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 US 579, 594-595, 113 S Ct 2786, 125 L Ed2d 469] .



Cross References:

Discussion of introducing scientific evidence or psychological tests and syndromes, see Cotchett, *California Courtroom Evidence*, 27.09, 25.10 (Matthew Bender).

Discussion of introducing documentary evidence as substantive evidence, see Cotchett, *California Courtroom Evidence*, 26.01 et seq. (Matthew Bender).

Discussion of validating scientific evidence, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 4, § N (Matthew Bender).

Legal Topics:

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

EvidenceTestimonyExpertsKelly-Frye Process



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11.93 CHECKLIST: Admitting and Objecting to Opinion Evidence.

☐ Use opinion testimony by lay witnesses.

Authority:

Evid Code § 800(a)

Discussion:

See 11.95

☐ Use opinion testimony by expert witnesses.

Authority:

Evid Code § 801(a)

Discussion:

See 11.96

☐ Have witness state basis of opinion.

Authority:

Evid Code § 802

Discussion:

See 11.97

☐ Court may exclude testimony where opinion is based on improper matter.

Authority:

Evid Code § 803

Discussion:

See 11.98

- ☐ Use opinion based on opinion or statement of another person.

Authority:

Evid Code § 804(a)

Discussion:

See 11.99

- ☐ Use opinion on ultimate issue.

Authority:

Evid Code § 805

Discussion:

See 11.100

Legal Topics:

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

EvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyLay WitnessesOpinion TestimonyGeneral Overview



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11.94 Options and Strategies.

In general, counsel should recognize that experts are experts for a reason. They know their field. Other than pointing to inconsistencies in their testimony, or supplying contradictory expert opinion through other witnesses, it is doubtful that an attorney under most circumstances can, through cross-examination, "defeat" an expert. Limiting the scope of an expert's testimony to truly admissible expert opinion, to expert opinion that is based upon the established facts, to expert opinion that does not violate rules (*e.g.*, *Kelly-Frye* test) or to opinion that does not opine on the ultimate facts to be determined by the trier of fact, may be the most effective way (if not only effective way) to counter expert testimony. Counsel should resist the attempt to engage in a lengthy, hortatory exegesis on some arcane, esoteric point that is the expert's lifelong pursuit. That exercise may well lead the jury to believe that both counsel and the expert are "not worth the time of day."

In general, jurors are more likely to credit facts than opinions. Thus, even if a witness may offer testimony in the form of an opinion, it is important to have the witness testify as to all the reasons why that opinion is entitled to significant weight. That testimony can relate to the witness's credibility, perception, training, experience, or other factors that make the opinion worthy of weight.

Legal Topics:

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

EvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsKelly-Frye Process



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11.95 Opinion Testimony by Lay Witness.

If a witness is not testifying as an expert, his or her testimony in the form of an opinion is limited to an opinion that is permitted by law, including but not limited to an opinion that is:

- Rationally based on the perception of the witness [*Evid Code* § 800(a)].
- Helpful to a clear understanding of his or her testimony [*Evid Code* § 800(b)].

Nonexpert opinions that are speculative and conjectural do not constitute substantial evidence [*Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 255 CA2d 40, 48, 62 CR 778] .

The trial judge has wide discretion to admit or reject opinion evidence, and an appellate court has no power to interfere with the ruling unless there is an obvious and pronounced abuse of discretion on the judge's part [*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp* (2007) 157 CA4th 835, 876-877, 68 CR3d 828] .

Example:

An owner of literary property may properly testify as to its value even if not an expert in such matters [*Donahue v. United Artists Corp.* (1969) 2 CA3d 794, 803, 83 CR 131] . An owner of property is allowed to estimate its worth whether or not the owner has any special knowledge of such values [*Windeler v. Scheers Jewelers* (1970) 8 CA3d 844, 853, 88 CR 39] .

➡ Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 800, see Cotchett, *California Courtroom Evidence*, 17.01 (Matthew Bender).

Foundational elements for lay opinion testimony and form of objections and responses, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 8, § B (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceTestimonyLay WitnessesOpinion TestimonyGeneral
Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.96

11.96 Opinion Testimony by Expert Witness.

If a witness is testifying as an expert, his or her testimony in the form of an opinion is limited to an opinion that is:

- Related to a subject that is sufficiently beyond common experience so that the opinion of an expert would assist the trier of fact [*Evid Code § 801(a)*].
- Based on matter (including his or her special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him or her at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied on by an expert in forming an opinion on the subject to which the testimony relates, unless the expert is precluded from using that matter as a basis for the opinion [*Evid Code § 801(b)*].

The reliable matter on which *Evid Code § 801* requires an expert's opinion to be based varies with each subject. The word "matter" is used to encompass facts, data, and other things within a witness's knowledge, experience, and other tangibles on which an opinion may be based. Thus, every conceivable basis for an opinion is included within this term [*People v. Bowker (1988) 203 CA3d 385, 390, 249 CR 886*] .

Under *Evid Code § 801(b)*, the matter on which an expert's opinion is based must meet each of three separate but related tests [*County Sanitation Dist. v. Watson Land Co. (1993) 17 CA4th 1268, 22 CR2d 117*] :

1. The matter must be perceived by or personally known to the witness or must be made known to the witness at or before the hearing at which the opinion is expressed.
2. Without regard to the means by which the expert becomes familiar with the matter on which the opinion is based, the matter relied on by the expert in forming the opinion must be of a type that reasonably may be relied on by experts in forming an opinion on the subject to which the testimony relates.
3. The expert may not base his or her opinion on any matter that is declared by law to be an improper basis for an opinion.

The value of an expert's opinion depends on the truth of the assumed facts. Expert testimony is competent evidence in areas in which the subject is sufficiently beyond common experience so that the opinion of an expert would assist the trier of fact [*People v. Fahy* (1970) 13 CA3d 808, 92 CR 451] .

An expert's opinion made on an assumption of fact of which there is no direct evidence and as to the probability of the truth of which circumstantial evidence has created a strong counterweight, is of little value [*Cabral v. Ralphs Grocery Co.* (2009) 179 CA4th 1, 19-20, 101 CR3d 474] . Although experts may properly rely on hearsay in forming their opinions, they may not relate the out-of-court statements of another expert as independent proof of the fact [*Garibay v. Hemmat* (2008) 161 CA4th 735, 743, 74 CR3d 715] . An expert's opinion that does not rest on relevant facts or that assumes an incorrect legal theory cannot constitute substantial evidence [*Smith v. Workers' Comp. Appeals Bd.* (1969) 71 C2d 588, 78 CR 718, 455 P2d 822] .



Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 801, see Cotchett, *California Courtroom Evidence*, 17.02 (Matthew Bender).

Foundational elements for expert opinion and forms of objections and responses, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 8, § C (Matthew Bender).

Legal Topics:

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

Evidence Testimony Experts Admissibility



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11.97 Statement of Basis of Opinion.

A witness testifying in the form of an opinion may state on direct examination the reasons for the opinion and the matter (including, in the case of an expert, his or her special knowledge, skill, experience, training, and education) on which it is based, unless the witness is precluded by law from using such reasons or matter as a basis for his or her opinion. The court may require that a witness before testifying in the form of an opinion be first examined concerning the matter on which his or her opinion is based [*Evid Code* § 802].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 802, see Cotchett, *California Courtroom Evidence*, 17.03 (Matthew Bender).

Legal Topics:

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



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11.98 Opinion Based on Improper Matter.

The court may, and on objection must, exclude testimony in the form of an opinion based in whole or in significant part on matter that is not a proper basis for the opinion. In that case, the witness may, if there is a proper basis for the opinion, state his or her opinion after excluding from consideration the matter determined to be improper [*Evid Code* § 803].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 803, see Cotchett, *California Courtroom Evidence*, 17.04 (Matthew Bender).

Legal Topics:

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



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11.99 Opinion Based on Opinion or Statement of Another Person.

If a witness testifying as an expert testifies that his or her opinion is based in whole or in part on the opinion or statement of another person, that other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement [*Evid Code § 804(a)*].

This provision is not applicable if the person on whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of *Evid Code § 776(d)*, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement on which the expert witness relied [*Evid Code § 804(b)*]. However, nothing in *Evid Code § 804* makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person [*Evid Code § 804(c)*], and an expert opinion otherwise admissible is not made inadmissible by *Evid Code § 804* because it is based on the opinion or statement of a person who is unavailable for examination [*Evid Code § 804(d)*].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code § 804*, see Cotchett, *California Courtroom Evidence*, 17.05 (Matthew Bender).

Legal Topics:

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

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11.100 Opinion on Ultimate Issue.

Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact [*Evid Code* § 805; *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 CA4th 272, 294, 99 CR3d 225]. The admissibility of the opinions of expert witnesses on an ultimate fact in a case depends on the nature of the issue and the circumstances. This determination involves an exercise of judicial discretion [*People v. Loving* (1968) 258 CA2d 84, 65 CR 425].

Example--Admissible Opinion:

In an action by an electrical subcontractor to recover from the general contractor for "extras" performed outside the scope of the written contract, although it was improper for the plaintiff to ask an expert hypothetical questions framed in terms of which of the parties "should pay" for certain types of work, the questions were properly limited by the court to the existence of a "custom and usage" in the electrical contracting business [*Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.* (1969) 1 C3d 266, 81 CR 849, 461 P2d 33].

Example--Inadmissible Opinion:

The trial court erred in allowing a police officer to testify that his expert opinion was that the defendant was a gang member and that because one gang member in the vehicle of which defendant was believed to have been an occupant possessed a gun, defendant knew of the gun and constructively possessed it. This testimony was not about the culture and habit of gangs, but rather was opinion testimony about the subjective knowledge and intent of each occupant of the vehicle [*People v. Killebrew* (2002) 103 CA4th 644, 126 CR 2d 876].

➡ Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 805, see Cotchett, *California Courtroom Evidence*, 17.06 (Matthew Bender).

Legal Topics:

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



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.101

11.101 CHECKLIST: Admitting and Objecting to Hearsay Evidence.

☐ Determine if evidence constitutes hearsay.

Authority:

Evid Code § 1200

Discussion:

See 11.103[1]

☐ If evidence constitutes hearsay, determine if it can be admitted for purpose other than truth of matter stated.

Authority:

Evid Code § 1200

Discussion:

See 11.103[2]

☐ Determine if an exception to the hearsay rule applies.

Authority:

Evid Code §§ 1220-1380

Discussion:

See 11.104

☐ If hearsay exception applies, seek to have evidence admitted.

Authority:

Evid Code § 1201

Discussion:

See 11.104

- ☐ If appropriate, object to introduction of evidence as inadmissible hearsay.

Authority:

Hyatt v. Sierra Boat Co. (1978) 79 CA3d 325, 337, 145 CR 47

Discussion:

See 11.103[4]

- ☐ If appropriate, respond to objection.

Authority:

People v. Sanders (1995) 11 C4th 475, 511-512, 46 CR2d 751, 905 P2d 420

Discussion:

See 11.103[6]

Legal Topics:

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

EvidenceHearsayGeneral OverviewEvidenceHearsayExceptionsGeneral OverviewEvidenceProcedural
ConsiderationsObjections & Offers of ProofObjections



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11.102 Options and Strategies.

Much has been written, extensively reported, and well examined on what is hearsay. If counsel is seeking to admit evidence that is otherwise hearsay, careful attention to the real purpose of the testimony may reveal a purpose other than the "truth of the matter stated" which avoids the hearsay rule, or a purpose that fits within an exception to the rule. For counsel seeking to exclude otherwise hearsay testimony, purposes often espoused by proffering counsel generally ignore the fact that if the statement is not offered for its truth, it is irrelevant.

Hearsay is one of those rules, like the rule against perpetuities, that generates much confusion. Whenever you are introducing evidence about an out of court statement, whether a document or a prior oral statement, you must consider how to overcome a hearsay objection. Documents frequently contain multiple layers of hearsay, so the analysis sometimes must proceed on a sentence by sentence basis. If part of a document is hearsay and part is not, you must be prepared to offer only the non-hearsay portion, such as by redacting the document. As a result, you may need to have multiple versions of the document available for use at trial, with different portions redacted, to reflect different possible rulings from the court on the hearsay issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayGeneral OverviewEvidenceHearsayHearsay Within Hearsay



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11.103 Applying Hearsay Rule.

11.103[1] "Hearsay" Defined. Under the hearsay rule, "hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at a hearing, which is offered to prove the truth of the matter stated [*Evid Code § 1200(a)*]. A "statement" can be an oral or written expression [*see Evid Code § 225*].

➤ Cross Reference:

Law Revision Commission comments and case authority interpreting the hearsay rule and its exceptions, see Cotchett, *California Courtroom Evidence*, 21.01 et seq. (Matthew Bender).

Except as provided by law, hearsay evidence is inadmissible [*Evid Code § 1200(b)*]. The main objection to the use of hearsay evidence is that the person who made the statement is not subject to cross-examination [*Evid Code § 1200*, Legislative Comm Cmt].

The statutory and judicial hearsay exceptions allow hearsay's introduction based on circumstances showing inherent trustworthiness and reliability [*see In re Cindy L. (1997) 17 C4th 15, 27-28, 69 CR2d 803, 947 P2d 1340*]. However, evidence of a statement is inadmissible if the statement was made under circumstances that indicate its lack of trustworthiness [*Evid Code § 1252*].

➤ Cross Reference:

Discussion of admissibility of hearsay under exceptions, see 11.104.

11.103[2] Admitting Hearsay for Other Purposes. An out-of-court statement (which would normally be hearsay) is not hearsay if it is offered for some purpose other than to prove the truth of the matter stated [*Evid Code § 1200*, Legislative Comm Cmt].

Example:

A statement made about shareholder status out of court was admitted to prove that the declarant made the statement, not for the truth of the statement itself [*Simon v. Steelman (1990) 224 CA3d 1002, 1006, 274 CR 218*].

11.103[3] Effect of Multiple Hearsay. A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of that statement is hearsay evidence if the hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule [*Evid Code § 1201*].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code § 1201*, see Cotchett, *California Courtroom Evidence*, 21.02 (Matthew Bender).

11.103[4] Objecting to Hearsay. There are several ways in which to make a hearsay objection to the admissibility or foundation of evidence, including:

- A motion in limine made outside the presence of the jury [*Hyatt v. Sierra Boat Co. (1978) 79 CA3d 325, 337, 145 CR 47*] .
- An objection before a statement that calls for hearsay.
- An objection after a statement that contains hearsay.

➡ **Cross Reference:**

Discussion of objecting to hearsay, with sample scripts of objections, see *California Trial Guide*, § 40.02 (Matthew Bender).

11.103[5] Waiving Hearsay Objection. In civil proceedings, the court in its discretion may admit hearsay evidence if it is trustworthy and there is sufficient evidence of reliability [*People v. Sword (1994) 29 CA4th 614, 635, 34 CR2d 810*] . Incompetent hearsay admitted without objection is sufficient to sustain a finding or judgment. When a hearsay objection is waived at trial and on appeal, the hearsay can be direct evidence of the fact it is offered to prove [*Gallagher v. Connell (2004) 123 CA4th 1260, 1266, 20 CR3d 673*] .

11.103[6] Responding to Hearsay Objection. There are several ways in which to respond to an objection that evidence offered is inadmissible hearsay:

- State that the evidence is not hearsay, such as if it is not offered for the truth of the statement made [*People v. Sanders (1995) 11 C4th 475, 511-512, 46 CR2d 751, 905 P2d 420*] .
- Request that opposing counsel stipulate that the evidence is admissible under a hearsay exception.
- State that the foundation for the hearsay was already laid.
- Offer to lay the foundation for the appropriate hearsay exception.

➡ **Cross Reference:**

Discussion of responding to hearsay objection, with sample scripts of responses, see *California Trial Guide*, § 40.03 (Matthew Bender).

11.103[7] Evidence Regarding Credibility of Hearsay Declarant Is Not Inadmissible. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by the declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he or she is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing [*Evid Code § 1202*]. For purposes of *Evid Code § 1202*, the deponent of a

deposition taken in the action in which it is offered is deemed to be a hearsay declarant.

 Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1202, see Cotchett, *California Courtroom Evidence*, 21.03 (Matthew Bender).

11.103[8] Cross-Examination of Hearsay Declarant Is Allowed in Some Circumstances. The declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement [*Evid Code* § 1203(a)]. However, *Evid Code* § 1203 does not apply in the following circumstances:

- If the declarant is (1) a party, (2) a person identified with a party within the meaning of *Evid Code* § 776(d), or (3) a witness who has testified in the action concerning the subject matter of the statement [*Evid Code* § 1203(b)]; or
- If the statement is one described in Article 1, Article 3, or Article 10 of Chapter 2 of Division 10 of the Evidence Code [*Evid Code* § 1203(c)].

A statement that is otherwise admissible as hearsay evidence is not made inadmissible by § 1203 because the declarant who made the statement is unavailable for examination [*Evid Code* § 1203(d)].

 Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1203, see Cotchett, *California Courtroom Evidence*, 21.04 (Matthew Bender).

Discussion of the hearsay rule and its exceptions, see Imwinkelried et al., *California Evidentiary Foundations*, Ch. 9, *The Hearsay Rule and Its Exceptions* (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionEvidenceHearsayGeneral
OverviewEvidenceHearsayExemptionsStatements by Party OpponentsGeneral OverviewEvidenceHearsayHearsay
Within HearsayEvidenceHearsayRule ComponentsTruth of Matter Asserted



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11.104 Exceptions to Hearsay Rule.

11.104[1] Party Admissions. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which the declarant is a party in either an individual or representative capacity, regardless of whether the statement was made in the individual or representative capacity [*Evid Code* § 1220].

Example:

In an action for wrongful death of an infant by drowning in a swimming pool, the trial court did not err in sustaining an objection to a statement made by one of the defendants that could not reasonably be construed as an admission of liability, but rather as an expression of hope that the matter would be compromised [*Grant v. Hipsher* (1967) 257 CA2d 375, 64 CR 892] .

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1220, see Cotchett, *California Courtroom Evidence*, 21.08 (Matthew Bender).

Foundational elements for hearsay exceptions, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § C et seq. (Matthew Bender).

11.104[2] Adoptive Admissions. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one the party, with knowledge of the content thereof, has by words or other conduct manifested adoption or belief in its truth [*Evid Code* § 1221]. It is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether the defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide [*People v. Pitts* (1990) 223 CA3d 606, 273 CR 757] .

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1221, see Cotchett, *California Courtroom Evidence*, 21.09 (Matthew Bender).

Foundational elements for adoptive admissions exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § C (Matthew Bender).

11.104[3] Authorized Admissions. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if [*Evid Code* § 1222]:

- The statement was made by a person authorized by the party to make a statement concerning the subject matter of the statement; and
- The evidence is offered either after admission of evidence sufficient to sustain finding of that authority or, in the court's discretion as to the order of proof, subject to the admission of that evidence.

The authority of an employee to make a statement for an employer concerning the subject matter of the statement can be implied, as well as express. This determination depends on the facts and circumstances of each case viewed in the light of the substantive law of agency, as distinct from evidence. It requires an examination of the nature of the employee's usual and customary authority, the nature of the statement in relation to that authority, and the particular relevance or purpose of the statement [*O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1402-1403, 55 CR3d 551] .

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1222, see Cotchett, *California Courtroom Evidence*, 21.10 (Matthew Bender).

Foundational elements for authorized admissions exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § C (Matthew Bender).

11.104[4] Admission of Co-Conspirator. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if [*Evid Code* § 1223]:

- The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
- The statement was made before or during the time that the party was participating in that conspiracy; and
- The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in *Evid Code* § 1223(a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

► **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1223, see Cotchett, *California Courtroom Evidence*, 21.11 (Matthew Bender).

11.104[5] Statement of Declarant Whose Liability or Breach of Duty Is in Issue. When the liability, obligation, or duty of a party to a civil action is based in whole or in part on the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty [*Evid Code* § 1224].

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1224, see Cotchett, *California Courtroom Evidence*, 21.12 (Matthew Bender).

Form of objections and responses to objections regarding the liability/breach of duty exception to the hearsay rule, see *California Trial Guide*, § 40.33 (Matthew Bender).

11.104[6] Statement of Declarant Whose Right or Title Is in Issue. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest [*Evid Code* § 1225].

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1225, see Cotchett, *California Courtroom Evidence*, 21.13 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.34 (Matthew Bender).

11.104[7] Statement of Minor Child in Parent's Action for Child's Injury. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under *CCP* § 376 for injury to such minor child [*Evid Code* § 1226].

► **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1226, see Cotchett, *California Courtroom Evidence*, 21.14 (Matthew Bender).

11.104[8] Statement of Declarant in Action for His or Her Wrongful Death. Evidence of a statement by a deceased person is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for that person's wrongful death brought under *CCP* § 377 [*Evid Code* § 1227].

► **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1227, see Cotchett, *California Courtroom Evidence*, 21.15 (Matthew Bender).

11.104[9] Statement of Minor Child As Victim of Sexual Abuse. Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime to admit as evidence the confession of a person accused of violating specified provisions of the Penal Code, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it makes specified findings about a statement from the minor victim [*Evid Code* § 1228].

► **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1228, see Cotchett, *California Courtroom Evidence*, 21.16 (Matthew Bender).

11.104[10] Signature of Parent or Guardian on Child Welfare Services Case Plan. Except as provided in *Evid Code* § 1228.1(b), neither the signature of any parent or legal guardian on a child welfare services case plan nor the acceptance of any services prescribed in the child welfare services case plan by any parent or legal guardian constitutes an admission of guilt or be used as evidence against the parent or legal guardian in a court of law [*Evid Code* § 1228.1(a)]. A parent's or guardian's failure to cooperate, except for good cause, in the provision of services specified in

the child welfare services case plan may be used as evidence, if relevant, in any hearing held pursuant to specified sections of the Welfare and Institutions Code and at any jurisdictional or dispositional hearing held on a petition filed pursuant to specified provisions of that Code [*Evid Code* § 1228.1(b)].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1228.1, see Cotchett, *California Courtroom Evidence*, 21.17 (Matthew Bender).

11.104[11] Declaration Against Interest. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, so far subjected the declarant to the risk of civil or criminal liability, so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true [*Evid Code* § 1230].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1230, see Cotchett, *California Courtroom Evidence*, 21.18 (Matthew Bender).

Foundational elements for declaration against interest exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § P (Matthew Bender).

11.104[12] Sworn Statement Regarding Gang-Related Crimes. Evidence of a prior statement made by a gang-member declarant is not made inadmissible by the hearsay rule if the declarant is deceased and the proponent of introducing the statement establishes specified information about the statement and related gang activity [*Evid Code* § 1231].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1231, see Cotchett, *California Courtroom Evidence*, 21.19 (Matthew Bender).

11.104[13] Prior Inconsistent Statements. Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his or her testimony at the hearing and is offered in compliance with *Evid Code* 770 [*Evid Code* § 1235].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1235, see Cotchett, *California Courtroom Evidence*, 21.24 (Matthew Bender).

Form of objections and responses to objections regarding the prior inconsistent statement exception to the hearsay rule, see *California Trial Guide*, § 40.36 (Matthew Bender).

11.104[14] Prior Consistent Statement. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his or her testimony at the hearing and is offered in compliance with *Evid Code* § 791 [*Evid Code* § 1236].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1236, see Cotchett, *California Courtroom Evidence*, 21.25 (Matthew Bender).

Form of objections and responses to objections regarding the prior consistent statement exception to the hearsay rule, see *California Trial Guide*, § 40.37 (Matthew Bender).

11.104[15] Past Recollection Recorded. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by the witness while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing that [Evid Code § 1237(a)]:

- Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness's memory;
- Was made (1) by the witness or under his or her direction, or (2) by some other person for the purpose of recording the witness's statement at the time it was made;
- Is offered after the witness testifies that the statement he made was a true statement of such fact; and
- Is offered after the writing is authenticated as an accurate record of the statement.

The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party [Evid Code § 1237(b)].

► Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1237, see Cotchett, *California Courtroom Evidence*, 21.26 (Matthew Bender).

Foundational elements for past recollection recorded exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § F (Matthew Bender).

11.104[16] Prior Identification. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and [Evid Code § 1238]:

- The statement is an identification of a party or another as a person who participated in a crime or other occurrence;
- The statement was made at a time when the crime or other occurrence was fresh in the witness's memory; and
- The evidence of the statement is offered after the witness testifies that he or she made the identification and that it was a true reflection of his or her opinion at that time.

► Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1238, see Cotchett, *California Courtroom Evidence*, 21.27 (Matthew Bender).

11.104[17] Spontaneous Statement. Evidence of a statement is not made inadmissible by the hearsay rule if the statement [Evid Code § 1240]:

- Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

- Was made spontaneously while the declarant was under the stress of excitement caused by the perception.

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code § 1240*, see Cotchett, *California Courtroom Evidence*, 21.28 (Matthew Bender).

Foundational elements for spontaneous statement exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § I (Matthew Bender).

11.104[18] Contemporaneous Statement. Evidence of a statement is not made inadmissible by the hearsay rule if the statement [*Evid Code § 1241*]:

- Is offered to explain, qualify, or make understandable conduct of the declarant; and
- Was made while the declarant was engaged in that conduct.

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code § 1241*, see Cotchett, *California Courtroom Evidence*, 21.29 (Matthew Bender).

Foundational elements for contemporaneous statement exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § J (Matthew Bender).

11.104[19] Dying Declaration. Evidence of a statement made by a dying person respecting the cause and circumstances of death is not made inadmissible by the hearsay rule if the statement was made on personal knowledge and under a sense of immediately impending death [*Evid Code § 1242*].

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code § 1242*, see Cotchett, *California Courtroom Evidence*, 21.30 (Matthew Bender).

Foundational elements for dying declaration exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § Q (Matthew Bender).

11.104[20] Statement of Declarant's Existing Mental or Physical State. Subject to *Evid Code § 1252*, evidence of a statement of the declarant's then-existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when [*Evid Code § 1250(a)*]:

- The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
- The evidence is offered to prove or explain acts or conduct of the declarant [*Evid Code § 1250(a)(2)*].

Evid Code § 1250 does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed [*Evid Code § 1250(b)*].

Evidence of a statement is inadmissible if the statement was made under circumstances that indicate its lack of trustworthiness [*Evid Code* § 1252].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1250, see Cotchett, *California Courtroom Evidence*, 21.31 (Matthew Bender).

Foundational elements for declarant's mental or physical state exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § R (Matthew Bender).

11.104[21] Statement of Declarant's Prior Mental or Physical State. Subject to *Evid Code* § 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if [*Evid Code* § 1251]:

- The declarant is unavailable as a witness; and
- The evidence is offered to prove the prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than the state of mind, emotion, or physical sensation.

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1251, see Cotchett, *California Courtroom Evidence*, 21.32 (Matthew Bender).

Form of objections and responses to objections regarding the declarant's prior mental or physical state exception to the hearsay rule, see *California Trial Guide*, § 40.43 (Matthew Bender).

11.104[22] Statement Describing Medical History, Symptoms, or Pain for Purposes of Medical Diagnosis or Treatment. Evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment [*Evid Code* § 1253]. However, this applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect. [*Evid Code* § 1253].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1253, see Cotchett, *California Courtroom Evidence*, 21.34 (Matthew Bender).

11.104[23] Statement Concerning Declarant's Will. Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked a will, or that identifies his or her will, is not made inadmissible by the hearsay rule [*Evid Code* § 1260(a)]. Evidence of a statement is inadmissible under *Evid Code* § 1260 if the statement was made under circumstances that indicate its lack of trustworthiness [*Evid Code* § 1260(b)].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1260, see Cotchett, *California Courtroom Evidence*, 21.35 (Matthew Bender).

Form of objections and responses to objections regarding the statement concerning declarant's will exception to the hearsay rule, see *California Trial Guide*, § 40.44 (Matthew Bender).

11.104[24] Statement of Decedent Offered in Action Against Estate. Evidence of a statement is not made inadmissible by the hearsay rule when offered in an action on a claim or demand against the estate of the declarant if the statement was made on the personal knowledge of the declarant at a time when the matter had been recently perceived by the declarant and while his or her recollection was clear [*Evid Code* § 1261(a)]. Evidence of a statement is inadmissible under this section if the statement was made under circumstances that indicate its lack of trustworthiness [*Evid Code* § 1261(b)].

Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1261, see Cotchett, *California Courtroom Evidence*, 21.36 (Matthew Bender).

Form of objections and responses to objections regarding the statement of decedent offered in action against estate exception to the hearsay rule, see *California Trial Guide*, § 40.45 (Matthew Bender).

11.104[25] Business Record Exception. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if [*Evid Code* § 1271]:

- The writing was made in the regular course of a business [see *Evid Code* § 1270 ("business" defined)];
- The writing was made at or near the time of the act, condition, or event;
- The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
- The sources of information and method and time of preparation were that indicate its trustworthiness.

Evidence of the absence from the records of a business of a record of an asserted act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the nonoccurrence of the act or event, or the nonexistence of the condition, if [*Evid Code* § 1272]:

- It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them; and
- The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist.

Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* §§ 1271, 1272, see Cotchett, *California Courtroom Evidence*, 21.38, 21.39 (Matthew Bender).

Foundational elements for the business record exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § D (Matthew Bender).

11.104[26] Official Record. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if

[*Evid Code* § 1280]:

- The writing was made by and within the scope of duty of a public employee;
- The writing was made at or near the time of the act, condition, or event; and
- The sources of information and method and time of preparation were that indicate its trustworthiness.

In general, an objection to the claim of this exception to the hearsay rule can be made on the basis that the proponent failed to establish one of the necessary elements of the exception as described above [*see Molenda v. Department of Motor Vehicles* (2009) 172 CA4th 974, 988-991, 91 CR3d 792] .

► **Cross Reference:**

Foundational elements for the official record exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § E (Matthew Bender).

11.104[27] Vital Statistic Record. Evidence of a writing made as a record of a birth, fetal death, death, or marriage is not made inadmissible by the hearsay rule if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law [*Evid Code* § 1281].

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1281, see Cotchett, *California Courtroom Evidence*, 21.40 (Matthew Bender).

Form of objections and responses to objections regarding the vital statistic record exception to the hearsay rule, see *California Trial Guide*, § 40.53 (Matthew Bender).

11.104[28] Statement of Absence of Public Record. Evidence of a writing made by the public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record, is not made inadmissible by the hearsay rule when offered to prove the absence of a record in that office [*Evid Code* § 1284].

► **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1284, see Cotchett, *California Courtroom Evidence*, 21.44 (Matthew Bender).

For form of objections and responses to objections regarding the statement of absence of public record exception to the hearsay rule, see *California Trial Guide*, § 40.54 (Matthew Bender).

11.104[29] Former Testimony Offered Against Party to Former Proceeding. Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and [*Evid Code* § 1291(a); *see Evid Code* § 1290 ("former testimony" defined)]:

- The former testimony is offered against a person who offered it in evidence in his or her own behalf on the former occasion or against the successor in interest of such person; or
- The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

The admissibility of former testimony is subject to the same limitations and objections as though the declarant were

testifying at the hearing, except that former testimony offered under this section is not subject to [Evid Code § 1291(b)]:

- Objections to the form of the question which were not made at the time the former testimony was given.
- Objections based on competency or privilege which did not exist at the time the former testimony was given.



Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code § 1291*, see Cotchett, *California Courtroom Evidence*, 21.46 (Matthew Bender).

Foundational elements for the former testimony exception to the hearsay rule, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § N (Matthew Bender).

11.104[30] Former Testimony Offered Against Person Not Party to Former Proceeding. Evidence of former testimony is not made inadmissible by the hearsay rule if [Evid Code § 1292(a); see Evid Code § 1290 ("former testimony" defined)]:

- The declarant is unavailable as a witness;
- The former testimony is offered in a civil action; and
- The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to objections based on competency or privilege which did not exist at the time the former testimony was given [Evid Code § 1292(b)].



Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code § 1292*, see Cotchett, *California Courtroom Evidence*, 21.47 (Matthew Bender).

Form of objections and responses to objections regarding the former testimony: not former party exception to the hearsay rule, see *California Trial Guide*, § 40.61 (Matthew Bender).

11.104[31] Former Testimony of Minor in Dependency Hearing. Evidence of former testimony made at a preliminary examination by a minor child who was the complaining witness is not made inadmissible by the hearsay rule if [Evid Code § 1293(a)]:

- The former testimony is offered in a proceeding to declare the minor a dependent child of the court pursuant to *W&I Code § 300*.
- The issues are such that a defendant in the preliminary examination in which the former testimony was given had the right and opportunity to cross-examine the minor child with an interest and motive similar to that which the parent or guardian against whom the testimony is offered has at the proceeding to declare the minor a dependent child of the court.

The admissibility of former testimony is subject to the same limitations and objections as though the minor child were testifying at the proceeding to declare him or her a dependent child of the court [*Evid Code* § 1293(b)]. The attorney for the parent or guardian against whom the former testimony is offered or, if none, the parent or guardian may make a motion to challenge the admissibility of the former testimony on a showing that new substantially different issues are present in the proceeding to declare the minor a dependent child than were present in the preliminary examination [*Evid Code* § 1293(c)].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1293, see Cotchett, *California Courtroom Evidence*, 21.48 (Matthew Bender).

11.104[32] Judgment of Felony Conviction. Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere [*Evid Code* § 1300].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1300, see Cotchett, *California Courtroom Evidence*, 21.50 (Matthew Bender).

Form of objections and responses to objections regarding the judgment of felony conviction exception to the hearsay rule, see *California Trial Guide*, § 40.62 (Matthew Bender).

11.104[33] Judgment Against Person Entitled to Indemnity. Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he seeks to [*Evid Code* § 1301]:

- Recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment;
 - Enforce a warranty to protect the judgment debtor against the liability determined by the judgment;
- or
- Recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached.

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1301, see Cotchett, *California Courtroom Evidence*, 21.51 (Matthew Bender).

Form of objections and responses to objections regarding the judgment against person entitled to indemnity exception to the hearsay rule, see *California Trial Guide*, § 40.62 (Matthew Bender).

11.104[34] Judgment Determining Liability of Third Person. When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissible by the hearsay rule when offered to prove such liability, obligation, or duty [*Evid Code* § 1302].

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1302, see Cotchett,

California Courtroom Evidence, 21.52 (Matthew Bender).

Form of objections and responses to objections regarding the judgment determining liability of third person exception to the hearsay rule, see *California Trial Guide*, § 40.62 (Matthew Bender).

11.104[35] Statement Concerning Declarant's Family History. Evidence of a statement by a declarant who is unavailable as a witness concerning his or her own birth, marriage, divorce, a parent and child relationship, relationship by blood or marriage, race, ancestry, or other similar fact of family history is not made inadmissible by the hearsay rule, even though the declarant had no means of acquiring personal knowledge of the matter declared [*Evid Code* § 1310(a)]. However, evidence of a statement is inadmissible if the statement was made under circumstances that indicate its lack of trustworthiness [*Evid Code* § 1310(b)].

 Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1310, see Cotchett, *California Courtroom Evidence*, 21.53 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.70 (Matthew Bender).

11.104[36] Statement Concerning Another Person's Family History. Evidence of a statement concerning the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and [*Evid Code* § 1311(a)]:

- The declarant was related to the other by blood or marriage; or
- The declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (1) on information received from the other or from a person related by blood or marriage to the other or (2) on repute in the other's family.

However, evidence of a statement is inadmissible under this section if the statement was made under circumstances that indicate its lack of trustworthiness [*Evid Code* § 1311(b)].

 Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1311, see Cotchett, *California Courtroom Evidence*, 21.54 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.70 (Matthew Bender).

11.104[37] Entries in Family Records. Evidence of entries in family Bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like, is not made inadmissible by the hearsay rule when offered to prove the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage [*Evid Code* § 1312].

 Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1312, see Cotchett, *California Courtroom Evidence*, 21.55 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.71 (Matthew Bender).

11.104[38] Reputation in Family Concerning Family History. Evidence of reputation among members of a family is not made inadmissible by the hearsay rule if the reputation concerns the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage [*Evid Code* § 1313].

➤ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1313, see Cotchett, *California Courtroom Evidence*, 21.56 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.72 (Matthew Bender).

11.104[39] Reputation in Community Concerning Family History. Evidence of reputation in a community concerning the date or fact of birth, marriage, divorce, or death of a person resident in the community at the time of the reputation is not made inadmissible by the hearsay rule [*Evid Code* § 1314].

➤ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1314, see Cotchett, *California Courtroom Evidence*, 21.57 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.72 (Matthew Bender).

11.104[40] Church Records Concerning Family History. Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history which is contained in a writing made as a record of a church, religious denomination, or religious society is not made inadmissible by the hearsay rule if [*Evid Code* § 1315]:

- The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event under *Evid Code* § 1271; and
- The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing.

➤ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1315, see Cotchett, *California Courtroom Evidence*, 21.58 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.73 (Matthew Bender).

11.104[41] Marriage, Baptismal, and Similar Certificates. Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history is not made inadmissible by the hearsay rule if the statement is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament and [*Evid Code* § 1316]:

- The maker was a clergyperson, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society; and
- The certificate was issued by the maker at the time and place of the ceremony or sacrament or within a reasonable time thereafter.

➡ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1316, see Cotchett, *California Courtroom Evidence*, 21.59 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.73 (Matthew Bender).

11.104[42] Reputation Concerning Community History. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community [*Evid Code* § 1320].

➡ **Cross Reference:**

For Law Revision Commission comments and case authority interpreting *Evid Code* § 1320, see Cotchett, *California Courtroom Evidence*, 21.60 (Matthew Bender).

11.104[43] Reputation Concerning Public Interest in Property. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns the interest of the public in property in the community and the reputation arose before controversy [*Evid Code* § 1321].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1321, see Cotchett, *California Courtroom Evidence*, 21.61 (Matthew Bender).

11.104[44] Reputation Concerning Boundary or Custom Affecting Land. Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy [*Evid Code* § 1322].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1322, see Cotchett, *California Courtroom Evidence*, 21.62 (Matthew Bender).

11.104[45] Statement Concerning Boundary. Evidence of a statement concerning a boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible if the statement was made under circumstances that indicate its lack of trustworthiness [*Evid Code* § 1323].

➡ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1323, see Cotchett, *California Courtroom Evidence*, 21.63 (Matthew Bender).

11.104[46] Character Reputation. Evidence of a person's general reputation with reference to his or her character or a trait of his or her character at a relevant time in the community in which the person resided or in a group with

which he or she then habitually associated is not made inadmissible by the hearsay rule [*Evid Code* § 1324].

➤ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1324, see Cotchett, *California Courtroom Evidence*, 21.64 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.74 (Matthew Bender).

11.104[47] Recitals in Writings Affecting Property. Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property is not made inadmissible by the hearsay rule if [*Evid Code* § 1330(b)]:

- The matter stated was relevant to the purpose of the writing;
- The matter stated would be relevant to an issue as to an interest in the property; and
- The dealings with the property since the statement was made have not been inconsistent with the truth of the statement.

➤ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1330, see Cotchett, *California Courtroom Evidence*, 21.65 (Matthew Bender).

11.104[48] Recitals in Ancient Writings. Evidence of a statement is not made inadmissible by the hearsay rule if the statement is contained in a writing more than 30 years old and the statement has been since generally acted on as true by persons having an interest in the matter [*Evid Code* § 1331].

➤ **Cross Reference:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1331, see Cotchett, *California Courtroom Evidence*, 21.66 (Matthew Bender).

11.104[49] Commercial Lists. Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation is not made inadmissible by the hearsay rule if the compilation is generally used and relied on as accurate in the course of a business [*Evid Code* § 1340; see *Evid Code* § 1270 ("business" defined)].

➤ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1340, see Cotchett, *California Courtroom Evidence*, 21.67 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.91 (Matthew Bender).

11.104[50] Publications Concerning Facts of General Notoriety and Interest. Historical works, books of science or art, and published maps or charts made by persons indifferent between the parties are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest [*Evid Code* § 1341].

➤ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1340, see Cotchett, *California Courtroom Evidence*, 21.67 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.92 (Matthew Bender).

11.104[51] Statement by Victim of Physical Abuse. Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if specified conditions relating to the infliction or threat of physical injury on the declarant are met, and the declarant is unavailable as a witness [see *Evid Code* § 1370(a)]. The statement must be made under circumstances that indicate its trustworthiness [*Evid Code* § 1370(a)(4); see *Evid Code* § 1370(b) (circumstances relevant to determination of trustworthiness)].



Cross References:

Law Revision Commission comments and case authority interpreting *Evid Code* § 1370, see Cotchett, *California Courtroom Evidence*, 21.71 (Matthew Bender).

Form of objections and responses to objections regarding this exception to the hearsay rule, see *California Trial Guide*, § 40.47 (Matthew Bender).

Legal Topics:

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

EvidenceHearsayExemptionsPrior Statements by WitnessesGeneral OverviewEvidenceHearsayExemptionsStatements by CoconspiratorsGeneral OverviewEvidenceHearsayExemptionsStatements by Party OpponentsAdopted StatementsEvidenceHearsayExemptionsStatements by Party OpponentsAuthorized StatementsEvidenceHearsayExemptionsStatements by Party OpponentsVicarious Statements



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Chapter 11 Questioning Witnesses and Objections
XVI. ADMITTING AND OBJECTING TO WRITINGS AND SECONDARY EVIDENCE

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.105

11.105 CHECKLIST: Admitting and Objecting to Writings and Secondary Evidence.

☐ Authenticate writings.

Authority:

Evid Code § 1400

Discussion:

See 11.107

☐ Prove content of writing by secondary evidence.

Authority:

Evid Code § 1521

Discussion:

See 11.108

Legal Topics:

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

EvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceDocumentary
EvidenceWritingsGeneral Overview



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.106

11.106 Options and Strategies.

Authentication is required, but does not equate with admissibility necessarily. For example, you can take judicial notice of a writing, but the writing itself may be hearsay. Always take care to authenticate writings, but also be sure to lay the necessary foundation for admissibility. You may ask a witness to identify his or her signature. If that is a party, you may argue that the document is an admission against interest, of a party, and admissible. Or, you can also ask the witness if they wrote, or signed after reading, the document in the ordinary course of business, as part of their responsibilities in the business, and in doing so attempted to be as accurate and truthful as possible in stating what was in the document. You have both authenticated the document and provided a basis to argue, if necessary, that the document falls within the business records exception to the hearsay rule.

Also, the Evidence Code lists several means of authenticating writings [*Evid Code* §§ 1410-1421], and several presumptions affecting the use of acknowledged and official writings [*Evid Code* §§ 1450-1453]. The Evidence Code provides that nothing set forth in §§ 1411-1421, the "means of authenticating and proving writings" shall be construed to limit the means by which writings may be authenticated or proved [*Evid Code* § 1410]. Counsel should consider other means of authenticating writings when a witness cannot do so under §§ 1411-1421, such as the use of stipulations and judicial notice.

Propound requests for admissions regarding the authenticity of documents before trial. If those requests are denied, try to stipulate to the authenticity of documents before trial.

Legal Topics:

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

EvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDocumentary EvidenceWritingsGeneral Overview



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XVI. ADMITTING AND OBJECTING TO WRITINGS AND SECONDARY EVIDENCE

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.107

11.107 Authenticating Writings.

11.107[1] "Authentication" Defined. Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law [*Evid Code § 1400*].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code § 1400* et seq., see Cotchett, *California Courtroom Evidence*, 22.01 -22.21 (Matthew Bender).

11.107[2] Authentication Required. Authentication of a writing is required before it may be received in evidence [*Evid Code § 1400(a)*]. Authentication of a writing is required before secondary evidence of its content may be received in evidence [*Evid Code § 1401(b)*].

11.107[3] Authentication of Altered Writing. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the alteration or appearance thereof. He may show that the alteration was made by another, without his or her concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he does that, he or she may give the writing in evidence, but not otherwise [*Evid Code § 1402*].

11.107[4] Means of Authenticating and Proving Writings. Among other methods, the Evid Code lists the following means by which a writing may be authenticated or proved:

- Except as provided by statute, the testimony of a subscribing witness is not required to authenticate a writing [*Evid Code § 1411*].
- If the testimony of a subscribing witness is required by statute to authenticate a writing and the subscribing witness denies or does not recollect the execution of the writing, the writing may be authenticated by other evidence [*Evid Code § 1412*].

- A writing may be authenticated by anyone who saw the writing made or executed, including a subscribing witness [*Evid Code § 1413*].

➡ **Cross References:**

Form of objections and responses to objections regarding writing authenticated by witness to its making or execution, see *California Trial Guide*, § 30.10 (Matthew Bender).

Foundational elements for authentication of private, business, and official writings, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 4, §§ D, E, F (Matthew Bender).

- A writing may be authenticated by evidence that the party against whom it is offered has at any time admitted its authenticity; or the writing has been acted upon as authentic by the party against whom it is offered [*Evid Code § 1414*].

➡ **Cross Reference:**

For form of objections and responses to objections regarding writing authenticated by admission, see *California Trial Guide*, § 30.16 (Matthew Bender).

- A writing may be authenticated by evidence of the genuineness of the handwriting of the maker [*Evid Code § 1415*].

➡ **Cross References:**

For form of objections and responses to objections regarding writing authenticated by witness with personal knowledge of author's handwriting, see *California Trial Guide*, § 30.11 (Matthew Bender).

Foundational elements for authenticating handwriting, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 9, § D (Matthew Bender).

- A witness who is not otherwise qualified to testify as an expert may state his or her opinion whether a writing is in the handwriting of a supposed writer if the court finds that he or she has personal knowledge of the handwriting of the supposed writer. Such personal knowledge may be acquired from:

- ☐ Having seen the supposed writer write;
- ☐ Having seen a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged;
- ☐ Having received letters in the due course of mail purporting to be from the supposed writer in response to letters duly addressed and mailed by him to the supposed writer; or
- ☐ Any other means of obtaining personal knowledge of the handwriting of the supposed writer [*Evid Code § 1416*].

➡ Cross Reference:

Form of objections and responses to objections regarding writing authenticated by witness with personal knowledge of author's handwriting, see *California Trial Guide*, § 30.11 (Matthew Bender).

- The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court [*Evid Code* § 1417].

➡ Cross Reference:

Form of objections and responses to objections regarding handwriting authentication by comparison with genuine handwriting, see *California Trial Guide*, § 30.12 (Matthew Bender).

- The genuineness of writing, or the lack thereof, may be proved by a comparison made by an expert witness with writing (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court [*Evid Code* § 1418].

➡ Cross Reference:

Form of objections and responses to objections regarding handwriting authentication by comparison with genuine handwriting, see *California Trial Guide*, § 30.12 (Matthew Bender).

- A writing may be authenticated by evidence that the writing was received in response to a communication sent to the person who is claimed by the proponent of the evidence to be the author of the writing [*Evid Code* § 1420].

➡ Cross Reference:

For form of objections and responses to objections regarding writing authenticated as response, see *California Trial Guide*, § 30.14 (Matthew Bender).

- A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing [*Evid Code* § 1421].

➡ Cross Reference:

Form of objections and responses to objections regarding writing authenticated by contents, see *California Trial Guide*, § 30.13 (Matthew Bender).

Consider:

Note that the Evidence Code expressly provides that these are not the exclusive means of authenticating a writing in *Evid Code* § 1410; also note that there are presumptions under *Evid Code* §§ 630-670 that may affect or enable authentication of a writing, or in turn

require additional evidence concerning the writing to authenticate it (e.g., foundational or preliminary facts.) For example, *Evid Code* § 645.1 provides that printed materials purporting to be a particular newspaper or periodical are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months. By establishing that a relevant article in a newspaper reporting on facts that counsel wishes to put in evidence actually comes from a newspaper may permit putting the newspaper article in evidence as authentic, subject to hearsay rule issues.

11.107[5] Presumptions Affecting Acknowledged Writings and Official Writings. The *Evid Code* contains several presumptions affecting acknowledged writings and official writings, which affect the burden of producing evidence [*Evid Code* § 1450]. These presumptions include the following:

- A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of Article 3 (commencing with *Section 1180*) of *Chapter 4, Title 4, Part 4, Division 2 of the Civil Code* [*Evid Code* § 1451].

➡ **Cross Reference:**

Form of objections and responses to objections regarding writing authenticated by acknowledgment, see *California Trial Guide*, § 30.15 (Matthew Bender).

- A seal is presumed to be genuine and its use authorized if it purports to be the seal of the United States or a department, agency, or public employee of the United States; a public entity in the United States or a department, agency, or public employee of such public entity; a nation recognized by the executive power of the United States or a department, agency, or officer of such nation; a public entity in a nation recognized by the executive power of the United States or a department, agency, or officer of such public entity; a court of admiralty or maritime jurisdiction; or a notary public within any state of the United States [*Evid Code* § 1452].

➡ **Cross References:**

Form of objections and responses to objections regarding writing authenticated as official writing, see *California Trial Guide*, § 30.17 (Matthew Bender).

Foundational elements for authenticating official writings, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 4, § F (Matthew Bender).

- A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his or her official capacity, of a public employee of the United States; a public employee of any public entity in the United States; or a notary public within any state of the United States [*Evid Code* § 1453].

➡ **Cross Reference:**

Form of objections and responses to objections regarding writing authenticated as official writing, see *California Trial Guide*, § 30.17 (Matthew Bender).

- A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his

or her official capacity, of an officer, or deputy of an officer, of a nation or public entity in a nation recognized by the executive power of the United States and the writing to which the signature is affixed is accompanied by a final statement certifying the genuineness of the signature and the official position of (a) the person who executed the writing or (b) any foreign official who has certified either the genuineness of the signature and official position of the person executing the writing or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates beginning with a certificate of the genuineness of the signature and official position of the person executing the writing. The final statement may be made only by a secretary of an embassy or legation, counsel general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation, authenticated by the seal of his or her office [*Evid Code* § 1454].

Legal Topics:

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

Estate, Gift & Trust Law Will Contests Testamentary Formalities Self-Proving Affidavits & Wills Evidence Authentication General Overview Evidence Authentication Self-Authentication Evidence Inferences & Presumptions Presumptions Evidence Scientific Evidence Handwriting



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.108

11.108 Secondary Evidence Rule.

Pursuant to the Secondary Evidence Rule, the content of a writing may be proved by otherwise admissible secondary evidence. The court excludes secondary evidence of the content of writing if the court determines either of the following:

- A genuine dispute exists concerning material terms of the writing and justice requires the exclusion [*Evid Code § 1521(a)(1)*].
- Admission of the secondary evidence would be unfair [*Evid Code § 1521(a)(2)*].



Cross Reference:

Law Revision Commission comments and case authority interpreting *Evid Code § 1521*, see Cotchett, *California Courtroom Evidence*, 23.02 (Matthew Bender).

Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing [*Evid Code § 1523(a)*].

Exceptions:

- Oral testimony of the content of a writing is not made inadmissible if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence [*Evid Code § 1523(b)*].
- Oral testimony of the content of a writing is not made inadmissible if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:
 - Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means [*Evid Code § 1523(c)(1)*].

☐ The writing is not closely related to the controlling issues and it would be inexpedient to require its production [*Evid Code* § 1523(c)(2)].

■ Oral testimony of the content of a writing is not made inadmissible if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole [*Evid Code* § 1523(d)].

➤ **Cross References:**

Law Revision Commission comments and case authority interpreting *Evid Code* § 1523, see Cotchett, *California Courtroom Evidence*, 23.04 (Matthew Bender).

Foundational elements for secondary evidence, see Imwinkelried, et al., *California Evidentiary Foundations*, Ch. 7, Secondary Evidence Rule (Matthew Bender).

Reproductions of files, records, writings, photographs, fingerprints or other instruments in the official custody of a criminal justice agency that were microphotographed or otherwise reproduced in a manner that conforms with the provisions of *Pen Code* §§ 11106.1, 11106.2, or 11106.3 is admissible to the same extent and under the same circumstances as the original file, record, writing or other instrument would be admissible [*Evid Code* § 1550.1].

Legal Topics:

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

EvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview



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XVII. ADMITTING AND OBJECTING TO DEMONSTRATIVE EVIDENCE

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.109

11.109 CHECKLIST: Admitting and Objecting to Demonstrative Evidence.

☐ Introduce demonstrative evidence.

Authority:

Evid Code §§ 210, 352, 702, 801

Discussion:

See 11.111

☐ Make and respond to objections to the introduction of demonstrative evidence.

Discussion:

See 11.112

Legal Topics:

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

Evidence Demonstrative Evidence Admissibility Evidence Procedural Considerations Objections & Offers of Proof Objections



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XVII. ADMITTING AND OBJECTING TO DEMONSTRATIVE EVIDENCE

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.110

11.110 Options and Strategies.

Typically demonstrative evidence may be shown to the jury but is not introduced into evidence. This means that, although you may use the evidence in a demonstration, or show it to the jury, it will not be part of the evidence that goes into the jury room for deliberations.

The use of demonstrative evidence is not governed by the general rules of evidence, and is not admitted into evidence unless all of the evidentiary requirements for admitting evidence are met. Nevertheless, the demonstrative evidence must reflect the actual admitted evidence, and, if introduced during opening statements, cannot be "argumentative." Counsel should make sure that the court's procedures and any applicable local rules are understood and satisfied.

The use of demonstrative evidence, from rudimentary easels with pads of paper, blackboards or whiteboards on which counsel draws, diagrams or writes, to extremely technological, advanced software with image motion, has become a requirement in any trial, and especially in making complex subject matter understandable. The use of more than one form of demonstrative evidence, from blow-up boards with timelines, to computer pictures, to enlarged documents and photographs can be successful if they are artfully mixed. A trial need not use just one form of demonstrative evidence.

Increasingly, courts are suggesting to counsel that they use timelines, charts on large boards with polystyrene backing, and even computerized demonstrations.

Counsel should contact professional trial graphic support vendors to learn what their capabilities are and what is available to help explain the case to a jury or court in a bench trial. Whether counsel uses simple presentations prepared by him or herself with standard slide generating software or some other software graphic presentation tool, or a professional vendor who prepares the information, the use of demonstrative evidence is something that should be considered from the outset of any trial preparation, and most effectively at the outset of any litigation.

Legal Topics:

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

EvidenceDemonstrative EvidenceGeneral OverviewEvidenceDemonstrative EvidenceAdmissibility



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XVII. ADMITTING AND OBJECTING TO DEMONSTRATIVE EVIDENCE

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.111

11.111 Introduction of Demonstrative Evidence.

All demonstrative evidence must meet three basic requirements to be admissible:

- It must be relevant [*Evid Code* § 210];
- It must be presented through a witness who has personal knowledge of the matter or is qualified to give an expert opinion on the matter [*Evid Code* §§ 702, 801]; and
- The trial court must be satisfied the evidence will not necessitate an undue consumption of time or create a substantial danger of undue prejudice, confusing the issues, or misleading the jury [*Evid Code* § 352].

► Cross References:

Discussion of presentation of demonstrative evidence at trial, see *California Trial Guide*, § 65.01 *et seq.* (Matthew Bender).

Discussion of presentation of demonstrative evidence at trial, see Cotchett, *California Courtroom Evidence*, 27.01 *et seq.* (Matthew Bender).

Legal Topics:

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

EvidenceDemonstrative EvidenceAdmissibilityEvidenceRelevanceGeneral OverviewEvidenceRelevanceConfusion, Prejudice & Waste of Time



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.112

11.112 Making and Responding to Objections to the Introduction of Demonstrative Evidence.

Objections to the introduction of demonstrative evidence may be based on the following arguments:

- The evidence is irrelevant to any fact in issue.
- The demonstration will be unduly prejudicial or will consume undue amount of time or confuse the jury.
- The witness is not qualified to perform/interpret demonstration.
- The demonstration is based on test or technique not generally accepted in scientific community.
- The photograph or other depiction does not accurately represent thing it purports to depict.
- The conditions of experiment are not substantially similar to those of actual event.



Cross Reference:

Form of making and responding to objections to the introduction of demonstrative evidence, see *California Trial Guide*, § 65.20 (Matthew Bender).

Legal Topics:

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

Evidence Demonstrative Evidence Admissibility Evidence Demonstrative Evidence Photographs



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XVIII. ADMITTING EVIDENCE WITHOUT A WITNESS

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.113

11.113 CHECKLIST: Admitting Evidence Without a Witness.

☐ Using stipulations to introduce evidence.

Discussion:

See 11.115

☐ Establish facts by means by judicial notice.

Authority:

Evid Code §§ 451, 452, 453

Discussion:

See 11.116

☐ Court may order a view of a relevant scene.

Authority:

CCP § 651

Discussion:

See 11.117

Legal Topics:

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

EvidenceJudicial NoticeGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of
EvidenceGeneral Overview



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XVIII. ADMITTING EVIDENCE WITHOUT A WITNESS

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.114

11.114 Options and Strategies.

In many situations, there are no witnesses available to authenticate writings, to lay evidentiary foundations for the admission of evidence, or to present known facts that are the foundation for other evidence. Counsel may be able to establish the authenticity of such writings or to lay the foundation for admitting such evidence without witness testimony. In such cases, the tools available may not provide all of the necessary foundational facts for the admission of evidence. For example, judicial notice may permit introduction at trial of official documents, but might not establish a hearsay exception for the admissibility into evidence of the document. Relevance is not established simply by authenticating a writing, or establishing that a certain article has been printed in a newspaper, even though *Evid Code* § 645.1 provides a presumption concerning the newspaper. Counsel needs to use the following tools carefully to ensure that the document noticed judicially, for example, will still be admissible into evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewEvidenceAuthenticationSelf-Authentication



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.115

11.115 Stipulations.

Evidence is whatever is admitted in the trial of the case as a part of the record, whether it be an article or document marked as an exhibit, or other matter formally introduced and received, a stipulation, or the testimony of witnesses, in order to enable the factfinder to pronounce with reasonable certainty concerning the truth of any matter in dispute.



Cross Reference:

Discussion of using stipulations as a substitute for other forms of evidence, see Imwinkelried, et al., California Evidentiary Foundations, Ch. 12, § B (Matthew Bender).



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.116

11.116 Judicial Notice.

The Evid Code establishes two categories of matters that are subject to judicial notice: (1) matters as to which judicial notice is mandatory [*Evid Code* § 451], and (2) matters as to which judicial notice is permissive [*Evid Code* § 452] but is mandatory upon sufficient notice and the furnishing of sufficient information [*Evid Code* § 453].

➡ **Cross References:**

Evidence subject to judicial notice and procedure, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.17.

Discussion of using judicial notice as a substitute for other forms of evidence, see Imwinkelried, et al., *California Evidentiary Foundations* Ch. 12, § C (Matthew Bender).

Legal Topics:

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



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1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.117

11.117 View of Scene.

On its own motion or on the motion of a party, where the court finds that such a view would be proper and would aid the trier of fact in its determination of the case, the court may order a view of any of the following:

- The property which is the subject of litigation [CCP § 651(a)(1)].
- The place where any relevant event occurred [CCP § 651(a)(2)].
- Any object, demonstration, or experiment, a view of which is relevant and admissible in evidence in the case and which cannot with reasonable convenience be viewed in the courtroom [CCP § 651(a)(3)].

On such occasion, the entire court, including the judge, jury, if any, court reporter, if any, and any necessary officers, proceeds to the place, property, object, demonstration, or experiment to be viewed. The court is in session throughout the view. At the view, the court may permit testimony of witnesses. The proceedings at the view are recorded to the same extent as the proceedings in the courtroom [CCP § 651(b)].



Cross References:

Discussion of presentation of demonstrative evidence at trial, see *California Trial Guide*, § 65.01 *et seq.* (Matthew Bender).

Discussion of viewing a scene, see Cotchett, *California Courtroom Evidence*, 27.07 (Matthew Bender);
or

Imwinkelried, et al., *California Evidentiary Foundations* (Matthew Bender), Ch. 12, § D.

Legal Topics:

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



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XIX. FORMS

1-11 MB Practice Guide: Trial & Post-Trial Civil Proc 11.118

11.118 Notice of Motion and Motion to Exclude Witnesses From Courtroom.

Notice of Motion and Motion to Exclude Witnesses From Courtroom.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION TO EXCLUDE
Defendant.	)	WITNESSES FROM
	)	COURTROOM
	)	

To _____ [party's name, e.g., Defendant Mary Jones] and 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], _____ [name], the _____ [specify party, e.g., Plaintiff John Smith] will, and hereby does, move for an order under *Evid Code Section 777* excluding _____ [specific particular witness or all witnesses] from attending the trial.

The motion will be made on the ground that _____ [specify, e.g., there is no good reason for any witness in this trial to hear the testimony of any other witness].

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 on the hearing of the motion.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

Attorney for Plaintiff _____ [*typed name*]

NOTES.

Authority:

Evid Code § 777

Grounds:

See 9.05



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Chapter 12 Motion for Nonsuit and Other Motions During Trial

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.syn

§ 12.syn Synopsis to Chapter 12: Motion for Nonsuit and Other Motions During Trial

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Chapter 12 Motion for Nonsuit and Other Motions During Trial
I. STRATEGY

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.01

12.01 Scope.

This chapter covers:

- Objectives and strategy for motions for nonsuit [see 12.02].
- Making a motion for nonsuit [see 12.03 -12.07].
- Opposing a motion for nonsuit [see 12.08 -12.10].
- Hearings on motions for nonsuit [see 12.11 -12.15].
- Seeking review of an order granting or denying a motion for nonsuit [see 12.16 -12.21].
- Making a motion to reopen a case [see 12.35 -12.38].
- Making a motion to amend pleadings to conform to proof [see 12.22 -12.26].
- Making a request for voluntary dismissal [see 12.27 -12.34].

Core Statutes:

CCP §§ 473, 576, 581c, 581(e), 607(6)

This chapter does not cover the following motions, which are discussed in detail in other chapters:

- Motion to continue the trial.



Cross Reference:

Discussion of continuing trial, see Ch. 4, Final Pretrial Conference.

- Motion to exclude witnesses.

**Cross Reference:**

Discussion of excluding witnesses, see Ch. 11, Questioning Witnesses and Objections.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview



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Chapter 12 Motion for Nonsuit and Other Motions During Trial
I. STRATEGY

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.02

12.02 Objective and Strategy.

A motion for nonsuit is like a demurrer to the evidence by which a defendant contests the sufficiency of the plaintiff's evidence before presenting the defendant's own evidence [see *CCP § 581c(a)*]. A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the plaintiff's evidence does not permit a jury to find in the plaintiff's favor [*County of Kern v. Sparks (2007) 149 CA4th 11, 16, 56 CR3d 551*]. A motion for nonsuit allows a defendant to challenge the legal sufficiency of the plaintiff's claims without waiving his or her own right to present a defense if the motion is denied. A defendant can appropriately bring the motion before the presentation of any evidence. Courts grant motions for nonsuits only under very restrictive conditions.

Strategic Point:



The three main hurdles for the defendant to overcome and, hence, points of attack for the plaintiff, are:

- Time limits [see *CCP § 581c(a)*].
- Showing that the plaintiff's evidence will not permit the jury to find in the plaintiff's favor as a matter of law [see *Barbosa v. IMPCO Technologies, Inc. (2010) 179 CA4th 1116, 1121, 101 CR3d 923*].
- Showing that the plaintiff will not be able to present sufficient evidence to find in the plaintiff's favor as a matter of law if the case is reopened [see *CCP § 581c*].

Distinguish:

The major difference between a motion for nonsuit and a motion for judgment is that a motion for nonsuit is used in both jury and bench trials, while a motion for judgment is used in bench trials except under very narrow circumstances [*Lingenfelter v. County of Fresno (2007) 154 CA4th 198, 204 64 CR3d 378*].



Cross Reference:

Discussion of motions for judgment, see Ch. 13, Motion for Judgment.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 389, Nonsuit and Motions for Judgment (Matthew Bender).

Legal Topics:

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

Civil Procedure Pretrial Judgments Nonsuits General Overview Civil Procedure Trials Bench Trials



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Chapter 12 Motion for Nonsuit and Other Motions During Trial
II. MAKING MOTION FOR NONSUIT

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.03

12.03 CHECKLIST: Making Motion for Nonsuit.



Determine timing.

- ☐ Make a motion for nonsuit within one of the following periods:
 - ☐ After the plaintiff has completed the opening statement in a jury or nonjury trial.
 - ☐ After the presentation of the plaintiff's evidence in a jury trial.

Authority:

CCP § 581c

Discussion:

See 12.05

- ☐ Determine whether grounds for nonsuit exist.
 - ☐ A defendant is entitled to a nonsuit if, as a matter of law, the plaintiff's evidence does not permit a jury to find in the plaintiff's favor.
 - ☐ Nonsuit is proper when the plaintiff fails to describe all the elements of a prima facie case.
 - ☐ Nonsuit is proper when the plaintiff reveals a complete defense.

Authority:

Burlesci v. Petersen (1998) 68 CA4th 1062, 1065, 80 CR2d 704

Discussion:

See 12.05

☐ Make motion in writing to trial judge.

Discussion:

See 12.06

Form:

See 12.39

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview



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II. MAKING MOTION FOR NONSUIT

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12.04 Options and Strategies for Moving Party.

A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the plaintiff's evidence does not permit a jury to find in the plaintiff's favor. Only a defendant or a cross-defendant may make the motion. Courts have traditionally taken a restrictive view of the circumstances under which a nonsuit at the close of an opening statement is appropriate because a nonsuit at that point takes the case away from the jury. A trial court may not grant a nonsuit unless the plaintiff's evidence, viewed most favorably to the plaintiff, could not possibly support a jury verdict for the plaintiff [*A.M. v. Albertsons, LLC* (2009) 178 CA4th 455, 463, 100 CR3d 449]. Thus, the burden on the moving party is heavy. On the other hand, if the court denies the motion, the defendant does not waive his or her right to present evidence [CCP § 581c(a)].

Strategic Point:



The motion for a nonsuit is rarely made, but when made properly will terminate the case immediately. If the plaintiff has truly omitted a major element of the case, and the defendant knows that the "hole" cannot be filled with material obtained during discovery or reasonably known, there is little risk in making the motion. Counsel should accompany the motion with at least a short memorandum containing the points the plaintiff has failed to establish and the reasons the defendant believes the plaintiff cannot establish those points.

Drawback:

Defendants should be careful when considering a motion for nonsuit after plaintiff's opening statement. The motion may alert the plaintiff to the deficiencies in his or her case and allow the plaintiff to remedy those defects. In such a situation, the better practice may be to make a motion for nonsuit or a motion for directed verdict after presentation of the plaintiff's case in chief. At that point, the plaintiff will have presented all of his or her evidence, and the motion will be based on the entirety of the case presented rather than, as plaintiff will argue in opposition, a mere inadvertent omission in the opening statement.



Cross References:

Discussion of motions for directed verdict, see Ch. 14, Motion for Directed Verdict.

Discussion of motions for judgment, see Ch. 13, Motion for Judgment.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview



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II. MAKING MOTION FOR NONSUIT

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.05

12.05 Make Motion for Nonsuit After Plaintiff's Opening Statement or After Plaintiff Presents Evidence.

12.05[1] Make Motion After Plaintiff's Opening Statement. A defendant may make a motion for nonsuit only after, not before, the plaintiff has completed his or her opening statement in a jury or nonjury trial [*CCP § 581c(a)*; see *Lingenfelter v. County of Fresno* (2007) 154 CA4th 198, 204 64 CR3d 378 (motion for nonsuit available in nonjury trial after plaintiff's opening statement); but see *Michel v. Moore & Associates, Inc.* (2007) 156 CA4th 756, 760 n4, 67 CR3d 797 (upholding nonsuit granted before opening statement if otherwise well-taken)].

In ruling on the motion when it is made following the plaintiff's opening statement, the trial court must assume that the plaintiff can prove all the favorable facts alleged. A nonsuit is proper only if the court concludes that there is no evidence that would support a judgment in the plaintiff's favor [*Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 CA4th 876, 891-892, 99 CR3d 870] . The court must accept as proven all of the facts that the plaintiff's counsel expects to prove and must indulge in all the favorable inferences reasonably arising from these facts. A court will grant the motion only if it is clear that counsel has undertaken to state all of the facts expected to be revealed [*Hamilton v. Gage Bowl, Inc.* (1992) 6 CA4th 1706, 1710, 8 CR2d 819] , and those facts do not constitute a cause of action [*Smith v. Roach* (1975) 53 CA3d 893, 897-898, 126 CR 29] .

If any substantial evidence supports a judgment in the plaintiff's favor, a nonsuit after the plaintiff's opening statement is not proper [*Willis v. Gordon* (1978) 20 C3d 629, 633, 143 CR 723, 574 P2d 794] .

Examples:

A nonsuit may be appropriate after any of the following:

- The plaintiff's counsel fails to describe all the elements of a prima facie case [see, e.g., *Nelson v. Specialty Records, Inc.* (1970) 11 CA3d 126, 141, 89 CR 540] .
- The plaintiff's counsel reveals a complete defense to the plaintiff's claims [see, e.g., *Russell v. Soldering* (1976) 59 CA3d 633, 642, 131 CR 145] .

Courts take a restrictive view of the circumstances under which a nonsuit at the close of an opening statement is

appropriate because a nonsuit at that point takes the case away from the jury. Granting a nonsuit at that point is particularly dangerous because counsel rarely present such an explicit, full, and unabridged version of the plaintiff's case that the court can be confident enough of the impossibility of proof of a cause of action to terminate the litigation [*Galanek v. Wismar* (1999) 68 CA4th 1417, 1424, 81 CR2d 236] . A nonsuit at this stage is disfavored and should be denied if the statement is not plainly insufficient [*Baber v. Napa State Hosp.* (1989) 209 CA3d 213, 217, 257 CR 55] .

12.05[2] Make Motion After Plaintiff Presents Evidence. In a jury trial, the defendant may move for a nonsuit after the plaintiff's presentation of evidence [CCP § 581c(a)]. However, because submission of the plaintiff's case to the jury would be precluded by a successful nonsuit motion, courts grant these motions only under very limited circumstances [*Barbosa v. IMPCO Technologies, Inc.* (2010) 179 CA4th 1116, 1121, 101 CR3d 923] . A trial court must not grant the motion if the plaintiff has presented evidence that would support a jury verdict in the plaintiff's favor [*Espinosa v. Little Co. of Mary Hosp.* (1995) 31 CA4th 1304, 1313, 37 CR2d 541] .

In ruling on the motion, the court must give the plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn in the plaintiff's favor, disregarding any conflicting evidence, and accepting the evidence most favorable to the plaintiff as true. Nonsuit is proper if the evidence viewed in this light would not be sufficient to support a jury verdict in the plaintiff's favor [*Nally v. Grace Cmty. Church* (1988) 47 C3d 278, 291, 253 CR 97, 763 P2d 948] . The trial court may not weigh the evidence or consider the credibility of the witnesses in determining the sufficiency of the evidence. Rather, the court must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant and must resolve all presumptions, inferences, conflicts, and doubts in the plaintiff's favor [*Saunders v. Taylor* (1996) 42 CA4th 1538, 1541, 50 CR2d 395] .

There must be more than a mere scintilla of evidence in the plaintiff's favor to avoid a nonsuit; there must be substantial evidence creating a conflict for the jury to resolve [*Nally v. Grace Cmty. Church* (1988) 47 C3d 278, 291, 253 CR 97, 763 P2d 948 ; *Pinero v. Specialty Rests. Corp.* (2005) 130 CA4th 635, 639, 30 CR3d 348] .

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedurePretrial JudgmentsNonsuitsGeneral Overview



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12.06 Normally Make Motion Orally in Court Without Notice to Plaintiff.

The defendant usually makes a motion for nonsuit orally in court after the plaintiff has completed his or her opening statement or presented his or her case. While supporting documents are not required, a defendant may submit a memorandum of points and authorities to support the motion. The defendant must state the precise grounds on which the motion is made, rather than provide a general statement that there is insufficient evidence to support the plaintiff's claims [*John Norton Farms v. Todagco* (1981) 124 CA3d 149, 161, 177 CR 215] .

Strategic Point:



The better practice is to submit a written document, whether it is simply a caption page for the case with a list of bullet points, or a few pages of authority. Time may preclude preparation of a proper written supporting memorandum, but supporting documents always help the court frame the issue in the middle of trial, and can help to assure proper consideration of the motion. If a motion must be made orally on the spur of the moment, follow up with a written brief to the judge.



Cross Reference:

Form of motion for nonsuit, see 12.39.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview



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12.07 Other Motions Compared.

12.07[1] Motion for Judgment on the Pleadings Compared. A motion for nonsuit differs from a motion for judgment on the pleadings in that it is directed to the sufficiency of the evidence rather than to the sufficiency of the pleadings. Thus, if the plaintiff's opening statement fails to establish the elements of a *prima facie* case without varying materially from the pleadings, the proof is insufficient, and the proper motion is for a nonsuit rather than for judgment on the pleadings [*Nelson v. Specialty Records, Inc.* (1970) 11 CA3d 126, 142, 89 CR 540] .

➡ **Cross Reference:**

Discussion of motion for judgment on pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Demurrers and Motions for Judgment on the Pleadings.

12.07[2] Motion In Limine to Exclude All Evidence Compared. Unlike a usual motion in limine that seeks to keep particular evidence from the jury, a motion in limine to exclude all evidence seeks to terminate a trial without evidence being introduced [*Mechanical Contractors Ass'n v. Greater Bay Area Ass'n* (1998) 66 CA4th 672, 676-677, 78 CR2d 225] . A motion to exclude all evidence on a particular claim is the functional equivalent of a common-law motion for judgment on the pleadings, or if it is decided in light of evidence produced during discovery, it is like a nonsuit [*Tan v. Arnel Management Co.* (2009) 170 CA4th 1087, 1093-1094, 88 CR 3d 754] .

➡ **Cross Reference:**

Discussion of excluding witnesses, see Ch. 11, *Questioning Witnesses and Objections*, 11.03 et seq.

12.07[3] Motion for Directed Verdict Compared. A motion for directed verdict may be made by either the plaintiff or the defendant and usually is made at the conclusion of the evidence, although it may be made at any time before the case is submitted to the jury [*Gibson v. Southern Pac. Co.* (1955) 137 CA2d 337, 346, 290 P2d 347] . The grounds of the motion are the same as that of a motion for nonsuit [see *Frisk v. Merrihew* (1974) 42 CA3d 319, 325, 116 CR 781] . The standard for ruling on a motion for a nonsuit and directed verdict is the same [*Adams v. City of Fremont* (1998) 68 CA4th 243, 263, 80 CR2d 196] .

➡ **Cross Reference:**

Discussion of directed verdicts, see Ch. 14, Motion for Directed Verdict.

12.07[4] Motion for Judgment Compared. After a party has completed presentation of evidence in a court trial, the other party, without waiving the right to offer evidence in support of his or her defense or in rebuttal in the event the motion is not granted, may move for a judgment [*CCP* § 631.8(a)]. This differs from a nonsuit in that a defendant may move for nonsuit after the plaintiff's presentation of evidence only in a jury trial [*see* 12.05[1]]. In addition, unlike in a motion for a nonsuit, in a motion for judgment, a trial court may weigh the evidence and make factual findings based on the evidence the plaintiff presented [*Jordan v. City of Santa Barbara* (1996) 46 CA4th 1245, 1255, 54 CR2d 340] .



Cross References:

Discussion of motions for judgment, see Ch. 13, Motion for Judgment.

Discussion of non-jury trials, see Ch. 5, Non-Jury Trials.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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III. OPPOSING MOTION FOR NONSUIT

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12.08 CHECKLIST: Opposing Motion for Nonsuit.

☐ Determine whether motion includes sufficient grounds to oppose motion. Grounds for opposition are:

☐ Motion is untimely.

Authority:
CCP § 581c(a)

Discussion:
See 12.05, 12.10[1]

☐ Evidence may permit jury to find in the plaintiff's favor.

Discussion:
See 12.10[2]

☐ The plaintiff may present sufficient evidence on reopening of case.

Discussion:
See 12.10[3]

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial JudgmentsNonsuitsGeneral Overview



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12.09 Options and Strategies for Opposing Party.

A trial court may not grant a nonsuit unless the plaintiff's evidence, viewed most favorably to the plaintiff, could not possibly support a jury verdict for the plaintiff [*Barbosa v. IMPCO Technologies, Inc. (2010) 179 CA4th 1116, 1121, 101 CR3d 923*]. The plaintiff should argue that there is some possibility that the evidence might support recovery, and thus that the court should deny the motion. Alternatively, the plaintiff can argue that the court should wait and, if necessary, grant a directed verdict after hearing the evidence [*Beavers v. Allstate Ins. Co. (1990) 225 CA3d 310, 328, 274 CR 766*].



Cross Reference:

Discussion of directed verdict, see Ch. 14, Motion for Directed Verdict.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsNonsuitsGeneral Overview



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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.10

12.10 Consider Potential Bases for Opposing Motion for Nonsuit.

12.10[1] Oppose Motion on Improper Timing of Motion. A defendant can make a motion for a nonsuit only after, not before, the plaintiff has completed his or her opening statement in a jury or nonjury trial [CCP § 581c(a)]. In addition, a defendant may move for a nonsuit after the plaintiff's presentation of evidence in a jury trial [CCP § 581c(a)]. Thus, a plaintiff may challenge a defendant's motion for nonsuit if the defendant makes the motion before the plaintiff completes his or her opening statement in a jury or nonjury trial or if the defendant fails to make the motion following the plaintiff's opening statement but makes the motion before the plaintiff completes presentation of evidence in a jury trial. [R & B Auto Center, Inc. v. Farmers Group, Inc. (2006) 140 CA4th 327, 340, 44 CR3d 426].

12.10[2] Oppose Motion on Ground That Evidence Will Permit Jury to Find in Plaintiff's Favor. When a defendant makes a motion for nonsuit following the plaintiff's opening statement, the trial court must assume that the plaintiff can prove all the favorable facts alleged. A nonsuit is proper only if the court concludes that there will be no evidence that would support a judgment in the plaintiff's favor [*Castaneda v. Olsher* (2007) 41 C4th 1205, 1214-1215, 63 CR3d 99, 162 P3d 610] . The court must accept as proven all of the facts that counsel expects to prove and must indulge in all the favorable inferences reasonably arising from these facts [*Piedra v. Dugan* (2004) 123 CA4th 1483, 1498, 21 CR3d 36] . Thus, the standard for granting a nonsuit is high. A court will grant the motion only if it is clear that counsel has undertaken to state all of the facts expected to be revealed, and those facts do not constitute a cause of action.

When a defendant makes a motion for nonsuit following the plaintiff's presentation of evidence, the plaintiff can oppose the motion on the ground that granting the nonsuit would preclude submission of the plaintiff's case to the jury. Courts grant nonsuits only under very limited circumstances. A trial court may not grant the motion if the plaintiff has presented evidence that would support a jury verdict in the plaintiff's favor [*Barbosa v. IMPCO Technologies, Inc.* (2010) 179 CA4th 1116, 1121, 101 CR3d 923] . The court must deny the motion if it can logically and reasonably be inferred from the evidence that there are sufficient facts to support a recovery, regardless of whether the evidence is susceptible to conflicting inferences. The court has a duty to let the case go to the jury if there is doubt about the inferences that may reasonably be drawn from the evidence [*Espinosa v. Little Co. of Mary Hosp.* (1995) 31 CA4th 1304, 1313, 37 CR2d 541] .

12.10[3] Oppose Motion on Ground That Plaintiff May Present Sufficient Evidence on Reopening Case.

After a motion for nonsuit in a jury trial, and before the court rules on the motion, on the plaintiff's request, the trial court must permit the plaintiff to reopen the case and introduce further evidence. Or, if the defendant makes the motion for nonsuit after the plaintiff's opening statement, the plaintiff may ask to augment his or her opening statement. The court's refusal to do so is error, which requires reversal if the plaintiff shows prejudice [*Abreuv. Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1457, 257 CR 26] .

**Strategic Point:**

If the plaintiff inadvertently omitted pertinent facts in the opening statement or omitted evidence concerning a material element in his or her case, the plaintiff should seek to reopen the case immediately whether or not there has been a motion for a nonsuit.

**Cross Reference:**

Discussion of motions to reopen generally, see 12.35 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsNonsuitsGeneral Overview



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12.11 CHECKLIST: Hearing on Motion for Nonsuit.

- ☐ Court must consider all the evidence presented by the plaintiff.

Authority:

Nally v. Grace Cmty. Church (1988) 47 C3d 278, 291, 253 CR 97, 763 P2d 948

Discussion:

See 12.13[1]

- ☐ Court may grant a partial nonsuit.

Authority:

CCP § 581c(b)

Discussion:

See 12.13[2]

- ☐ Court may award costs of suit.

Authority:

CCP § 1033

Discussion:

See 12.15[1]

- ☐ Order on motion operates as adjudication of the issues.

Authority:

CCP § 581c(c)

Discussion:

See 12.14

☐ Court must make a written order.

Authority:

CCP § 581d

Discussion:

See 12.13[3]

Form:

See 12.40

Legal Topics:

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

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12.12 Hearing Is Usually Held During Trial.

In the case of an oral motion for nonsuit in a jury trial, it is common practice for counsel to ask for permission to approach the bench and to make the motion at the bench. This procedure gives the court an opportunity to excuse the jury from the courtroom.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.13

12.13 Court's Action on Motion for Nonsuit.

12.13[1] Court Must Consider All Evidence. In ruling on a motion for nonsuit, the court must give the plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn in the plaintiff's favor, disregarding any conflicting evidence, and accepting the evidence most favorable to the plaintiff as true. Nonsuit is proper if the evidence viewed in this light would not be sufficient to support a jury verdict in the plaintiff's favor [*Nally v. Grace Cmty. Church* (1988) 47 C3d 278, 291, 253 CR 97, 763 P2d 948] . All relevant evidence, even if it is unreliable or has been erroneously admitted, must be given the credit and benefit of its full probative strength [see *Estate of Callahan* (1967) 67 C2d 609, 617, 63 CR 277, 432 P2d 965] . The trial court may not weigh the evidence or judge the credibility of the witnesses [*Estate of Callahan* (1967) 67 C2d 609, 613, 63 CR 277, 432 P2d 965] .

12.13[2] Court May Grant Partial Nonsuit. If the evidence supports granting the motion with respect to some but not all the issues involved in the action, the court must grant the motion as to those issues. The action then proceeds with respect to the remaining issues. Despite the granting of a partial nonsuit, no final judgment is entered before the entire action terminates. However, the final judgment in the action must, in addition to any matters determined in the trial, award judgment as the court determined on the motion for nonsuit [CCP § 581c(b)].

Examples:

A partial nonsuit may be granted under the following circumstances:

- The plaintiff fails to prove a prima facie case on only some of its causes of action [*Abreu v. Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1456-1457, 257 CR 26] .
- The court may grant a nonsuit only against certain defendants [*Freeman v. Lind* (1986) 181 CA3d 791, 799, 226 CR 515] .
- The court may grant a nonsuit with respect to claims by only certain plaintiffs [*Stills v. Gratton* (1976) 55 CA3d 698, 709, 127 CR 652] .

12.13[3] Court Must Make Written Order. All dismissals must be in writing signed by the court and filed in the action [*CCP* § 581d]. Because a judgment of nonsuit is a form of dismissal, it must be written, signed by the court, and filed in the action [see *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 CA4th 212, 240, 26 CR3d 798] .

Legal Topics:

For related research and practice materials, see the following legal topics:
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12.14 Order on Motion Operates As Adjudication of Issues.

If the court grants the motion, the judgment operates as an adjudication on the merits, unless the court specifies otherwise [CCP § 581c(c)]. If the court grants the motion as to some but not all the issues in the action, no final judgment is entered until a judgment is reached on all the issues [CCP § 581c(b)].

 Cross Reference:

Form, see 12.40.

Findings of fact are not necessary for a judgment of nonsuit [*Nelson v. Specialty Records, Inc.* (1970) 11 CA3d 126, 142, 89 CR 540] .

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral Overview



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12.15 Consequences If Court Grants Nonsuit.

12.15[1] If Court Grants Nonsuit, Defendant May Recover Costs. If a court grants a nonsuit, the defendant may recover the costs of suit [*CCP* § 1033].

12.15[2] If Court Grants Nonsuit, Other Defendants May Not Blame Dismissed Defendant. In actions that arise out of an injury to a person or to property, when a motion for judgment of nonsuit is granted on the basis that the defendant was without fault, no other defendant during trial, over the plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion [*CCP* § 581c(d)].

Legal Topics:

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

Civil Procedure
Pretrial Judgments
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Costs & Attorney Fees
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12.16 CHECKLIST: Seeking Review of Order Granting Nonsuit.

☐ If court grants nonsuit, immediate appeal is available.

Authority:

CCP § 581d

Discussion:

See 12.17

☐ If court denies nonsuit, appeal is available after trial.

Discussion:

See 12.18

☐ If court grants partial nonsuit, appeal is available after trial.

Authority:

Sole Energy Co. v. Petrominerals Corp. (2005) 128 CA4th 212, 240, 26 CR3d 798

Discussion:

See 12.18

☐ File appeal papers before deadline.

☐ Observe proper time limits to file notice of appeal.

Authority:

Cal Rules Ct, 8.104(a)

- ☐ Appellate court reviews ruling granting motion de novo.

Authority:

Pinero v. Specialty Rests. Corp. (2005) 130 CA4th 635, 639, 30 CR3d 348

Discussion:

See 12.19

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityTime LimitationsCivil ProcedureAppealsStandards of ReviewDe Novo Review



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12.17 If Court Grants Motion, Immediate Appeal Is Available.

An order granting a nonsuit to a plaintiff's entire action is treated as a final judgment for purposes of appeal [*see CCP § 581d*]. However, if a cross-complaint is pending, no appeal is available until after the cross-complaint is resolved [*CCP § 581c(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsNonsuitsGeneral Overview



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12.18 If Court Denies Motion, Appeal Is Available After Trial.

If the trial court denies a motion for nonsuit or grants a partial nonsuit, the case is tried on the merits, and, after trial, the moving party on appeal from the judgment asserts denial of the nonsuit motion as error.

Although no reported opinion has specifically approved the use of an extraordinary writ to review the denial of a motion for a nonsuit, such review may be possible when there is no plain, speedy, and adequate remedy in the ordinary course of law [see *CCP* §§ 1068, 1086, 1103]. The denial of a motion for a nonsuit, like the denial of a motion for summary judgment and the overruling of a demurrer, is not an appealable order because it is not a final judgment on the merits. As a general rule, when an order is not appealable, but is reviewable only on appeal from a subsequent judgment, various factors, such as the expense of proceeding with a trial and prejudice resulting from delay, may operate to make that remedy inadequate [*Phelan v. Superior Court* (1950) 35 C2d 363, 370, 217 P2d 951] . Further, a motion for a nonsuit is the equivalent of a demurrer [*Hamilton v. City of San Diego* (1990) 217 CA3d 838, 843, 266 CR 215] , and extraordinary writs have been issued to review orders overruling demurrers [see, e.g., *Harden v. Superior Court* (1955) 44 C2d 630, 635-636, 642, 284 P2d 9] .



Cross Reference:

Complete discussion of appeals, see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview, et seq. (Matthew Bender).

Legal Topics:

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

Civil Procedure Pretrial Judgments Nonsuits General Overview Civil Procedure Remedies Writs Common Law Writs General Overview Civil Procedure Appeals Appellate Jurisdiction General Overview Civil Procedure Appeals Reviewability General Overview



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12.19 Appellate Court Reviews Ruling Granting Motion De Novo.

An appellate court independently reviews the ruling on a motion for nonsuit, guided by the same rules that govern the trial court [*Stonegate Homeowners Association v. Staben* (2006) 144 CA4th 740, 746, 50 CR3d 709] .

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo Review



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12.20 Appellate Court Reviews Ruling Denying Nonsuit in Light Most Favorable to Plaintiff.

When reviewing the denial of a motion for nonsuit, appellate courts evaluate the evidence in the light most favorable to the plaintiff [*Barbosa v. IMPCO Technologies, Inc.* (2010) 179 CA4th 1116, 1121, 101 CR3d 923] . Reversal is proper only when no substantial evidence exists tending to prove each element of the plaintiff's case [*Laico v. Chevron U.S.A., Inc.* (2004) 123 CA4th 649, 659, 20 CR3d 307]. In other words, while the reviewing court's duty in most appeals is to indulge every reasonable intendment in favor of sustaining the trial court, the reverse is true in an appeal from an order of nonsuit.

An appellate court reviews the sufficiency of the evidence to support the jury's verdict, not the sufficiency of the evidence at the time of the nonsuit motion [*Ewing v. Gill Indus., Inc.* (1992) 3 CA4th 601, 613, 4 CR2d 640] .

If there is no evidence to review because the trial court excluded it, the appellate court reviews the trial court's evidentiary rulings to determine if the evidence was properly excluded. If relevant and material evidence was excluded that would have allowed the plaintiff to overcome a nonsuit, the judgment must be reversed [*Stonegate Homeowners Association v. Staben* (2006) 144 CA4th 740, 746, 50 CR3d 709] .

An appellate court may consider grounds not specified in a motion for nonsuit only if it is clear that the defect is one which could not have been remedied had it been called to the plaintiff's attention [*Lawless v. Calaway* (1944) 24 C2d 81, 94, 147 P2d 604] .

Despite *Lawless*, there is a split of authority over whether an appellate court may consider grounds argued by the defendant but not relied on by the trial court in granting the motion. Some courts of appeal have held that appellate review is limited to the grounds relied on by the trial court, the theory being that the appellate court need examine only grounds that a plaintiff may have been able to correct had they been called to its attention [see, e.g., *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 CA4th 1320, 1328, 96 CR2d 364] . Other courts hold that an appellate court may sustain a judgment of nonsuit on any ground specified in the motion, even if the trial court did not rely on that ground [see, e.g., *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 CA4th 1320, 1328, 96 CR2d 364] .

Legal Topics:

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

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12.21 Appeal of Expedited "Mini-Trial" Based on Offer of Proof Is Treated As Nonsuit.

Trial courts sometimes attempt to streamline trial proceedings by adjudicating a case from the bench based on offers of proof [see, e.g., *Stein-Brief Group, Inc. v. Home Indem. Co.* (1998) 65 CA4th 364, 369, 76 CR2d 3]. This "unusual and unorthodox procedure," without certain precautions, may result in an unnecessary reversal of the trial court's judgment because the reviewing court must treat the case as if it were the product of a motion for nonsuit after an opening statement [*Panico v. Truck Ins. Exch.* (2001) 90 CA4th 1294, 1296, 109 CR2d 638]. If both parties and the trial judge understand a procedure to be the functional equivalent of a motion for nonsuit in a jury trial based on the plaintiff's opening statement that subjects any ensuing judgment to an extremely strict standard of review, not only must all reasonable inferences be drawn in favor of the nonmoving party, but that party must be given the opportunity to amend the opening statement to correct its supposed defects [*Panico v. Truck Ins. Exch.* (2001) 90 CA4th 1294, 1299, 109 CR2d 638].

► Cross Reference:

Discussion of nonsuit, see California Forms of Pleading and Practice, Ch. 389, Nonsuit and Motions for Judgment (Matthew Bender).

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo Review



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12.22 CHECKLIST: Making Motion to Amend Pleadings to Conform to Proof.



Determine timing.



Make a motion for to amend any time before judgment is entered.

Authority:

Lee v. Murphy (1897) 119 C 364, 367, 51 P 549

Discussion:

See 12.24



Make motion orally to trial judge.

Discussion:

See 12.25



If making motion in writing, include supporting memorandum.

Discussion:

See 12.25

Form:

See 12.41



Court has discretion to grant motion.



Court must consider extent to which the issues have already been tried.

- ☐ Court considers the effect of any delay.
- ☐ Court does not permit amendment if it would cause prejudice.
- ☐ Court does not permit amendment to remedy a failure of proof.

Discussion:

See 12.26[1] -[5]

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedureJudicial OfficersJudgesDiscretion



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12.23 Options and Strategy.

The trial court may allow a party to amend the pleadings to conform to proof during trial [CCP § 576]. Motions to amend during trial are permitted to amend from one kind of relief to another [*Peters v. Binnard* (1933) 219 C 141, 149, 25 P2d 834] or to pray for damages greater than originally sued for [*Nuttman v. Chais* (1950) 101 CA2d 476, 479, 225 P2d 660] . These types of amendments are permitted if they do not change the cause of action, and relate solely to the identical cause of action set forth in the original complaint.

Strategic Point--Plaintiff:



Evidence admissible regarding one claim may establish another, separate cause of action. In that case, a motion to amend to conform to proof is proper and will likely succeed.

Strategic Point--Defendant:



A defendant can avoid such a motion by assiduously attempting throughout trial to restrict admission of evidence to the scope of the pleadings. If evidence is presented that establishes matters not alleged in the pleadings, that evidence ought to be irrelevant and properly excluded and, in that case, there would be nothing to conform to proof.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Amended Pleadings Conforming Pleadings to Evidence



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12.24 Make Motion to Amend Any Time Before Judgment Is Entered.

A party may make a motion to amend the pleadings to conform to proof any time during trial before the judgment has been entered [*Jud Whitehead Heater Co. v. Obler* (1952) 111 CA2d 861, 869, 245 P2d 608] .

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to Evidence



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12.25 Normally Make Motion Orally.

Motions and orders to conform a pleading to proof are generally made orally at trial. Notice of a motion to amend to conform to proof is not required [*State Med. Educ. Bd. v. Roberson* (1970) 6 CA3d 493, 502, 86 CR 258] . A supporting memorandum is not required unless the motion is made on notice [see *Cal Rules Ct, Rule 3.1113(a)*].



Cross Reference:

Form, see 12.41.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Amended Pleadings Conforming Pleadings to Evidence



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12.26 Court's Action on Motion to Amend Pleadings.

12.26[1] Court Has Discretion to Grant Motion. Denial of leave to amend pleadings to conform to proof is rarely justified. This supports the policy of great liberality in allowing amendment to pleadings at any stage of the proceedings so as to dispose of cases on their merits when the permission to amend will not prejudice the substantial rights of others [*Hyman v. Tarplee* (1944) 64 CA2d 805, 813, 149 P2d 453] .

12.26[2] Court Considers Extent to Which Issues Already Tried. An amendment to conform to proof is proper and the court has discretion to allow it if it is related to the original action and the relief sought arises on the same general state of facts as the prior pleading [*Sieck v. Hall* (1934) 139 CA 279, 301, 34 P2d 844] .

Example:

The general rule in a contested cause is that, absent an amendment to the complaint to conform to proof, a court may not award the plaintiff a sum in excess of the amount of damages the plaintiff claims to have sustained [*Castaic Clay Mfg. Co. v. Dedes* (1987) 195 CA3d 444, 449, 240 CR 652] . However, a court may grant a plaintiff any relief consistent with the case made by the complaint and embraced within the issue [*Castaic Clay Mfg. Co. v. Dedes* (1987) 195 CA3d 444, 449, 240 CR 652] . Thus, an amendment to award compensatory damages in an amount greater than that set forth in the complaint does not prejudice the defendant when evidence was admitted on the issue of damages of at least the amount that was awarded and the parties actually tried the issues of damages in amounts above the limits set forth in the body of the complaint [*Castaic Clay Mfg. Co. v. Dedes* (1987) 195 CA3d 444, 449-450, 240 CR 652] .

When a party is allowed to prove facts to establish one cause of action, an amendment that would allow the same facts to establish another cause of action is permitted, and a trial court abuses its discretion by prohibiting such an amendment when it would not prejudice another party [*South Bay Bldg. Enters., Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 CA4th 1111, 1124, 85 CR2d 647] .

12.26[3] Court Can Consider Effect of Delay. A trial judge may deny a request to amend to conform to proof if the requesting party delayed in making the request [*Emerald Bay Cmty. Ass'n v. Golden Eagle Ins. Corp.* (2005) 130 CA4th 1078, 1097, 31 CR3d 43, 59] .

12.26[4] Court Can Reject Amendment If It Would Cause Prejudice. As long as an amendment would not prejudice another party, a court should allow an amendment. Prejudice exists if additional investigation and discovery is required to address the new issue [*Rainer v. Community Mem'l Hosp.* (1971) 18 CA3d 240, 254, 95 CR 901] .

Example:

A trial court abuses its discretion if it permits an amendment to conform to proof that will introduce into the case new and substantially different issues not included in the pleadings, against which the adverse party had no opportunity to defend [*Trafton v. Youngblood* (1968) 69 C2d 17, 31, 69 CR 568, 442 P2d 648] .

A plaintiff may not use an amendment to conform to proof to abandon an entire case made by his or her pleading in favor of a new and different case [CCP § 471].

12.26[5] Court Can Deny Amendment to Remedy Failure of Proof. Although a mere variance between a pleading and proof may be remedied by an amendment, a failure of proof is fatal [*Johnson v. De Waard* (1931) 113 CA 417, 423, 298 P 92] . There is a failure of proof, rather than a variance, when the allegation of the claim or defense to which the proof is directed is unproved, not in some particular, but in its general scope and meaning [CCP § 471].

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Amended Pleadings Conforming Pleadings to Evidence Civil Procedure Judicial Officers Judges Discretion



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VII. MAKING REQUEST FOR VOLUNTARY DISMISSAL

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12.27 CHECKLIST: Making Request for Voluntary Dismissal.

- ☐ Complete and file Judicial Council form for request for dismissal.

Authority:

Cal Rules Ct, Rule 1.30

Discussion:

See 12.29

Form:

See 12.43

- ☐ Complete and file Judicial Council form for notice of entry of dismissal.

Authority:

Cal Rules Ct, Rule 3.1390

Discussion:

See 12.29

Form:

See 12.44

- ☐ Voluntary dismissal during trial is with prejudice.

Authority:

CCP § 581(e)

Discussion:

See 12.30[1]

- ☐ Voluntary dismissal during trial does not affect any pending cross-complaint.

Authority:

CCP § 581(e)

Discussion:

See 12.30[2]

- ☐ Dismissal cuts off pending motions; court may award costs and statutory attorney's fees incurred to dismissal date.

Authority:

Kyle v. Carmon (1999) 71 CA4th 901, 909, 84 CR2d 303

Discussion:

See 12.30[3]

- ☐ Parties may agree to limit the legal effect of dismissal to the dismissing plaintiff.

Authority:

Manning v. Wymer (1969) 273 CA2d 519, 523-527, 78 CR 600

Discussion:

See 12.30[4]

- ☐ Dismissal may be by abandonment.

Authority:

CCP § 581(d)

Discussion:

See 12.31

Legal Topics:

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

Civil Procedure Dismissals Voluntary Dismissals General Overview Civil Procedure Dismissals Voluntary Dismissals Court Orders Dismissals With Prejudice



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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.28

12.28 Options and Strategy.

A plaintiff may request a dismissal with prejudice of a complaint, or any of the causes of action asserted in it, after commencement of trial [CCP § 581(e)]. In addition, any party may dismiss an action with the written consent of all the other parties [CCP § 581(b)(2)].



Warning:

Typically, a plaintiff should not voluntarily dismiss an action with prejudice, even during trial, unless doing so is part of a settlement or for other strategic reasons. Doing so will preclude the plaintiff from being able to later assert these claims against the dismissed parties [see *Paniagua v. Orange County Fire Authority* (2007) 149 CA4th 83, 89, 56 CR3d 746]. The better practice is for plaintiff to attempt to obtain the other parties' consent for the dismissal to be without prejudice or to dismiss the case before the actual commencement of trial [see *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 CA4th 869, 876-881, 100 CR3d 771 (discussing when trial "commences")].

Legal Topics:

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



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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.29

12.29 Party Must Use Judicial Council Forms to Request Dismissal and Give Notice of Entry of Dismissal.

A party requesting voluntary dismissal must use the mandatory Judicial Council form of "Request for Dismissal" [*Cal Rules Ct, Rule 1.30; see Cal Rules Ct, Rule 3.1390*].

In addition, a party requesting dismissal under *CCP* § 581(b)(1), (2), or (e) must use the mandatory Judicial Council form of "Notice of Entry of Dismissal and Proof of Service" [*Cal Rules Ct, Rule 1.30; see Cal Rules Ct, Rule 3.1390*].



Cross Reference:

Forms, see 12.43, 12.44.

Legal Topics:

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

Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersMotions



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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.30

12.30 Effect of Voluntary Dismissal.

12.30[1] Voluntary Dismissal During Trial Is With Prejudice. If a plaintiff voluntarily dismisses a cause of action during trial, the dismissal is with prejudice unless all the affected parties consent that dismissal be without prejudice or the court orders that the dismissal be without prejudice on a showing of good cause [*CCP* § 581(e)].



Strategic Point:

A motion to dismiss with prejudice of the entire case after commencement of trial will operate res judicata, and therefore will be determinative of all matters that could have been litigated. Although such a motion must be made on written consent of all the other parties, it is the better practice for plaintiff to attempt to obtain a dismissal without prejudice.

12.30[2] Voluntary Dismissal During Trial Does Not Affect Cross-Complaint. A dismissal with prejudice before the court renders its decision will not have the effect of dismissing a cross complaint filed in the same action [*see CCP* § 581(e)].

12.30[3] Voluntary Dismissal Cuts Off Pending Motions. Once the court grants a voluntary dismissal, any pending motions, such as a motion to intervene or a motion to dismiss under the five-year provision of *CCP* §§ 583.310 and 583.360(a), may not be heard, and the moving party's rights are entirely cut off [*see Kyle v. Carmon* (1999) 71 CA4th 901, 909, 84 CR2d 303] .

12.30[4] Parties May Agree to Limit Legal Effect of Dismissal. The parties may agree to limit the legal effect of a dismissal to the plaintiff dismissing the action [*see Manning v. Wymer* (1969) 273 CA2d 519, 523-527, 78 CR 600] .

Example:

Parties who file separate complaints involving the same transaction may enter into an agreement that dismissal with prejudice by one party of the action will not preclude the other party from proceeding with the remaining action [*see Manning v. Wymer* (1969) 273 CA2d 519, 523-527, 78 CR 600] .

12.30[5] Voluntary Dismissal Does Not Affect Pending Sanctions Motions. A voluntary dismissal made while a

motion for sanctions pursuant to *CCP § 128.7* is pending does not avoid a court's consideration of a sanctions award [*Eichenbaum v. Alon* (2003) 106 CA4th 967, 976, 131 CR2d 296] .

12.30[6] After Dismissal, Court Has No Jurisdiction to Enforce Settlement. Voluntary dismissal deprives the court of jurisdiction to enforce the terms of a settlement. However, the parties may agree to the court's retaining jurisdiction to enforce the terms of the settlement [*Wackeen v. Malis* (2002) 97 CA4th 429, 433, 118 CR2d 502] . Otherwise, a plaintiff's only remedy to enforce a settlement after dismissal is a separate action for enforcement.

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSanctionsGeneral Overview



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12.31 Plaintiff's Abandonment of Case Can Result in Dismissal.

The court may infer a voluntary dismissal if a plaintiff abandons the case after commencement of trial. In this case, the court must dismiss the complaint [*CCP* § 581(d)].

A finding of voluntary dismissal must be predicated on a clear, unequivocal, and express intent to abandon an action. That 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 Bldg. Co. v. City & Suburban Mortg. Co. (1970) 10 CA3d 206, 212-213, 88 CR 858*] .

Example:

A 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 the plaintiff's dismissal attempt as an abandonment if the defendant insists on proceeding with trial [see *Burnett v. Burnett (1948) 88 CA2d 805, 807, 199 P2d 685*] .

Legal Topics:

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

Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral Overview



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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.32

12.32 Voluntary Dismissal Comports With Trial Court Delay Reduction Action.

A plaintiff's ability to exercise the statutory right to voluntarily dismiss an action under *CCP* § 581(b) is consistent with the mission of the trial court delay reduction program [*Harris v. Billings* (1993) 16 CA4th 1396, 1404-1405, 20 CR2d 718] . Therefore, the court should allow dismissal without prejudice even if the parties have an underlying agreement to facilitate settlement, under which the parties will toll any statutes of limitations and laches claims for a particular period of time. The dismissal is nonetheless a final disposition that removes the case from the court's inventory and allows later-filed cases to move ahead in line [*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 DismissalsCourt OrdersDismissals Without PrejudiceCivil
ProcedureSettlementsGeneral Overview



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12.33 Effect of Voluntary Dismissal on Attorney's Fees.

12.33[1] Court May Award Costs and Statutory Attorney's Fees Incurred to Dismissal Date. Although dismissal cuts off any pending motions, the court still has jurisdiction to award costs and statutory attorney's fees incurred up to the date of dismissal [*Coltrain v. Shewalter* (1998) 66 CA4th 94, 107, 77 CR2d 600] .

➡ Cross Reference:

Discussion of cutting off pending motions, see 12.30[3].

12.33[2] Contractually Authorized Attorney's Fees Are Not Recoverable. When a party voluntarily dismisses a cause of action, there is no prevailing party for purposes of CC § 1717 [*Gogri v. Jack in the Box Inc.* (2008) 166 CA4th 255, 273-274, 82 CR3d 629] .

12.33[3] Recovery of Attorney's Fees Incurred in Defending Tort or Other Noncontract Claims Arising From Contract May Be Recoverable. Although CC § 1717 bars recovery of attorney's fees incurred in defending contract claims when the case is voluntarily dismissed before trial, CC § 1717 does not bar recovery of attorney's fees incurred in defending tort or other noncontract claims arising from a contract with a broadly worded attorney's fee provision. Whether attorney's fees incurred in defending tort or other noncontract claims are recoverable after a pretrial dismissal depends on the terms of the contractual attorney's fee provision [*Santisas v. Goodin* (1998) 17 C4th 599, 602, 617, 71 CR2d 830, 951 P2d 399] .

➡ Cross Reference:

Further discussion of attorney's fees on voluntary dismissal, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 39.13.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil

Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs
& Attorney Fees Costs General Overview



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12.34 No Appeal From Voluntary Dismissal.

The entry of a properly filed request for dismissal is a ministerial act from which there is no right to appeal [*Parenti v. Lifeline Blood Bank* (1975) 49 CA3d 331, 335, 122 CR 709] . Thus, a plaintiff may not appeal after obtaining a voluntary dismissal [*Yancey v. Fink* (1991) 226 CA3d 1334, 1342-1343, 277 CR 415] , nor may a defendant appeal the plaintiff's dismissal [*Gray v. Superior Court* (1997) 52 CA4th 165, 170-171, 60 CR2d 428] . A defendant may file a motion to vacate the dismissal. If the motion to vacate is denied, it is nonappealable, but may be reviewed by extraordinary writ [*Gray v. Superior Court* (1997) 52 CA4th 165, 171-172, 60 CR2d 428] .



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VIII. MAKING MOTION TO REOPEN CASE

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.35

12.35 CHECKLIST: Making Motion to Reopen Case.



Determine timing.



Make motion to reopen a case any time before judgment is entered.

Authority:

Horning v. Shilberg (2005) 130 CA4th 197, 208-209, 29 CR3d 717

Discussion:

See 12.37



Make motion to reopen in response to motion for nonsuit or motion for directed verdict.

Authority:

Abreu v. Svenhard's Swedish Bakery (1989) 208 CA3d 1446, 1457, 257 CR 26

Discussion:

See 12.10[3], 12.37[2]

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview



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12.36 Options and Strategy.

The trial judge has broad discretion to reopen a case after an oral ruling, but before final judgment is entered, even over the objection of litigants, if adequate notice is given to parties [*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 CA4th 1595, 1610-1612, 18 CR2d 692*]. Accordingly, after a motion for nonsuit in a jury trial and before the court rules on the motion, the plaintiff can move to reopen the case and introduce further evidence, if appropriate.



Strategic Point:

If plaintiff has inadvertently omitted pertinent facts in the opening statement or omitted evidence concerning a material element in his or her case, plaintiff should seek to reopen the case immediately whether or not there has been a motion for a nonsuit.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview



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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.37

12.37 Making Motion to Reopen Case.

12.37[1] Make Motion Any Time Before Entry of Judgment. The trial court has discretion to grant a motion to reopen any time before entry of judgment [see *Horning v. Shilberg* (2005) 130 CA4th 197, 208-209, 29 CR3d 717] .

12.37[2] Ordinarily, Make Motion in Response to Motion for Nonsuit or Motion for Directed Verdict. After a motion for nonsuit, the plaintiff may ask to augment his or her opening statement or case-in-chief [*Abreu v. Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1457, 257 CR 26] .

Cross Reference:

Discussion of motion for nonsuit, see 12.08 et seq.

In response to a motion for a directed verdict, the trial court has discretion to reopen the case on a showing of good cause [see *Pocock v. Deniz* (1955) 134 CA2d 758, 761, 286 P2d 466] .

Cross Reference:

Discussion of directed verdict, see Ch. 14, Motion for Directed Verdict.

12.37[3] Include Offer of Proof With Motion to Reopen Case. A plaintiff who asks to reopen a case must specify the additional evidence he or she intends to present to cure the deficiencies that would otherwise result in a nonsuit [*S.C. Anderson, Inc. v. Bank of Am.* (1994) 24 CA4th 529, 540, 30 CR2d 286] . In other words, the plaintiff waives the right to present further evidence if the plaintiff fails to both request leave to reopen and make an offer of proof, describing the evidence and explaining how it would cure the deficiencies [*Austin B. v. Escondido Union School District* (2007) 149 CA4th 860, 886-887, 57 CR3d 454] .



Strategic Point:

The offer of proof should be clear and specific. Counsel should specify the evidence offered and how it will be presented. Documents may be attached as an exhibit to the offer of proof, as can deposition testimony.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil
ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsOpening StatementsDirected
Verdicts



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12.38 Denial of Request to Reopen Case Is Error.

Denial of a request to reopen or augment that is accompanied by an offer of proof of evidence that will cure the deficiency is reversible error if the plaintiff shows prejudice [*Alpert v. Villa Romano Homeowners Assn. (2000) 81 CA4th 1320, 1337, 96 CR96 364*].

Legal Topics:

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

Civil ProcedureTrialsGeneral OverviewCivil ProcedureAppealsStandards of ReviewReversible Errors



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IX. FORMS

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.39

12.39 Motion for Nonsuit.

Motion for Nonsuit.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____
MOTION FOR NONSUIT

To _____ [party, e.g., Plaintiff John Smith] and to _____ [name], his/her attorney of record.

_____ [Party, e.g., Defendant] hereby moves pursuant to *Code of Civil Procedure Section 581c* for nonsuit in his/her favor on _____ [identify pleading, e.g., Plaintiff's complaint]. This motion is made on the ground that, as a matter of law, _____ [specify legal grounds, e.g., the evidence is insufficient to sustain Plaintiff's burden of proof on the issue that Defendant was negligent in his operation of the vehicle in question].

This motion is based on the _____ [affidavits(s) or declarations] of _____ [name(s)], the supporting memorandum served and filed with this motion, the records and file in this matter, [on such portions of the transcript of the trial and supplemental affidavits or declarations and memoranda that may be filed subsequently in this matter], 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 _____ [moving party]

NOTES.

Authority:

CCP § 581c



Timing:

See 12.05

Grounds:

See 12.06

Related Form of Order:

See 12.53

Related Form of Memorandum:

See California Points and Authorities, § 155.254 (Matthew Bender)



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IX. FORMS

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.40

12.40 Order Granting Judgment of Nonsuit.

Order Granting Judgment of Nonsuit.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER GRANTING
_____ [name],	)	JUDGMENT OF
Defendant.	)	NONSUIT
	)	
	)	

The motion of Defendant _____ [name] for an order granting judgment of nonsuit pursuant to *Code of Civil Procedure Section 581c(a)* on Plaintiff's _____ [opening statement or presentation of evidence] was heard by the court on _____ [date]. Defendant appeared by counsel _____ [name]; Plaintiff appeared by counsel _____ [name].

Plaintiff having rested his/her case and good cause for an order for judgment of nonsuit having been shown in that _____ [specify ground argued on motion],

IT IS ORDERED, ADJUDGED, AND DECREED that the motion of Defendant be, and hereby is, granted, that Plaintiff take nothing by the complaint on file herein, that this order shall [not] operate as an adjudication on the merits, and that Defendant recover from Plaintiff his/her costs in the sum of \$_____ [and attorney's fees in the sum of \$_____].

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES.

Authority:

CCP § 581c



Timing:

See 12.05

Grounds:

See 12.05

Related Form of Motion:

See 12.39



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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.41

12.41 Memorandum in Support of Motion to Amend Pleadings to Conform to Proof.

Memorandum of Points and Authorities in Support of Motion to Amend Pleadings to Conform to Proof.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN
_____ [name],	)	SUPPORT OF MOTION TO
Defendant.	)	AMEND PLEADINGS TO
	)	CONFORM TO PROOF
	)	

THE COURT SHOULD LIBERALLY EXERCISE ITS DISCRETION TO ALLOW AN AMENDMENT TO CONFORM TO PROOF AT ANY STAGE OF TRIAL.

A. Statutory Authority. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his or her prejudice in maintaining his or her action or defense on the merits. Whenever it appears that a party has been so misled, the court may order the pleadings to be amended, on such terms as may be just [*Cal. Code Civ. Proc. § 469*]. If the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs [*Cal. Code Civ. Proc. § 470*]. The court, in its discretion, after notice to the adverse party, may allow an amendment to any pleading in the furtherance of justice and on any terms as may be just, at any time before or after commencement of trial [*Cal. Code Civ. Proc. §§ 473(a), 576*].

B. Discretion of Court. An amendment to allege a new cause of action to conform to proof is favored, and a trial court

abuses its discretion by prohibiting such an amendment when doing so would not prejudice another party [*South Bay Bldg. Enters., Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 CA4th 1111, 1124, 85 CR2d 647] . Although the Code of Civil Procedure statutes use the word "may," thus committing the matter to the trial court's discretion, the court must permit an amendment to conform to proof offered by Plaintiff where no prejudice results to Defendant. The same rule applies to a plaintiff's request to direct the fact to be found according to the evidence as provided by *Cal. Code Civ. Proc. § 470* [*Walker v. Belvedere* (1993) 16 CA4th 1663, 1670, 20 CR2d 773] .

C. Liberal Allowance of Amendment. The power of the court to allow amendment of pleadings is to be liberally exercised so that cases may be decided on their merits, and the greatest liberality is encouraged in allowing amendments to conform to proof [*Desny v. Wilder* (1956) 46 C2d 715, 751, 299 P2d 257] .

D. Amendment at Any Stage of Trial. The trial court may permit amendment to conform to proof at any stage of the trial, even after submission of the cause [*Lee v. Murphy* (1897) 119 C 364, 367, 51 P 549] .

E. Notice Not Required. Notice of a motion to amend to conform to proof is not required [*State Med. Educ. Bd. v. Roberson* (1970) 6 CA3d 493, 502, 86 CR 258] .

[Add, where appropriate, supporting memoranda relating to any specific reasons why the amendment should be allowed.]

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [moving party]

NOTES.

Authority:

CCP §§ 469, 470, 473(a), 576



Timing:

See 12.24

Grounds:

See 12.26[1] -[5]

Related Forms of Memoranda:

See California Points and Authorities, Ch. 16, Amended and Supplemental Pleadings (Matthew Bender)



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1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.42

12.42 Memorandum in Opposition to Motion to Amend Pleadings to Conform to Proof.

Memorandum of Points and Authorities in Opposition to Motion to Amend Pleadings to Conform to Proof.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	MEMORANDUM IN
_____ [name],	)	OPPOSITION TO MOTION TO
Defendant.	)	AMEND PLEADINGS TO
	)	CONFORM TO PROOF
	)	

THE COURT SHOULD DENY THE PROPOSED AMENDMENT BECAUSE ALLOWING THE AMENDMENT
WOULD NOT BE IN THE FURTHERANCE OF JUSTICE.

A. Amendment Only in Furtherance of Justice. Amendment is to be granted only if the court, in the exercise of its discretion, finds that it will be in furtherance of justice [*Bank of Woodland v. Heron* (1898) 122 C 107, 109, 54 P 537].

B. No Showing to Justify Exercise of Discretion. An application for leave to amend is addressed to the sound discretion of the court and may be denied when no showing is made to justify exercise of the court's discretionary power [*Tognazzi v. Wilhelm* (1936) 6 C2d 123, 127, 56 P2d 1227].

[Specify any additional grounds for opposing motion to amend, e.g.,:]

C. Introduction of New Issue. A trial court abuses its discretion if it permits an amendment to conform to proof that will introduce into the case new and substantially different issues not included in the pleadings, on which the adverse party had no opportunity to defend [*Trafton v. Youngblood* (1968) 69 C2d 17, 31, 69 CR 568, 442 P2d 648] .

[AND/OR]

D. Prejudice to Adverse Party. A trial court abuses its discretion by permitting amendment to conform to proof if the rights of the adverse party will be prejudiced by the amendment [*Trafton v. Youngblood* (1968) 69 C2d 17, 31, 69 CR 568, 442 P2d 648] .

[AND/OR]

E. Lack of Evidence. It is manifestly erroneous for the court to grant leave to amend to conform to proof when the record shows that no conformity results due to the absence of the claimed evidence [*Hunt v. Smyth* (1972) 25 CA3d 807, 829-830, 101 CR 4] .

[AND/OR]

F. Evidence Objected To. A motion to amend to conform to proof cannot be predicated on evidence to which an objection has properly been made [*Hunt v. Smyth* (1972) 25 CA3d 807, 829, 101 CR 4] .

[AND/OR]

G. Based on Evidence Relating to Pleadings Issue. When proof has been introduced in conformity with the pleadings, there is no room for a court to exercise its discretion to allow an amendment of the pleadings to introduce another issue that the proof also supports. When evidence was properly admitted under the original pleading, failure to object to its admission does not estop a party from objecting to a motion to amend to conform to the proof based on that evidence [*Winberry v. Lopez* (1960) 178 CA2d 672, 679, 3 CR 245] .

[AND/OR]

H. Unwarranted Delay Supports Denial. Unwarranted delay in presenting a proposed amendment may be grounds in itself for denial of a motion for leave to amend [*Record v. Reason* (1999) 73 CA4th 472, 86 CR2d 547] . Denial may rest on the lack of diligence in offering the amendment after knowledge of the facts or the effect of the delay on the adverse party [*Roemer v. Retail Credit Co.* (1975) 44 CA3d 926, 939-940, 119 CR 82] .

[AND/OR]

I. Lack of Due Diligence. A lack of due diligence may be inferred from a long delay in presenting an amendment after knowledge of the facts [*Roemer v. Retail Credit Co.* (1975) 44 CA3d 926, 940, 119 CR 82] .

[AND/OR]

J. New Issue Requiring Further Investigation or Discovery. Denial of permission to amend pleadings may be based on long unexcused delay especially when the proposed amendment interjects a new issue that may require further investigation or discovery procedures [*Green v. Rancho Santa Margarita Mortgage Co. (1994) 28 CA4th 686, 692, 33 CR2d 706*] .

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [moving party]

NOTES.

Authority:

CCP §§ 473(a), 576



Timing:

See 12.24

Grounds:

See 12.26[1] -[5]

Related Forms of Memoranda:

See California Points and Authorities, Ch. 16, Amended and Supplemental Pleadings (Matthew Bender)



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Chapter 12 Motion for Nonsuit and Other Motions During Trial
IX. FORMS

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.43

12.43 Judicial Council Form CIV-110--Request for Dismissal.

Judicial Council Form CIV-110--Request for Dismissal.

[Click here to view image.](#)

NOTES.

Authority:

Cal Rules Ct, Rules 1.30, 3.1390

Grounds:

See 12.39

Related Form of Notice:

See 12.44



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Chapter 12 Motion for Nonsuit and Other Motions During Trial
IX. FORMS

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.44

12.44 Judicial Council Form CIV-120--Notice of Entry of Dismissal and Proof of Service.

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

NOTES.

Authority:

Cal Rules Ct, Rules 1.30, 3.1390

Grounds:

See 12.39

Related Form of Request:

See 12.43



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Chapter 12 Motion for Nonsuit and Other Motions During Trial
IX. FORMS

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.45

12.45 Declaration in Support of Motion to Reopen Case.

Declaration in Support of Motion to Reopen Case.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION IN
_____ [name],	)	SUPPORT OF MOTION
Defendant.	)	TO REOPEN CASE
	)	
	)	

I, _____, 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, in successively numbered paragraphs, facts within declarant's personal knowledge establishing the grounds of the motion, e.g.:]

2. There is material oral and documentary evidence relevant to the issues in this case that _____ [moving party] was prevented from presenting at the trial because _____ [specify reasons such as newly discovered evidence, inadvertence, rulings of the trial court, or other as appropriate, with particulars].

3. The oral evidence pertains to, and tends to _____ [prove or disprove], the issue of

_____ [specify]. It consists of the testimony of _____ [name], who will testify in substance as follows: _____ [specify].

4. The documentary evidence pertains to, and tends to _____ [prove or disprove], the issue of _____ [specify]. It consists of the following: _____ [describe].

5. The foregoing evidence is available for immediate introduction with the permission of the court.

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 § 607(6)



Timing:

See 12.37

Grounds:

See 12.38



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Chapter 12 Motion for Nonsuit and Other Motions During Trial
IX. FORMS

1-12 MB Practice Guide: Trial & Post-Trial Civil Proc 12.46

12.46 Declaration in Opposition to Motion to Reopen Case.

Declaration in Opposition to Motion to Reopen Case.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION
_____ [name],	)	IN OPPOSITION TO
Defendant.	)	MOTION TO REOPEN CASE
	)	
	)	

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 _____ (opposing party) or other statement as appropriate].

2. I oppose the motion of _____ [moving party] for an order setting aside the submission of this case and reopening the trial on the ground(s) that _____ [set forth facts within declarant's personal knowledge negating the grounds of the motion, e.g., all the evidence mentioned in the declaration of _____ (name) was available to the _____ (moving party) at the trial of this action, in that _____ (set forth evidentiary facts showing that moving party knew and could have produced the evidence at trial)].

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 § 607(6)



Timing:

See 12.37

Grounds:

See 12.38



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Chapter 13 Motion for Judgment

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.syn

§ 13.syn Synopsis to Chapter 13: Motion for Judgment

13.01 Scope.

13.02 Objective and Strategy.

13.02[1] Purpose of Motion for Judgment.

13.02[2] Comparing Other Trial Motions Affecting Judgment.

13.02[2][a] Motion for Judgment on the Pleadings Compared.

13.02[2][b] Motion for Nonsuit Compared.

13.02[2][c] Motion for Directed Verdict Compared.

13.02[2][d] Motion for Judgment Notwithstanding the Verdict Compared.

13.03 CHECKLIST: Making Motion for Judgment.

13.04 Options and Strategies for Moving Party.

13.05 Plaintiff or Defendant May Make Motion.

13.06 Make Motion After Opponent Completes Presentation of Evidence.

13.07 Prepare and File Written Motion.

13.08 Moving Party Does Not Waive Right to Proceed.

13.09 Moving Party May Recover Defense Costs.

13.10 CHECKLIST: Opposing Motion for Judgment.

- 13.11 Options and Strategies for Opposing Party.
- 13.12 Opposing Party May Offer Rebuttal Evidence.
- 13.13 Opposing Party Waives Right to Offer Rebuttal by Failing to Request It.
- 13.14 Opposing Party May Move for New Trial.
- 13.15 CHECKLIST: Hearing on Motion for Judgment.
- 13.16 Court May Render Judgment or Take Matter Under Submission.
- 13.17 Court Must Weigh Evidence.
- 13.18 Court May Disregard Witness or Expert Testimony.
- 13.19 Court May Grant Partial Judgment.
- 13.20 Court Must Prepare Statement of Decision.
- 13.21 Judgment Operates As Adjudication on Merits.
- 13.22 CHECKLIST: Seeking Review of Order Granting or Denying Judgment.
- 13.23 If Court Grants Motion for Judgment, Losing Party May Move for New Trial.
- 13.24 Appeal May Be Taken of Order Granting Judgment.
- 13.25 No Appeal May Be Taken of Order Granting Partial Judgment.
- 13.26 Appellate Court Upholds Trial Court Decision If Supported by Substantial Evidence.
- 13.27 Appellate Court Liberally Construes Trial Court's Findings in Favor of Judgment.
- 13.28 Motion for Judgment.
- 13.29 Judgment on Motion for Judgment.



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Chapter 13 Motion for Judgment
I. STRATEGY

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.01

13.01 Scope.

This chapter covers:

- Objectives and strategy for motions for judgment [see 13.02].
- Making a motion for judgment [see 13.03 -13.09].
- Opposing a motion for judgment [see 13.10 -13.14].
- Hearings on motions for judgment [see 13.15 -13.21].
- Seeking review of an order granting or denying a motion for judgment [see 13.22 -13.27].

Core Statute:

CCP § 631.8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 13 Motion for Judgment
I. STRATEGY

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.02

13.02 Objective and Strategy.

13.02[1] Purpose of Motion for Judgment. In a court trial (that is, a non-jury trial), after one party has finished presenting evidence, the other party, without waiving his or her right to offer evidence in support of his or her defense or in rebuttal in the event the motion is not granted, may move for a judgment [CCP § 631.8(a)]. The purpose of a motion for judgment is to enable the trial court to dispense with the need for a party to present evidence when, after weighing the evidence at the close of the plaintiff's case, the court is persuaded that the plaintiff has failed to sustain its burden of proof [*Plaza Home Mortgage, Inc. v. North American Title Co.* (2010) 184 CA4th 130, 135, 109 CR3d 9] . A party may also move for a judgment on a cross complaint [CCP § 631.8(a)].

Cross References:

Discussion of non-jury trials generally, see Ch. 5, Non-Jury Trials.

Discussion of motion for judgment generally, see *California Forms of Pleading and Practice*, § 389.12 (Matthew Bender).

For non-jury trials, the motion for judgment is used in place of the motion for nonsuit as a means to challenge the sufficiency of the plaintiff's evidence [*Combs v. Skyriver Communications, Inc.* (2008) 159 CA4th 1242, 1262, 72 CR3d 171] .



Strategic Point:

As with a motion for nonsuit, a motion for judgment by the defendant may alert the plaintiff to deficiencies in its case in time to move to reopen evidence.

Consider:

The defendant typically makes a motion for judgment at the end of the presentation of the plaintiff's case. However, the defendant may make the motion after presentation of its own case, but before the plaintiff has the chance to rebut the defendant's case. If the plaintiff has not presented any rebuttal case and if the defendant based its motion on the whole case to that point, the plaintiff should argue that it should be

permitted to present a rebuttal case to answer anything defendant has presented [see, e.g., *People v. Mobil Oil Co.* (1983) 143 CA3d 261, 270-271, 192 CR 155] .

13.02[2] Comparing Other Trial Motions Affecting Judgment.

13.02[2][a] Motion for Judgment on the Pleadings Compared. A motion for judgment differs from a motion for judgment on the pleadings in that it is directed to the sufficiency of the evidence rather than to the sufficiency of the pleadings. Thus, if the plaintiff's evidence fails to establish the elements of a prima facie case without varying materially from the pleadings, the proof is insufficient, and the proper motion is for judgment rather than for judgment on the pleadings [see *Nelson v. Specialty Records, Inc.* (1970) 11 CA3d 126, 142, 89 CR 540] .

13.02[2][b] Motion for Nonsuit Compared. A motion for nonsuit may be made after the plaintiff's opening statement or after the plaintiff's presentation of evidence in a jury or a nonjury trial. This differs from a motion for judgment in that a defendant may move for judgment after the plaintiff's presentation of evidence only in a nonjury trial [see 13.06]. In addition, unlike in a motion for nonsuit, in a motion for judgment, the trial court may weigh the evidence and make factual findings based on the evidence presented [*Combs v. Skyriver Communications, Inc.* (2008) 159 CA4th 1242, 1263, 72 CR3d 171] .

Cross Reference:

Discussion of motions for nonsuit, see Ch. 12, *Motion for Nonsuit and Other Motions During Trial*, 12.07[4].

13.02[2][c] Motion for Directed Verdict Compared. A motion for a directed verdict challenges whether the opposing party's evidence makes out a prima facie case of the claim asserted [*Hilliard v. A. H. Robins Co.* (1983) 148 CA3d 374, 394, 196 CR 117] . In a motion for judgment, the trial court may weigh the evidence and determine whether the evidence meets the burden of proof [see *Heap v. General Motors Corp.* (1977) 66 CA3d 824, 829, 136 CR 304] .

Cross Reference:

Discussion of motions for direct verdict, see Ch. 14, *Motion for Directed Verdict*.

13.02[2][d] Motion for Judgment Notwithstanding the Verdict Compared. A motion for judgment notwithstanding the verdict (JNOV) differs from a motion for judgment in that a motion for JNOV is made after a jury has rendered a verdict for the opposing party [see CCP § 629]. In a motion for JNOV, the trial court may not weigh the evidence or consider witnesses' credibility [*Carter v. CB Richard Ellis, Inc.* (2004) 122 CA4th 1313, 1320, 19 CR3d 519] .

Detailed Discussion/Forms:

Discussion generally, see California Forms of Pleading and Practice, Ch. 389, *Nonsuit and Motions for Judgment*.

Cross References:

Discussion of motions for judgment notwithstanding the verdict, see Ch. 20, *Motion for Judgment Notwithstanding the Verdict*.

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 JudgmentsJudgment on the PleadingsCivil ProcedurePretrial JudgmentsNonsuitsGeneral
OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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Chapter 13 Motion for Judgment
II. MAKING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.03

13.03 CHECKLIST: Making Motion for Judgment.

☐ Defendant or plaintiff may make motion.

Authority:

CCP § 631.8(a)

Discussion:

See 13.05



Determine timing.



Make motion after opponent completes presentation of evidence.

Authority:

CCP § 631.8(a)

Discussion:

See 13.06

☐ By making motion, moving party does not waive right to put on case.

Authority:

CCP § 631.8(a)

Discussion:

See 13.08

- ☐ If possible, prepare and file written motion for judgment.

Discussion:

See 13.07

Form:

See 13.28

- ☐ If appropriate, follow standard noticed motion procedure.

☐ Serve and file all reply papers to opposing party's response at least five calendar days before the hearing [CCP § 1005]

Standard Procedure Checklist:

See *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.39 et seq.

- ☐ Moving party may recover defense costs.

Authority:

CCP § 1038

Discussion:

See 13.09

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 13 Motion for Judgment
II. MAKING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.04

13.04 Options and Strategies for Moving Party.

In a court trial, after a party has finished presenting evidence, the other party may move for a judgment under the theory that the party presenting the case has not sustained his or her burden of proof [*CCP* § 631.8(a)]. Unlike a motion for a nonsuit, which may be made after a party's opening statement or after the presentation of evidence in a jury trial, a motion for judgment is made in a nonjury trial after a party has presented his or her evidence.

The motion can be made at any time, for the purpose of showing that there is no point in moving forward. For example, at the end of the plaintiff's case, the defendant presents its case including evidence purportedly supporting one or more affirmative defenses. A motion for judgment by the plaintiff would then lie on the ground that the plaintiff presented sufficient evidence to establish its affirmative case, and that the defendant failed to establish its affirmative defenses. There is little difference between such a motion for judgment and, in a jury trial, a motion for a directed verdict.

Counsel representing a defendant in a non-jury trial should focus on the evidence offered by the plaintiff to determine whether the plaintiff meets its burden of proof as to all elements of the claims being asserted and that the evidence offered is substantial, as relevant case law has determined. If either of these factors is lacking, a motion for judgment may be in order and eliminate the need for presenting a defense.



Strategic Point:

The moving party should reference specific failures of proof by the opposing party and match them up with elements of the claim that are thereby not established.

Additionally, because the trier of fact in the non-jury trial will be entitled to weigh the evidence in considering a motion for judgment, factors such as credibility of witnesses can be taken into account when considering the motion. Even if the motion for judgment is denied, the moving party may learn from the non-moving party's opposition or from the trial judge matters on which more, or less, focus should be addressed in the moving party's case in chief.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 13 Motion for Judgment
II. MAKING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.05

13.05 Plaintiff or Defendant May Make Motion.

A motion for judgment is usually made by the defendant at the close of the plaintiff's case [*People v. Mobil Oil Corp.* (1983) 143 CA3d 261, 267 n6, 192 CR 155] . However, the same principles apply to a motion by the plaintiff at the close of the defendant's case [see *Roth v. Parker* (1997) 57 CA4th 542, 549, 67 CR2d 250] . A plaintiff may make the motion after the defendant presents his or her case to avoid the need to put on a rebuttal case [see *People v. Mobil Oil Corp.* (1983) 143 CA3d 261, 267, 192 CR 155] .

A motion for judgment allows the trial court to dispense with the need for a party, typically the defendant, to present evidence when, after weighing the evidence at the close of the plaintiff's case, the court is persuaded that the plaintiff has failed to sustain its burden of proof [*Heap v. General Motors Corp.* (1977) 66 CA3d 824, 829, 136 CR 304] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 13 Motion for Judgment
II. MAKING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.06

13.06 Make Motion After Opponent Completes Presentation of Evidence.

A motion for judgment can be made only after the opposing party has completed his or her presentation of evidence in a nonjury trial [*CCP* § 631.8(a)].

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 13 Motion for Judgment
II. MAKING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.07

13.07 Prepare and File Written Motion.

Motions for judgment can be made orally in open court, but if possible a written motion should be prepared and filed. A notice of motion should be prepared if the motion is anticipated before trial or if time is available to prepare it. This may happen, for example, if, by stipulation, the statement of facts in plaintiff's trial brief is deemed to be plaintiff's opening statement [*see Timmsen v. Forest E. Olson, Inc. (1970) 6 CA3d 860, 863, 86 CR 359*].

Strategic Point:



Although the motion for judgment can be made orally, it is always a better practice to submit a short motion or some supporting documentation (memorandum of points and authorities, summary of the evidence militating a favorable ruling), because that will provide a tool on which the court can rely.

Only when there is insufficient time prepare a written motion should counsel consider making an oral motion. If the motion is made orally, ask leave to submit papers in support of the motion. A motion for judgment will rarely be made as a traditional noticed motion.

A motion for judgment at the end of the case, though, in a court trial, will be unlikely to prevail because the court may well want to have the advantage of full briefing and final argument, and then rule on the case. The court's final decision will be easier for the prevailing party to sustain on appeal than a ruling granting a motion for judgment.



Cross References:

Form of motion for judgment, see 13.28.

Discussion of making oral motion for judgment and sample script of oral motion, see *California Trial Guide*, § 80.50 (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 13 Motion for Judgment
II. MAKING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.08

13.08 Moving Party Does Not Waive Right to Proceed.

If the court denies the motion for judgment, the moving party does not waive the right to offer evidence in support of his or her defense or in rebuttal [*CCP* § 631.8(a)].

➡ **Cross Reference:**

Discussion of rebuttal evidence, see *13.12*.

Legal Topics:

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

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Chapter 13 Motion for Judgment
II. MAKING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.09

13.09 Moving Party May Recover Defense Costs.

If the action is brought under the California Tort Claims Act or is for express or implied indemnity or contribution in a civil action, a court may grant defense costs with a motion for judgment. The award is based on the court's determination that the action was not brought with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law that warranted the filing of the complaint, cross complaint, or complaint in intervention [CCP § 1038].

The motion for costs should be filed at the earliest practical time before the entry of judgment and, unless the judge is unavailable, the motion for costs must be heard by the same judge who heard the motion for judgment [*Gamble v. Los Angeles Dep't of Water & Power* (2002) 97 CA4th 253, 259, 118 CR2d 271] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral
OverviewTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple
DefendantsIndemnityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview



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Chapter 13 Motion for Judgment
III. OPPOSING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.10

13.10 CHECKLIST: Opposing Motion for Judgment.

☐ Opposing party may offer rebuttal evidence if court considered defensive matter to rule on motion for judgment.

Authority:

CCP § 631.8(a)

Discussion:

See 13.12

☐ Opposing party waives right to offer rebuttal if he or she does not request it.

Authority:

CCP § 631.8(a)

Discussion:

See 13.13

☐ Opposing party may move for new trial.

Authority:

Watt v. Kantel (1970) 13 CA3d 249, 253-254, 91 CR 449

Discussion:

See 13.14

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral
OverviewEvidenceTestimonyPresentation of Evidence



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Chapter 13 Motion for Judgment
III. OPPOSING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.11

13.11 Options and Strategies for Opposing Party.

A party may oppose a motion for judgment by arguing that the evidence presented does in fact establish the moving party's claims and/or defenses. The opposing party may also offer evidence to rebut the moving party's arguments.

In opposing the motion for judgment, reference the specific evidence that proves up each element of the original claim. If something pointed out by the opposing party is arguably missing, make an offer of proof. The offer of proof should specify what the evidence would be (i.e., documents or testimony) and explain how it proves the point.

Strategic Point:



The opposing party either will have sustained its burden on the issues it presented or will have additional evidence it wants to present. In the latter case, an offer of proof, request to reopen the case, or a request to offer rebuttal evidence will be necessary.



Cross Reference:

Discussion of rebuttal, see *13.12*.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral
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Chapter 13 Motion for Judgment
III. OPPOSING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.12

13.12 Opposing Party May Offer Rebuttal Evidence.

The party against whom the motion for judgment has been made must have an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party [CCP § 631.8(a)]. However, the opposing plaintiff may rebut and rehabilitate only if the court exercises its discretionary power to consider defensive matter in the body of evidence that the court weighs in ruling on the motion [see *People v. Mobil Oil Corp.* (1983) 143 CA3d 261, 271, 192 CR 155] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral
OverviewEvidenceTestimonyCredibilityRehabilitation



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Chapter 13 Motion for Judgment
III. OPPOSING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.13

13.13 Opposing Party Waives Right to Offer Rebuttal by Failing to Request It.

If the evidence calls for rebuttal and rehabilitation and the opposing party fails to claim that opportunity despite knowledge that it should and can do so, the opportunity is waived [see *People v. Mobil Oil Corp.* (1983) 143 CA3d 261, 274, 192 CR 155] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral
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Chapter 13 Motion for Judgment
III. OPPOSING MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.14

13.14 Opposing Party May Move for New Trial.

If the court grants a motion for judgment, the opposing party may make a motion for a new trial [*see Watt v. Kantel* (1970) 13 CA3d 249, 253-254, 91 CR 449] .



Timing:

The motion for new trial should be made immediately. Once the court grants the motion for judgment, the post-trial time periods for entry of judgment, notice of appeal, and the like begin to run.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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Chapter 13 Motion for Judgment
IV. HEARING ON MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.15

13.15 CHECKLIST: Hearing on Motion for Judgment.

☐ Court may render judgment or take matter under submission.

Authority:

CCP § 631.8(a)

Discussion:

See 13.16

☐ Court must weigh evidence.

Authority:

CCP § 631.8(a)

Discussion:

See 13.17

☐ Court may grant partial judgment.

Authority:

CCP § 631.8(b)

Discussion:

See 13.19

☐ Court must prepare statement of decision.

Authority:

CCP § 631.8(a)

Discussion:

See 13.20

☐ Judgment operates as adjudication on merits.

Authority:

CCP § 631.8(c)

Discussion:

See 13.21

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral Overview



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Chapter 13 Motion for Judgment
IV. HEARING ON MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.16

13.16 Court May Render Judgment or Take Matter Under Submission.

The court may render a judgment in favor of the moving party or may decline to render any judgment until the close of all the evidence [CCP § 631.8].

Consider:

It is uncommon for a motion for judgment to be granted without first having been taken under submission. If the motion is made at the end of the case, the court will usually wait until it can weigh the evidence, perhaps consider post-trial briefing, and then rule. A written motion, and a request for a hearing immediately, are suggested because that will focus the court on the need to rule definitively.

Typically there is no hearing on a motion for judgment, though it can be held at the end of the case. Judges may handle this in different ways.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 13 Motion for Judgment
IV. HEARING ON MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.17

13.17 Court Must Weigh Evidence.

In response to a motion for judgment, it is the court's job to "weigh the evidence" [CCP § 631.8(a); *Emerald Bay Cmty. Ass'n v. Golden Eagle Ins. Corp.* (2005) 130 CA4th 1078, 1086-1087, 31 CR3d 43] . This means that the court must consider all the pertinent evidence, not just the evidence that the parties brought to the court's attention when they argued the motion [*County of Contra Costa v. Humore, Inc.* (1996) 45 CA4th 1335, 1344, 53 CR2d 647] . The court must consider all the evidence received, provided that the party against whom the motion for judgment has been made had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him or her and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party [CCP § 631.8(a)].



Warning:

Unlike with a motion for nonsuit, on a motion for judgment, the trial judge has no obligation to draw inferences favorable to plaintiff, but may draw whatever inferences seem reasonable [*Greening v. General Air-Conditioning Corp.* (1965) 233 CA2d 545, 551, 43 CR 662] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral
OverviewEvidenceInferences & PresumptionsInferencesEvidenceTestimonyCredibilityRehabilitation



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Chapter 13 Motion for Judgment
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13.18 Court May Disregard Witness or Expert Testimony.

The court may refuse to believe witnesses and may draw conclusions contrary to expert opinion [*Roth v. Parker* (1997) 57 CA4th 542, 550, 67 CR2d 250] .

Example:

In a case involved bone fragments in ground beef, the court accepted the defendant's expert's estimate of the maximum size of bone fragment that could have passed through the meat processing machine, and rejected the plaintiff's estimate [*Ford v. Miller Meat Co.* (1994) 28 CA4th 1196, 1199-1200, 33 CR2d 899] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral

OverviewEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyLay WitnessesGeneral Overview



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13.19 Court May Grant Partial Judgment.

If the evidence presented supports a motion for judgment with respect to some but not all the issues in the action, the court must grant the motion as to those issues. The action then proceeds as to the remaining issues. No final judgment may be entered before the action terminates. The final judgment in the action must, in addition to any matters determined in the trial, award judgment as determined by the motion [CCP § 631.8(b)].

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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Chapter 13 Motion for Judgment
IV. HEARING ON MOTION FOR JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.20

13.20 Court Must Prepare Statement of Decision.

If the court renders a judgment, the court must prepare a statement of decision if required by *CCP* § 632 or 634 [*CCP* § 631.8(a)].



Cross Reference:

Discussion of statement of decision, see California Forms of Pleading and Practice, Ch. 529, Statement of Decision (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview



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13.21 Judgment Operates As Adjudication on Merits.

Unless the court specifies otherwise in its order of judgment, the judgment operates as an adjudication on the merits [CCP § 631.8(c)]. The court has limited discretion under this provision, controlled by the principles applicable to the doctrine of res judicata [see *American Broad. Cos., Inc. v. Walter Reade-Sterling, Inc.* (1974) 43 CA3d 401, 406-408, 117 CR 617] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect
of JudgmentsRes Judicata



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Chapter 13 Motion for Judgment
V. SEEKING REVIEW OF ORDER GRANTING OR DENYING JUDGMENT

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.22

13.22 CHECKLIST: Seeking Review of Order Granting or Denying Judgment.

☐ Determine whether trial court granted, in whole or part, or denied, motion for judgment.

☐ If court granted motion for judgment, losing party may move for new trial.

Authority:
CCP § 657

Discussion:
See 13.23; see also Ch. 21, Motion for New Trial

☐ If court granted motion for partial judgment, losing party may not appeal until final judgment is entered.

Authority:
CCP § 631.8(b)

Discussion:
See 13.25

☐ If court denied motion for judgment, losing party may file appeal from entire judgment.

Authority:
CCP § 904.1(a)

Discussion:
See 13.24

☐ Determine whether there are grounds for appeal.

- ☐ Trial court failed to give appellant opportunity to rebut adverse evidence.

Authority:

CCP § 631.8(a)

Discussion:

See 13.12

- ☐ Trial court failed to give appellant opportunity to rehabilitate witness.

Authority:

CCP § 631.8(a)

Discussion:

See 13.12

- ☐ Trial court considered matters not in evidence.

Authority:

CCP § 631.8(a)

Discussion:

See 13.17

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
ProcedureAppealsAppellate JurisdictionState Court Review



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13.23 If Court Grants Motion for Judgment, Losing Party May Move for New Trial.

If the court grants a motion for judgment, the opposing party may move for a new trial under *CCP* § 657 [see *Watt v. Kantel* (1970) 13 CA3d 249, 252-253, 91 CR 449] .

➡ **Cross Reference:**

Discussion of making a motion for a new trial, see *Ch. 21, Motion for New Trial, 21.03 -21.12.*

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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13.24 Appeal May Be Taken of Order Granting Judgment.

An appeal may be taken of a *CCP* § 631.8(a) judgment [*CCP* 904.1(a)]. However, no immediate appeal may be taken when the court denies a motion for judgment. The losing party must wait until the entire action is terminated.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
ProcedureAppealsAppellate JurisdictionState Court Review



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1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.25

13.25 No Appeal May Be Taken of Order Granting Partial Judgment.

No appeal may be taken from an order granting a partial judgment [*CCP* § 631.8(b)]. The losing party must wait until the entire action is terminated.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
ProcedureAppealsAppellate JurisdictionState Court Review



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13.26 Appellate Court Upholds Trial Court Decision If Supported by Substantial Evidence.

On appeal from a *CCP* § 631.8(a) judgment, the appellate court will uphold the trial court's decision if it is supported by any substantial evidence [*Combs v. Skyriver Communications, Inc. (2008)* 159 CA4th 1242, 1263, 72 CR3d 171] . The appellate court does not reweigh the evidence or reassess issues of credibility [*Ford v. Miller Meat Co. (1994)* 28 CA4th 1196, 1200, 33 CR2d 899] .

However, when the decisive facts are undisputed, the appellate court must determine a question of law and is not bound by the trial court's findings. The appellate court exercises a de novo review when confronted with a question of law and the application of the law to the facts [*Kinney v. Overton (2007)* 153 CA4th 482, 487, 63 CR3d 136] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo ReviewCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceGeneral Overview



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13.27 Appellate Court Liberally Construes Trial Court's Findings in Favor of Judgment.

The appellate court will liberally construe the trial court's findings in favor of the judgment [*Native Sun Inv. Group v. Tigor Title Ins. Co. (1987) 189 CA3d 1265, 1272, 235 CR 34*] . The appellate court will view the evidence in the light most favorable to the respondent, resolving all evidentiary conflicts in favor of the prevailing party and indulging all reasonable inferences possible to uphold the trial court's findings [*San Diego Metro. Transit Dev. Bd. v. Handlery Hotel, Inc. (1999) 73 CA4th 517, 528, 86 CR2d 473*] .

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil
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Chapter 13 Motion for Judgment
VI. FORMS

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.28

13.28 Motion for Judgment.

Motion for Judgment.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	MOTION FOR JUDGMENT
Defendant.	)	
	)	
	)	

To _____ [party, e.g., Plaintiff John Smith] and to _____ [name], his/her attorney of record.

_____ [Party, e.g., Defendant] hereby moves pursuant to *Section 631.8 of the Code of Civil Procedure* for judgment in his/her favor on _____ [identify pleading, individual count, cause of action, defense, or issue]. This motion is made on the ground that _____ [specify legal grounds, e.g., the evidence is insufficient to sustain Plaintiff's burden of proof on the issue that Defendant was negligent in his operation of the vehicle in question].

This motion is based on the _____ [affidavits(s) or declarations] of _____ [name(s)], the memorandum of points and authorities served and filed with this motion, the records and file in this matter, [on such portions of the transcript of the trial and supplemental affidavits or declarations and memoranda of points and authorities that may be filed subsequently in this matter], 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 _____ [moving party]

NOTES.

Authority:

CCP § 631.8



Timing:

See 13.06

Grounds:

See 13.02[1]

Related Form of Judgment:

See 13.29

Related Form for Points and Authorities:

See California Points and Authorities, § 155.254 (Matthew Bender)



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Chapter 13 Motion for Judgment
VI. FORMS

1-13 MB Practice Guide: Trial & Post-Trial Civil Proc 13.29

13.29 Judgment on Motion for Judgment.

Judgment on Motion for Judgment.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	JUDGMENT ON MOTION FOR JUDGMENT
Defendant.	)	
	)	
	)	

This case came on regularly for trial on _____ [date], [in _____ (Department or Division) _____] of the above-entitled court, the Honorable _____, Judge presiding[, sitting without a jury]. The Plaintiff appeared by counsel _____ [name]. The Defendant appeared by counsel _____ [name]. Evidence, both oral and documentary, having been presented by [both] Plaintiff [and Defendant]: Plaintiff [and Defendant] having rested; _____ [Defendant or Plaintiff] having moved the Court for a judgment pursuant to CCP § 631.8(a); the Court having weighed the evidence; _____ [describe court's action with respect to statement of decision, e.g., and the court (on request of _____ (Plaintiff or Defendant)) having caused to be made and filed herein its statement of decision on _____ (date) or and a statement of decision not having been requested or and the court makes the following statement of decision: _____],

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that the motion for judgment in favor of _____ [Defendant or Plaintiff] _____ [name] be, and the same hereby is, granted[, provided that this judgment shall not operate as an adjudication on the merits],

[EITHER]

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff take nothing by the complaint on file herein and that Defendant have and recover from plaintiff costs in the sum of \$_____ [and attorney's fees in the sum of \$_____].

[OR]

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff recover from Defendant as follows:

1. The sum of \$_____;

[2. Interest on this sum at the rate of _____ percent per annum from and after _____ (date), to and including the date hereof; this interest amounting to \$_____;]

[3. Attorney's fees in the amount of \$_____;] and

4. Plaintiff's costs herein incurred in the sum of \$_____.

[CONTINUE]

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

CCP § 631.8



Timing:

See 13.06

Grounds:

See 13.02

Related Form for Points and Authorities:

See California Points and Authorities, Ch. 71, Demurrers and Motions for Judgment on the Pleadings (Matthew Bender)

Related Form of Motion:

See 13.28



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Chapter 14 Motion for Directed Verdict

1-14 MB Practice Guide: Trial & Post-Trial Civil Proc 14.syn

§ 14.syn Synopsis to Chapter 14: Motion for Directed Verdict

14.01 Scope.

14.02 Objective and Strategy.

14.02[1] Motion for Directed Verdict Decides Issue As Matter of Law.

14.02[2] Motion for Directed Verdict Compared to Motion for Nonsuit.

14.02[3] Motion for Directed Verdict Compared to Motion for Judgment.

14.02[4] Motion for Directed Verdict Compared to Motion for JNOV.

14.03 CHECKLIST: Making Motion for Directed Verdict.

14.04 Options and Strategies for Party Making Motion for Directed Verdict.

14.05 Either Party, or Court, May Move for Directed Verdict.

14.06 Time Limits for Bringing Motion for Directed Verdict.

14.06[1] Bring Motion for Directed Verdict After All Parties Have Presented Evidence in Jury Trial.

14.06[2] At Court's Discretion, Bring Motion Earlier.

14.06[2][a] Court May Specify Earlier Time for Motion.

14.06[2][b] Plaintiff May Bring Motion After Opening Statement When Defendant's Case Is Without Merit.

14.06[3] Bring Motion for Directed Verdict After Jury Is Discharged Without Rendering Verdict.

14.07 Grounds for Directed Verdict.

- 14.07[1] Evidence Must Support Judgment for Moving Party.
- 14.07[2] Evidence Must Not Support Opposing Party's Claim or Defense.
- 14.07[3] Evidence Must Support Verdict for Moving Party When Moving Party Has Burden of Proof.
- 14.07[4] Directed Verdict Is Appropriate for Any Issue That May Be Decided As Matter of Law.
 - 14.08 Directed Verdict Is Appropriate Against Some but Not All Parties.
 - 14.09 Partial Directed Verdict Is Appropriate for Some but Not All Issues or Claims.
- 14.09[1] Trial Will Proceed on Remaining Claims.
- 14.09[2] Moving for Directed Verdict on Some Issues.
 - 14.09[2][a] Counsel May Request Special Verdict or Special Interrogatories.
 - 14.09[2][b] Special Verdict and General Verdict Compared.
- 14.10 Directed Verdict Is Adjudication on Merits.
- 14.11 Prepare Motion to Emphasize Insufficiency of Evidence.
 - 14.11[1] State Precise Grounds in Contents of Motion.
 - 14.11[2] Making Written Motion or Oral Motion.
 - 14.11[3] Include Supporting Memorandum.
 - 14.11[4] Include Supporting Papers.
 - 14.11[5] Include Proposed Order Granting Motion.
- 14.12 Moving Party May Recover Defense Costs.
- 14.13 CHECKLIST: Opposing Motion for Directed Verdict.
- 14.14 Options and Strategies for Party Opposing Motion for Directed Verdict.
- 14.15 Bases for Opposing Motion for Directed Verdict.
 - 14.15[1] Motion Is Not Timely.
 - 14.15[2] Motion Should Be Stayed Pending Events.
 - 14.15[2][a] Opposing Party Needs to Present Case.
 - 14.15[2][b] Jury Is Not Yet Dismissed Without Verdict.

14.15[3] Motion Is Not Supported by Evidence.

14.15[3][a] Evidence Does Not Support Verdict for Moving Party.

14.15[3][b] Evidence Supports Verdict for Opposing Party.

14.15[3][c] There Is Conflicting Evidence.

14.15[3][d] Question of Fact Must Go to Jury.

14.15[4] Time Limits for Opposing Motion for Directed Verdict.

14.16 Opposing Party May Move to Amend Complaint or Answer.

14.17 Opposing Party May Ask to Reopen Case and Present More Evidence.

14.18 CHECKLIST: Seeking Review of Order Granting Directed Verdict.

14.19 Options and Strategies.

14.20 Move for Judgment Notwithstanding the Verdict.

14.21 Move to Correct Verdict.

14.22 Move to Vacate Judgment and for New Trial.

14.23 Appeal Final Judgment.

14.23[1] Timely Appeal Lies From Final Judgment.

14.23[2] Partial Directed Verdict Is Not Appealable As Final Judgment.

14.23[3] Presumption on Appeal Against Order Granting Directed Verdict.

14.24 CHECKLIST: Seeking Review of Order Denying Directed Verdict.

14.25 Options and Strategies.

14.26 Move to Reconsider or Renew Motion for Directed Verdict.

14.27 Move to Vacate Judgment and for New Trial.

14.28 File Timely Appeal.

14.29 Notice of Motion and Motion for Directed Verdict.

14.30 Memorandum Supporting Motion for Directed Verdict.

14.31 Declaration Supporting Motion for Directed Verdict.

14.32 Order Granting Motion for Directed Verdict.



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Chapter 14 Motion for Directed Verdict
I. STRATEGY

1-14 MB Practice Guide: Trial & Post-Trial Civil Proc 14.01

14.01 Scope.

This chapter covers:

- Objectives and strategy for motions for directed verdict [see 14.02].
- Making or renewing a motion for directed verdict [see 14.03 -14.11].
- Opposing a motion for directed verdict [see 14.13 -14.17].
- Seeking review of an order granting or denying directed verdict [see 14.18 -14.28].

Core Statute:

CCP § 630

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureAppealsAppellate JurisdictionState
Court Review



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Chapter 14 Motion for Directed Verdict
I. STRATEGY

1-14 MB Practice Guide: Trial & Post-Trial Civil Proc 14.02

14.02 Objective and Strategy.

14.02[1] Motion for Directed Verdict Decides Issue As Matter of Law. A motion for directed verdict is used in civil jury trials to achieve a judgment as a matter of law in favor of one (or more) party on all (or some) issues, after all parties present their evidence and before the matter goes to the jury. A directed verdict thus may dismiss a party or decide some (or all) of the issues before the matter goes to a jury. After entry of judgment in accordance with a directed verdict, the prevailing party can recover its costs of suit [*see CCP § 1038*].

A motion for directed verdict is typically brought by a defendant [*see, e.g., De La Rosa v. City of San Bernardino (1971) 16 CA3d 739, 742-743, 94 CR 175*], but may also be brought by a plaintiff [*see CCP § 630(a)*]. The court may not act sua sponte to grant a directed verdict unless the jury has been discharged without rendering a verdict [*see CCP § 630(f)*].

Strategic Point:



A motion for directed verdict is appropriate when it is clear from the evidence presented that the party against whom the motion is made, typically a plaintiff or cross-complainant, cannot meet its burden of proof of elements of its claim against the moving party. A common situation when this arises is in cases of multiple defendants, when the plaintiff is unable to offer sufficient evidence of the identity of a particular party. It is also appropriate when one side thinks that the other side has made a concession that mandates a result in the first side's favor.

A judge may be wary of granting a directed verdict. A motion based on the insufficiency of the evidence is especially unlikely to succeed. A motion may be more likely to succeed if based on a fact that the other party has conceded (rather than merely failed to controvert) that the attorney thinks is fatal to the case as a matter of law.

Judge's Perspective:

Some judges are hesitant to grant a directed verdict when the matter can be sent to the jury and then reassess the matter on a motion for judgment notwithstanding the verdict. Should the trial court err in granting a motion for judgment notwithstanding the verdict, the appellate court will reinstate the jury

verdict, while erring on a motion for directed verdict means retrying the case. Many judges recognize this situation, and the denial of a motion for directed verdict should not dissuade counsel from bringing a motion for judgment notwithstanding the verdict when the facts and law support the motion. However, the judge may grant a directed verdict to one of more causes of action that are overreaching and clearly unsupported by the evidence; for example, where a cause of action is against all parties where it is clearly only applicable to one party. The granting of a directed verdict in this instance does not dispose of the entire case, but pares it down to the matters appropriate for the jury.



Warning:

Attorneys sometimes move for directed verdict without proper justification or forethought. It is most appropriate when there is a clear outcome mandated by the evidence or the law applied to the evidence. If it is simply a matter of wishful thinking, or to "set up" an appeal, it is not necessary and might be unhelpful. The attorney should consider whether the act of moving, on a record that is not sufficient to establish the case as a matter of law, will reduce the ability to prevail on other issues of importance such as requested jury instructions, post trial motions, and the like.



Cross References:

Discussion of recovery of costs, see 14.12.

Discussion of time limits, see 14.06.

Discussion of grounds, see 14.07.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 326A, Jury Verdicts (Matthew Bender).

14.02[2] Motion for Directed Verdict Compared to Motion for Nonsuit. A motion for directed verdict, like a motion for nonsuit, is in the nature of a demurrer to evidence [*Fariba v. Dealer Services Corp.* (2009) 178 CA4th 156, 174, 100 CR3d 219] . Either motion will be granted if there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion. Important differences between the two motions include:

- A motion for directed verdict generally lies after all the parties have completed presentation of evidence in a jury trial [CCP § 630(a)]; a nonsuit motion is usually made after the plaintiff's evidence is concluded [CCP § 581c(a)].
- A motion for directed verdict may be brought by any party [CCP § 630(a)].
- A motion for directed verdict may be brought even if a motion for nonsuit was previously denied [*Fuch v. Southern Pac. Co.* (1935) 5 CA2d 409, 412, 42 P2d 704] .
- A motion for directed verdict may be granted in favor of, as well as against, the party with the burden of proof [*Walters v. Bank of Am. Nat'l Trust & Sav. Ass'n* (1937) 9 C2d 46, 49, 69 P2d 839] .
- The court may act without the assent of the jury in granting a motion for directed verdict [CCP § 630(e)-(f)].



Cross Reference:

Discussion/forms, see Ch. 12, *Motion for Nonsuit and Other Motions During Trial*, 12.07[3].

14.02[3] Motion for Directed Verdict Compared to Motion for Judgment. A motion for judgment is similar to a directed verdict, in that a motion for judgment is based on the premise that the other party has not met its burden of proof. A motion for judgment can be brought by any party in a non-jury trial after the other party has completed presentation of evidence, without waiving the right to offer evidence in support of a defense or in rebuttal [CCP § 631.8].

On a motion for judgment, during the time the court is considering the evidence received, the party against whom the motion is brought may present additional evidence to rebut adverse evidence received during the moving party's presentation and to rehabilitate witnesses whose testimony has been attacked by the moving party [CCP § 631.8(a)]. The statute authorizing directed verdict has no such provision [see CCP § 630], so new evidence can be presented only at the court's discretion [see 14.20].

Because the motion for judgment is used only in a non-jury trial, the court acts as trier of fact, weighs the evidence, and makes a statement of decision if the motion is granted, although the court may decline to render any judgment until the close of all the evidence [CCP § 631.8(a)]. In contrast, on a motion for directed verdict, the court determines only whether there is no evidence to support a verdict against the moving party [see 14.07[1]]. On a motion for directed verdict, the court's decision operates as an adjudication on the merits [CCP § 630(c)], but the jury must nevertheless render a verdict before the decision on the motion for directed verdict can be incorporated in the final judgment [CCP § 630(b)].

Cross Reference:

Discussion of bringing motion for directed verdict under CCP § 630(f), see 14.06[3].

Discussion, see Ch. 13, *Motion for Judgment*, 13.02[2][c].

14.02[4] Motion for Directed Verdict Compared to Motion for JNOV. A motion for directed verdict must be made before a verdict is rendered, while a motion for judgment notwithstanding the verdict (JNOV) must follow the verdict [see CCP § 629 (motion for JNOV)]. Otherwise, the trial court's power to grant a motion for JNOV is the same as its power to grant a directed verdict, and the appellate standard is the same [*Tognazzini v. San Luis Coastal Unified Sch. Dist.* (2001) 86 CA4th 1053, 1057-1058, 103 CR2d 790] .

If a motion for directed verdict is granted, the opposing party may want to move for a judgment notwithstanding the verdict [see 14.20].

Cross References:

Discussion of judge's perspective on granting a motion for directed verdict versus JNOV, see 14.02[1].

Discussion/forms for JNOV, see Ch. 20, *Motion for Judgment Notwithstanding the Verdict*.

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
Pretrial Judgments
Nonsuits
General Overview
Civil Procedure
Trials
Judgment as Matter of Law
Directed Verdicts
Civil Procedure
Trials
Judgment as Matter of Law
Judgments Notwithstanding Verdicts
Civil Procedure
Remedies
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II. MAKING MOTION FOR DIRECTED VERDICT

1-14 MB Practice Guide: Trial & Post-Trial Civil Proc 14.03

14.03 CHECKLIST: Making Motion for Directed Verdict.

☐ Determine timing.

☐ Before case goes to jury.

☐ After jury is discharged without verdict.

Authority:

CCP § 630(a), (f); see CCP § 1005

Discussion:

See 14.06

☐ Determine burden and quantum of proof on each issue.

Authority:

Evid Code § 115

Discussion:

See 14.07[1]

☐ Determine whether presented evidence supports verdict against any opposing party.

Authority:

Golceff v. Sugarman (1950) 36 C2d 152, 152-153, 222 P2d 665

Discussion:

See 14.07[2]

- ☐ Determine whether presented evidence supports verdict for moving party on any issue.

Authority:

Walters v. Bank of Am. Nat'l Trust & Sav. Ass'n (1937) 9 C2d 46, 49, 69 P2d 839

Discussion:

See 14.07[3]

- ☐ Determine whether court can decide issue as matter of law.

Authority:

Golceff v. Sugarman (1950) 36 C2d 152, 152-153, 222 P2d 665

Discussion:

See 14.07[4]

- ☐ Determine whether to make oral motion or written motion.

Authority:

CCP § 630(f) (applies if jury has been discharged)

Discussion:

See 14.11[1], [2]

- ☐ Draft notice of motion and motion for directed verdict.

Authority:

CCP §§ 630, 1010 et seq.; *Cal Rules Ct*, Rules 3.1110, 3.1111

Discussion:

See 14.11[1]

Form:

See 14.29

- ☐ Draft supporting memorandum.

Authority:

Cal Rules Ct, Rule 3.1113

Discussion:

See 14.11[3]

Form:

See 14.30

- ☐ Draft supporting declaration.

Authority:

Cal Rules Ct, Rules 3.1110, 3.1111

Discussion:

See 14.11[4]

Form:

See 14.31

- ☐ Draft proposed order granting motion for directed verdict as to some or all issues and parties.

Discussion:

See 14.11[5]

Form:

See 14.32

- ☐ Follow standard noticed motion procedure.



Serve and file all reply papers to opposing party's response at least five calendar days before the hearing.

Authority:

CCP § 1005

Standard Procedure Checklist:

See *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.39 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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14.04 Options and Strategies for Party Making Motion for Directed Verdict.

A motion for directed verdict is proper when there is no conflict in the evidence, and substantial evidence supports a verdict in favor of the moving party [see *Gelfo v. Lockheed Martin Corporation* (2006) 140 CA4th 34, 46-47, 43 CR3d 874].

Frame a motion for directed verdict in the context of *no* conflict in the evidence. Present all of the evidence pertinent to the motion (not just evidence that supports the requested outcome) and distinguish any of it that is problematic. Every inference to be drawn from any unfavorable evidence must be explained or distinguished so that there is truly no conflict in the evidence. If there is no conflict in the evidence, any evidence will be substantial enough.

Strategic Point:



In general, counsel should not move for a directed verdict without a *very* strong case, referencing *very specific* evidence. Before making such a motion, counsel should feel strongly that the motion will be granted.

A motion for directed verdict is much like a summary judgment motion. Keep track of the evidence as it comes in at trial to reference documents and testimony. Consider getting transcripts of relevant portions of the testimony.

Unless something unanticipated was presented during the opposing party's case in chief that gives rise to such a motion, it should be prepared in written form, providing appropriate points and authorities for the court's consideration.

Strategic Point:



After a party against whom the motion is directed has rested, and before the moving party has begun its case in chief, the moving party typically addresses the court by stating, on the record, "Party X has a motion." The motion will not be heard in front of the jury, a point the trial judge will typically recognize. At an appropriate opportunity, the trial judge, outside the presence of the jury, will entertain the motion. If the motion is in writing, the moving papers are filed with the court and served on other parties in the trial.

 Cross Reference:

Definition of substantial evidence, see 14.07[1].

Bringing a motion for directed verdict does not jeopardize the right to a jury trial on any issues that remain after the court decides the motion [CCP § 630(a)].

A directed verdict may be proper against (or in favor of) some, but not all, of multiple parties. Thus, the court may direct a verdict in favor of (or against) one of multiple plaintiffs, or against (or in favor of) one of multiple defendants.

 Cross Reference:

Discussion of multiple parties, see 14.08.

When multiple parties are involved in litigation and a plaintiff is able to present evidence supporting its burden of proof against some, but not all, defendants, a motion for directed verdict may appropriately be brought by the defendants against whom proof is not established.

**Strategic Point:**

If there is a valid motion against some but not all parties, moving against all parties can create the risk of a denial. It is only appropriate to move against all parties if there is a substantial likelihood of prevailing against all parties. Although parties can file a motion if there is a reasonable basis for doing so [see CCP § 128.7], filing a motion against all parties in a case in which it does not lie against one of the parties can deter the court from granting the motion. The attorney should proceed with caution in this area.

**Judge's Perspective:**

In instances where a party has one of more causes of action that are overreaching and clearly unsupported by the evidence; for example, where a cause of action is against all parties where it is clearly only applicable to one party, the court will grant the directed verdict. Courts are more inclined to grant such motions where the motion does not dismiss the entire case but cleans up obvious evidentiary shortcomings.

Similarly, a directed verdict may be proper on some but not all issues. The court can grant a motion for directed verdict as to some issues and the action will proceed on the remaining issues [CCP § 630(b)].

A motion for directed verdict is not a good idea when it will educate the other side to a failure of proof that can be corrected.

**Strategic Point:**

Particularly in cases in which a special verdict is being used, any issue that is conclusively established or defeated is a candidate for a motion for a directed verdict. This may amount to all issues, or just some. This is particularly true if the issue is one on which other issues depend, because the result may be to prevail on a whole cause of action, the issue of damages, or an entire affirmative defense. This may also be important in a tort claim in which punitive damages are sought but the cause of action that is the predicate for punitive damages lacks evidentiary support. A motion for directed verdict as to that cause of action may avoid having to address the second phase of the trial related to punitive damages determination.

 Cross Reference:

Discussion of special verdicts, see *14.09[2]*.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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14.05 Either Party, or Court, May Move for Directed Verdict.

Any party may move for an order directing entry of a verdict in its favor, on any or all issues [CCP § 630(a)]. The court may invite a motion for directed verdict before all parties have presented their evidence [CCP § 630(a)] or may, on its own motion, order judgment if the jury has been discharged without rendering a verdict [CCP § 630(f)].



Strategic Point--Plaintiff:

Discovery should include a request for admissions on liability, and at trial the attorney should try to get the judge to direct a verdict on the issue of liability if appropriate. Even if it appears that a jury would find 100 percent liability against a defendant, the plaintiff's counsel should still get a directed verdict and then use CACI No. 3901 for the jury.

Jury Instructions:

Introduction to Tort Damages--Liability Established, see *Judicial Council of California Civil Jury Instructions, CACI No. 3901* (LexisNexis Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Judgment as Matter of Law Directed Verdicts



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14.06 Time Limits for Bringing Motion for Directed Verdict.

14.06[1] Bring Motion for Directed Verdict After All Parties Have Presented Evidence in Jury Trial. Any party may request a verdict directed in its favor, on any or all issues, after all parties have presented their evidence in a jury trial [CCP § 630(a)]. Although a motion for directed verdict is typically made before closing argument, the court has discretion to permit it at any time before the case is submitted to the jury [*Gibson v. Southern Pac. Co. (1955)* 137 CA2d 337, 346, 290 P2d 347 (upholding directed verdict after motion made in chambers, before closing argument concluded, without objection)].



Timing:

If the opposing party files a response, all reply papers to that response must be served and filed at least five calendar days before the hearing [CCP § 1005].

14.06[2] At Court's Discretion, Bring Motion Earlier.

14.06[2][a] Court May Specify Earlier Time for Motion. The court may, in its discretion, permit a motion for directed verdict any time before the case is submitted to the jury [CCP § 630(a); *Gibson v. Southern Pac. Co. (1955)* 137 CA2d 337, 346, 290 P2d 347].



Strategic Point:

Although this is usually an oral motion, it is advisable to submit a written brief. A short summary of the motion, if the motion is well taken, is helpful to the court. In some cases, a party knows well in advance that a motion for direct verdict will be made, and the notice to the court and provides an opportunity for full briefing and scheduling to avoid jury inconvenience.

Consider:

It is possible to make an oral motion for leave to file an early motion for directed verdict, but better practice suggests first raising the issue in chambers. It would make sense if the other side has made a concession that it cannot fix or some fact has been definitely proven and there is no point waiting until

the close of the evidence. The court may invite a motion for directed verdict if, for example, an essential witness or evidentiary piece of one side's case is not provided. A typical example is the failure to offer an expert on the standard of care in a professional liability case.

 Cross Reference:

Comparison of motion for directed verdict with defendant's motion for nonsuit, see 14.02[2].

14.06[2][b] Plaintiff May Bring Motion After Opening Statement When Defendant's Case Is Without Merit.

In unusual circumstances, the plaintiff may bring a motion for directed verdict after the defendant's opening statement, when it is clear that the facts to be proved will not constitute a defense.

Example:

In an action to collect under fire insurance policies, the court granted the plaintiff's motion for directed verdict after the defendant's opening statement. The defendant was permitted to augment its opening statement during the argument on the motion for directed verdict, so that both the trial court and the appellate court relied on the defendant having stated every substantial fact on which the defendant was relying. The defense turned on a question of law relating to the liability of the principal for an agent's wrongful act. The trial court decided this question as a matter of law, assuming that every fact stated by the defendant was true, and the appellate court affirmed: "No purpose would have been served in permitting defendants to introduce evidence in support of the facts they intended to prove" [*Nuffer v. Insurance Co. of North Am.* (1965) 236 CA2d 349, 363, 45 CR 918] .

Strategic Point:



The plaintiff may want to bring a motion for directed verdict at this stage if discovery, and the documents and facts already known make filling in the gap in the defendant's case impossible (although there is always the risk of a move to reopen the evidence). If the plaintiff waits until the defendant rests to make the motion and the case has truly "closed," the court is less likely to permit "reopening," and the defendant is less likely to correct the error.

 Cross Reference:

Comparison of motion for directed verdict with defendant's motion for nonsuit after plaintiff's opening statement, see 14.02[2].

14.06[3] Bring Motion for Directed Verdict After Jury Is Discharged Without Rendering Verdict. If the jury is discharged without rendering a verdict (as in the case of a mistrial), the court has 30 days to order judgment to be entered in favor of a party whenever a motion for directed verdict for that party should have been granted, if a previous motion had been made [CCP § 630(f)]. The court can do this on its own motion or on the motion of a party, notice of which was given within 10 days after discharge of the jury [CCP § 630(f)]. The 30-day time period can be extended by a court holiday [CCP § 12a]. If the allotted time expires without the court ordering a judgment, the effect is the denial of any motion for judgment without further order of the court [CCP § 630(f)].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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14.07 Grounds for Directed Verdict.

14.07[1] Evidence Must Support Judgment for Moving Party. A directed verdict in favor of the moving party is appropriate when any of the following is true:

- If the opposing party has the burden of proof, there is no substantial evidence to support a judgment in the opposing party's favor [*e.g.*, *Evid Code* § 115];
- If the moving party has the burden of proof, there is substantial evidence to support a judgment in the moving party's favor and no substantial evidence to support any defenses or claims of the opposing party [*see 14.07[2]*]; or
- The court can decide the motion as a matter of law [*see 14.07[3]*].

Consider--"Substantial Evidence":

"Substantial evidence" means evidence sufficient to support a jury verdict [*see Golceff v. Sugarman* (1950) 36 C2d 152, 152-153, 222 P2d 665 (standard for grant of motion for directed verdict)]. Although the evidence may include inferences, all inferences should be reasonable and logical [*Newing v. Cheatham* (1975) 15 C3d 351, 365, 124 CR 193, 540 P2d 33] and not contradicted by positive, uncontradicted evidence [*Engstrom v. Auburn Auto. Sales Corp.* (1938) 11 C2d 64, 69-72, 77 P2d 1059] . "Substantial evidence" means more than a scintilla of evidence [*Newing v. Cheatham* (1975) 15 C3d 351, 358, 124 CR 193, 540 P2d 33] .



Strategic Point:

Although "substantial evidence" means more than a scintilla of evidence, the recitation in the motion of supporting evidence introduced at trial will be substantial if it is uncontroverted. If it is controverted, the motion may be inappropriate. The determination of substantiality is necessarily determined on a case-by-case basis. Counsel should become familiar with analogous cases in which evidence was found to be substantial or not.

14.07[2] Evidence Must Not Support Opposing Party's Claim or Defense. A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from the evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of the opposing party [*Golceff v. Sugarman* (1950) 36 C2d 152, 152-153, 222 P2d 665] .

Examples:

- In an automobile personal injury case, the plaintiff argued that the driver's possession of the car raised an inference of permissive use. The owner's uncontradicted testimony that the driver did not have permission dispelled this inference, so that directed verdict for the defendant owner was proper [*Engstrom v. Auburn Auto. Sales Corp.* (1938) 11 C2d 64, 69-72, 77 P2d 1059] .

- The doctrine of *res ipsa loquitur* raises an inference of the defendant's negligence. If the defendant does not present evidence to dispel this inference, a partial directed verdict on liability is proper [*Newing v. Cheatham* (1975) 15 C3d 351, 365, 124 CR 193, 540 P2d 33] .



Strategic Point:

The standard for granting a motion for direct verdict is essentially the same as for granting a motion for summary judgment.

14.07[3] Evidence Must Support Verdict for Moving Party When Moving Party Has Burden of Proof.

Although a motion for directed verdict is typically brought by a party who claims that the opposing party has not carried its burden of proof, any party may bring a motion for directed verdict [CCP § 630(a)]. Therefore, a party with the burden of proof on any issue is not precluded from moving for a directed verdict--whether a plaintiff with the burden of proof on a claim, or a defendant with the burden of proof on a defense [see *Walters v. Bank of Am. Nat'l Trust & Sav. Ass'n* (1937) 9 C2d 46, 49, 69 P2d 839 (in banking dispute, grant of directed verdict for plaintiff with burden of proof was affirmed when no substantial evidence supported verdict for defendant)].

Because a trial court cannot take an issue from the jury unless, as a matter of law, no other reasonable conclusion is legally deducible from the evidence and any other holding would be so lacking in evidentiary support that a reviewing court would be compelled to reverse on appeal or a trial court to set it aside [*Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 CA4th 357, 381, 27 CR3d 126] , there must be substantial evidence to support a jury verdict in favor of the moving party with the burden of proof.



Cross Reference:

Definition of substantial evidence, see 14.07[1].

14.07[4] Directed Verdict Is Appropriate for Any Issue That May Be Decided As Matter of Law. A directed verdict may be appropriate on any issue that can be decided as a matter of law, such as the applicability of a particular statute.

Examples:

- A patient sued her doctor for invasion of privacy and violation of a medical information confidentiality statute after the doctor disclosed to the patient's employer that the plaintiff had been seen

by him and was suffering from work-related stress [*Garrett v. Young* (2003) 109 CA4th 1393, 1397-1398, 1 CR3d 134] . The trial court ruled that the nonspecific information disclosed by the doctor fell within an exception to the confidentiality statute, and that under the evidence presented (the plaintiff's continuous and open expression at work of her feelings of unfair treatment and abuse) the plaintiff could not maintain a nonstatutory privacy claim. The appellate court affirmed a directed verdict for the doctor.

■ After a dispute about payment for car repairs, the repair shop sold the car, and the owner brought suit [*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 CA4th 754, 759, 114 CR2d 558] . The trial court found that as a matter of law the Fair Debt Collection Practices Act did not apply to the case, which were largely undisputed, and correctly directed a verdict for the defendant repair shop on that claim. The jury later returned a defense verdict on other claims, which was affirmed.

The court may decide that the evidence is insufficient as a matter of law, and grant a directed verdict on that basis. However, unless as a matter of law no other reasonable conclusion is legally deducible from the evidence and any other holding would be so lacking in evidentiary support that a reviewing court would be compelled to reverse on appeal or a trial court to set it aside, the trial court may not take the issue from the jury [*Golceff v. Sugarman* (1950) 36 C2d 152, 152-153, 222 P2d 665] .

Legal Topics:

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

Civil Procedure Trials Judgment as Matter of Law Directed Verdicts Evidence Procedural Considerations Burdens of Proof General Overview



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14.08 Directed Verdict Is Appropriate Against Some but Not All Parties.

The court may grant a motion for directed verdict for some but not all of the parties if the evidence presented supports such a directed verdict. Trial will proceed on the remaining claims [*CCP* § 630(b)].



Strategic Point--Personal Injury or Property Damage Cases:

If any defendant in a personal injury or property damage action obtains a directed verdict on the basis of not being at fault, at trial the plaintiff should object to attempts by the remaining defendants to attribute fault to, or comment on, the absence or involvement of the defendant who obtained the directed verdict [*CCP* § 630(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14.09 Partial Directed Verdict Is Appropriate for Some but Not All Issues or Claims.

14.09[1] Trial Will Proceed on Remaining Claims. If the trial court directs a verdict on some but not all issues or claims, trial will proceed on the remaining claims [CCP § 630(b)]. For instance, the court may direct a verdict on liability issues, while sending the question of damages to the jury [see, e.g., *Sanchez v. Bay Gen. Hosp.* (1981) 116 CA3d 776, 793, 172 CR 342]. The jury must always decide issues of punitive damages [*Miller v. Elite Ins. Co.* (1980) 100 CA3d 739, 756-757, 161 CR 322 (insurance bad faith action)].

Examples:

- In an eminent domain lawsuit, the trial court directed a partial verdict on the value of the goodwill of the defendant's condemned business, based on the testimony of the plaintiff's expert, after it struck the defendant's expert's testimony valuing the goodwill, thus leaving no evidence supporting the defendant's valuation [*Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 CA4th 357, 381, 27 CR3d 126]. The appellate court found that the trial court erred in its grounds for striking the defendant's expert's testimony and should have let the matter go to the jury.

- In an action by a homeowner's association to enforce its CC&Rs against a homeowner who built an unpermitted fence, the underlying facts were undisputed. Therefore, the validity of the unrecorded regulatory code provisions of the residential community development could be decided as a matter of law. The appellate court affirmed a partial grant of directed verdict for the association on the issue of the reasonableness of its regulations [*Rancho Santa Fe Ass'n v. Dolan-King* (2004) 115 CA4th 28, 8 CR3d 614].

14.09[2] Moving for Directed Verdict on Some Issues.

14.09[2][a] Counsel May Request Special Verdict or Special Interrogatories. The moving party may move for a directed verdict on all issues in the case or only on specified issues. If the court grants a motion for directed verdict as to some but not all issues, the action will proceed on any remaining issues [CCP § 630(b)].

**Strategic Point:**

The defendant may be interested in making a motion for directed verdict as to the entire case, and that is preferable if justified. Having a motion granted as to some specified issues only may restrict the same party from being able to argue about evidence that may be of value in encouraging the trial of fact to rule in that party's favor on the remaining issues. Such evidence may be deemed immaterial or irrelevant to the remaining issue.

At the time the matter is submitted to the jury, the court may direct a special verdict in writing on any or all issues or on particular questions of fact with a general verdict. If the special verdict conflicts with the general verdict, the special verdict controls [CCP § 625].

**Strategic Point:**

For a form of directed verdict, it is common to use the special verdict in the case and move for a directed verdict on specific questions under the rubric of CCP § 630(b), that the motion is on "issues" as permitted by the statute.

14.09[2][b] Special Verdict and General Verdict Compared. A special verdict is a verdict in which the jury finds only the facts, leaving the judgment to the court. A special verdict presents conclusions of fact as established by the evidence, rather than presenting the evidence used to prove those facts. The jury's conclusions of fact must be presented in such a manner that nothing remains for the court to do but draw the conclusions of law from them [CCP § 624; *Valentine v. Baxter Healthcare Corp.* (1999) 68 CA4th 1467, 1487, 81 CR2d 252] .

A general verdict is a verdict pronounced on all or any issues generally, either in favor of the plaintiff or in favor of the defendant [CCP § 624]. A general verdict implies a finding in favor of the prevailing party of every fact essential to support its claim or defense [*Southern Pac. Co. v. Unarco Indus., Inc.* (1974) 42 C3d 142, 152, 116 CR 847] .

**Cross References:**

Effect of partial directed verdict, see 14.10.

Discussion of special and general verdicts, see Ch 18, Jury Verdicts.

California Trial Guide, Unit 91, Jury Deliberations and Renditions of Verdict (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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14.10 Directed Verdict Is Adjudication on Merits.

Unless the court specifies otherwise, the grant of a motion for directed verdict operates as an adjudication on the merits [CCP § 630(c)], so that it bars new actions on the claim involved.

Exception:

The court may grant a motion for directed verdict on a technical ground, such as that a claim is premature, which would not be an adjudication on the merits.

If a directed verdict is granted on some but not all issues, the court will not enter a final judgment before the action terminates. The final judgment will reflect the verdict ordered by the court on the motion for directed verdict [CCP § 630(b)].

Strategic Point--Defendant:



A defendant prevailing on a directed verdict in certain actions (under the California Tort Claims Act or for express or implied indemnity or for contribution in any civil action) may move the court to consider the issue of defense costs at the same time the court decides the motion for directed verdict. If the court determines that the proceeding was not brought in good faith and with reasonable cause, the court will decide and award the amount of defense costs reasonably and necessarily incurred, in addition to the costs normally awarded to the prevailing party [CCP § 1038(a)].



Cross Reference:

Discussion of costs, see 14.12.

Legal Topics:

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

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14.11 Prepare Motion to Emphasize Insufficiency of Evidence.

14.11[1] State Precise Grounds in Contents of Motion. The moving party must briefly state the basis for the motion and the relief sought [*Cal Rules Ct, Rule 3.1110(b)*]. It is especially important to specify the precise grounds for a motion for directed verdict, because the opposing party may be given an opportunity to introduce further facts or proof [*see 14.17*]. It is particularly necessary to be precise when the moving party is requesting a partial directed verdict, on a particular issue or against a particular defendant.

 Judge's Perspective:

Written motions are common because the party bringing the motion knows well in advance that the motion will be made after the other party rests. It is always preferable to have the motion in writing, and courts prefer arguments in writing.



Strategic Point:

As with all trial motions, the court is concerned with error, and the proceedings are rapid. Counsel should make the motion succinct, compelling, and at least on its face helpful to a correct resolution of the issue. A motion that seeks too much, overreaches, or raises a flag that something does not pass the "smell" test will lose.



Cross Reference:

Discussion of partial direct verdict, see *14.08, 14.09*.

14.11[2] Making Written Motion or Oral Motion. A motion for directed verdict may be made orally without prior notice, or may be written. The only time a motion for directed verdict must be in writing is when it is brought after the jury is discharged without reaching a verdict [*see CCP § 630(f)*].



Strategic Points:

- The court will ordinarily excuse the jury while the motion is made and argued, although it is not required to do so.

- Although oral motions are more routine, they are treated as routine. The propensity for courts to take motions for directed verdicts under submission and wait to see what the jury will do speaks to the advantage, and advisability, of a written motion. However, if making an oral motion, ask for leave to supplement the oral motion with a briefing.

Cross References:

Grounds for motion for directed verdict, see 14.07.

Form of notice of motion and motion for directed verdict, see 14.29.

Discussion of oral motion for directed verdict and sample text of motion, see *California Trial Guide*, § 80.20 *et seq.* (Matthew Bender).

Detailed discussion/forms, see *California Forms of Pleading and Practice*, § 326A.80 (Matthew Bender).

14.11[3] Include Supporting Memorandum. A party filing a written notice of motion must serve and file with it a supporting memorandum. The absence of this memorandum may be construed by the court as an admission that the motion is not meritorious. In the case of a demurrer it may be construed as a waiver of all grounds not supported [*Cal Rules Ct, Rule 3.1113(a)*].

Consider:

Because a motion for directed verdict is in the nature of a demurrer [*Howard v. Owens Corning* (1999) 72 CA4th 621, 629-630, 85 CR2d 386 ; see 14.02[2]], counsel does not want to risk a waiver of grounds for directed verdict by failing to file a memorandum with a written motion.



Strategic Point:

Even if not required, a written motion and supporting memorandum are advisable. If counsel has all the facts, cases, and the like written out, an oral motion that carefully and slowly puts all of the information into the record should suffice. However, judges are human, and if the motion is oral, it is not as compelling as a written brief supporting the motion. The motion can be supported by portions of the trial transcript and exhibits, and these transcripts should be highlighted and lodged with the court.

Cross Reference:

Form of supporting memorandum, see 14.30.

14.11[4] Include Supporting Papers. Counsel may supplement a motion for directed verdict with excerpts from the trial transcript, if any are available.



Strategic Points:

- The material is in the record and can be so cited. Ensure that any material supplemented is from the

record. If in preparing for trial, counsel suspects that a motion for a directed verdict is appropriate or likely to be appropriate, careful consideration to a daily transcript is warranted.

- An attorney who anticipates bringing a motion for directed verdict (or a motion for nonsuit or motion for JNOV) should consider requesting from the court reporter, at the beginning of the trial, copies of trial transcripts related to testimony or documentary evidence that will support the motion. Such transcripts, and the declarations for which they form a basis, will be invaluable, particularly in a lengthy trial with complex issues, in focusing the trial judge's attention to the factors for consideration.

Cross Reference:

Form of supporting declaration, see 14.31.

14.11[5] Include Proposed Order Granting Motion. Because the order of the court is effective without any assent from the jury [CCP § 630(c)], a directed verdict is not submitted to the jury before the clerk enters the verdict and records the judgment on the verdict. Accordingly, the movant should draft and submit a proposed order granting the motion.

The moving party may request a partial directed verdict, such as on the issue of liability. The proposed order must clearly state the court's decision as to issues and as against the relevant parties. If there is a partial directed verdict, no final judgment is entered until after trial of the remaining issues, at which point the final judgment will reflect the court's decision on the directed verdict [CCP § 630(b)].



Strategic Point:

Always prepare a proposed order. Even if the court does not use it, it helps the court to frame a response to the motion that is favorable.

Cross References:

Discussion of partial directed verdicts, see 14.09.

Form of order, see 14.32.

Preparing and submitting verdict forms, see *California Trial Guide*, § 91.21 (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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14.12 Moving Party May Recover Defense Costs.

If the action is brought under the California Tort Claims Act or is for express or implied indemnity or contribution in a civil action, a court may grant defense costs with a motion for directed verdict. The award is based on the court's determination that the action was not brought with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law that warranted the filing of the complaint, cross complaint, or complaint in intervention [*CCP* § 1038].

The motion for costs should be filed at the earliest practical time before the entry of judgment and, unless the judge is unavailable, the motion for costs must be heard by the same judge who heard the motion for directed verdict [see *Gamble v. Los Angeles Dep't of Water & Power* (2002) 97 CA4th 253, 259, 118 CR2d 271] .

► Cross Reference:

Discussion of costs, see Ch. 24, Costs.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview



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III. OPPOSING MOTION FOR DIRECTED VERDICT

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14.13 CHECKLIST: Opposing Motion for Directed Verdict.

- ☐ Calendar response and hearing dates.
- ☐ Review motion and supporting documents for adequacy.
- ☐ Determine procedural position of case if motion is granted.
- ☐ Grounds for opposition include:
 - ☐ Motion is untimely or should be stayed pending events.

Discussion:

See 14.15[1], [2]

- ☐ Verdict in favor of moving party is not supported by substantial evidence.

Discussion:

See 14.15[3][a]

- ☐ There is or will be substantial evidence, including inferences, to support verdict for opposing party.

Discussion:

See 14.15[3][b]

- ☐ Matter cannot be decided as question of law and must go to jury as question of fact.

Discussion:

See 14.15[3][c], [d]

☐ Determine what relief to seek:

☐ Order denying motion for directed verdict, in whole or in part.

Form:

See 14.32

☐ Counter-motion for directed verdict.

Discussion:

See 14.14

☐ Motion to amend pleadings.

Discussion:

See 14.16

☐ Motion to reopen case and present more evidence.

Discussion:

See 14.17

☐ Draft:

☐ Opposing memorandum of points and authorities

Form:

See 14.30

☐ Declaration opposing motion

Form:

See 14.31

☐ Proposed order.

Form:

See 14.32

☐ Serve and file response, following standard noticed motion procedure.

Standard Procedure Checklist:

See Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 26.39 et seq.

☐ Calendar response and hearing dates.

Discussion:

See 14.15[4]

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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14.14 Options and Strategies for Party Opposing Motion for Directed Verdict.

The party opposing the motion for directed verdict may choose one of the following approaches:

1. Oppose the motion for directed verdict on an applicable ground [see 14.15];

Strategic Point:



If a motion for directed verdict is unopposed, then it certainly risks loss. However, there are reasons not to oppose. First, counsel may make the strategic decision to simplify the issues for the jury, and avoid complicated or bad jury instructions.

Another reason not to oppose a motion for directed verdict is to concede issues, and the conceding or responding party had better step up and stipulate or risk incurring the wrath of the court. In the summary judgment context, one court of appeals held that a summary judgment motion in which the respondent did not submit a response to a separate statement could nevertheless not be granted because the court had an obligation to go through the facts to determine whether they were in conflict [see *Parkview Villas Ass'n, Inc. v. State Farm Fire & Cas. Co. (2006) 133 CA4th 1197, 1209-1211, 35 CR3d 411*]. This raises the issue of whether the court would, on an unopposed motion for a directed verdict, have an obligation to determine the motion on the record anyway. In most cases, presumably the trial court will have seen the record, and an appellate court would charge the court with that responsibility.

Finally, at times the parties to litigation understand and acknowledge that issues in litigation cannot be resolved at the trial court level. In some instances these parties may want to have the matter considered by an appellate court without having had a jury decide those same issues. In such a case, not opposing a motion for directed verdict may be a valid strategic decision.

2. Bring a countermotion for directed verdict [see 14.03 et seq.];



Strategic Points:

- A countermotion for directed verdict must fulfill the substantive requirements of any motion for directed verdict [*see* 14.03 (checklist), 14.07 (grounds)]. A countermotion is filed along the same timeline as the original motion [*see* 14.06].
- Conceptually, countermotions may indicate that there are no conflicts in the facts and the issue can be determined on the law; one party is right and the other party is wrong. As with cross-motions for summary judgment, usually they are the result of one or both sides ignoring some of the facts to make their motion sound like it ought to prevail. This will virtually guarantee that the evidence is conflicting and the matter should go to the jury [*see* 14.15[3][c]].

3. Move to amend its pleadings [*see* 14.16]; or

4. Move to reopen the case to supplement its evidence [*see* 14.17].



Strategic Point--Personal Injury or Property Damage Case:

When one defendant in a personal injury or property damage action obtains a directed verdict on a finding of no liability (which a plaintiff may want to stipulate to if the case against that defendant is weak), the remaining defendants may not attempt to attribute fault to the dismissed defendant, nor to comment on that defendant's absence or involvement, over plaintiff's objection [*CCP* § 630(d)]. Remaining defendants should not stand by and allow a motion for directed verdict to be unopposed by a plaintiff if the result is to saddle them with additional liability.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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14.15 Bases for Opposing Motion for Directed Verdict.

14.15[1] Motion Is Not Timely. A motion for directed verdict may be challenged as untimely (brought too early) if it is brought before all parties have presented their evidence [*see CCP § 630(a)*], unless the court permits an earlier motion [*see 14.06[2]*]. A motion for directed verdict may be challenged as untimely (brought too late) if it is brought after the matter has gone to the jury [*see CCP § 630(a)*]. However, if the jury is discharged without rendering a verdict, such as for a mistrial, counsel has 10 days to give notice of a motion for directed verdict [*CCP § 630(f)*]. If the jury renders an unfavorable verdict, the appropriate motion is a motion for judgment notwithstanding the verdict [*CCP § 629*].

 Cross References:

Motion for directed verdict compared with motion for JNOV, *see 14.02[4]*.

Time limits, *see 14.06*.

Discussion of motion for JNOV, *see Ch. 20, Motion for Judgment Notwithstanding the Verdict*.

14.15[2] Motion Should Be Stayed Pending Events.

14.15[2][a] Opposing Party Needs to Present Case. Although a motion for directed verdict is typically brought after all parties have presented their evidence [*see CCP § 630(a)*], it may be brought earlier at the court's discretion [*see 14.06[2]*]. Therefore, a motion for directed verdict could potentially be brought before a party (such as a co-defendant) has presented its case, or matters could arise during a motion for directed verdict on which a party wants to present more evidence [*see 14.17*].



Strategic Point:

A motion for directed verdict is rarely, if ever, made at this stage. If it were, it would likely be denied; it is not surprising that no court of appeal has commented on the procedure.

 Cross Reference:

Discussion of reopening case to present more evidence, see 14.17.

14.15[2][b] Jury Is Not Yet Dismissed Without Verdict. If the case has gone to the jury, and the jury has not yet been dismissed without rendering a verdict, a motion for directed verdict is not proper unless the courts permits it [CCP § 630(a); see CCP § 630(f)].

 Cross Reference:

Discussion of CCP § 630(f), see 14.06[3].

14.15[3] Motion Is Not Supported by Evidence.

14.15[3][a] Evidence Does Not Support Verdict for Moving Party. Unless as a matter of law no other reasonable conclusion can be deduced from the evidence and any other holding would be so lacking in evidentiary support that a reviewing court would be compelled to reverse on appeal, or a trial court to set it aside, the trial court is not justified in taking the issue from the jury [*Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 CA4th 357, 381, 27 CR3d 126 (quoting *Aetna Life & Cas. Co. v. City of Los Angeles* (1985) 170 CA3d 865, 876, 216 CR 831)]. Whether this standard has been met in a particular case depends on the applicable law and the evidence presented.

14.15[3][b] Evidence Supports Verdict for Opposing Party. A motion for directed verdict must be denied if the party opposing the motion produces sufficient evidence to support a jury verdict in its favor, disregarding all conflicts in the evidence [*McMahon v. Albany Unified Sch. Dist.* (2002) 104 CA4th 1275, 1282, 129 CR2d 184 (citing *Howard v. Owens Corning* (1999) 72 CA4th 621, 629-630, 85 CR2d 386)]. Evidence that supports inferences in favor of the opposing party is sufficient to preclude a directed verdict against it [*Stilson v. Moulton-Niguel Water Dist.* (1971) 21 CA3d 928, 933, 98 CR 914]. The inference must be logical and reasonable, not speculative [*Newing v. Cheatham* (1975) 15 C3d 351, 365, 124 CR 193, 540 P2d 33 (argument that plane crash could have occurred from cause other than pilot's negligence was speculative)].

Example:

In an action for wrongful arrest, the trial court denied the plaintiff's motion for a directed verdict [*McMahon v. Albany Unified Sch. Dist.* (2002) 104 CA4th 1275, 1282, 129 CR2d 184]. The plaintiff's challenge to this ruling contended that insufficient evidence supported the jury verdict against him. The jury was instructed that the respondents bore the burden of proving that the plaintiff was lawfully arrested; the jury found the burden was met. The appellate court found that substantial evidence supported the finding, and thus that the trial court did not err in denying the plaintiff's motion for a directed verdict.

 Cross Reference:

Discussion of counter motions, see 14.14.

14.15[3][c] There Is Conflicting Evidence. The trial court may grant a motion for directed verdict only when there is no substantial conflict in the evidence [*Bunch v. Hoffinger Indus., Inc.* (2004) 123 CA4th 1278, 1290-1291, 20 CR3d 780]. It is not necessary to have an utter absence of conflict in the evidence [*Wayland v. Latham* (1928) 89 CA 55, 58, 264 P 766].

The trial judge cannot reweigh the evidence or judge the credibility of witnesses on a motion for directed verdict. Accordingly, if the evidence is conflicting or if several reasonable inferences may be drawn from the evidence, the motion for directed verdict should be denied [*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 CA4th 212, 226, 26 CR3d 798 ; see *Clemmer v. Hartford Ins. Co.* (1978) 22 C3d 865, 877-878, 151 CR 285, 587 P2d 1098 (applying

standard for directed verdict to motion for JNOV)].

14.15[3][d] Question of Fact Must Go to Jury. A directed verdict may not be granted if reasonable minds could differ on an essential question of fact [see generally *Short v. Nevada Joint Union High Sch. Dist.* (1985) 163 CA3d 1087, 1095-1096, 210 CR 297] .

Examples:

- In a personal injury action arising out of a car accident at a dangerous intersection, the question of "reasonableness" under a statute protecting the city was not a question of law for the court but a question of fact for the jury, because reasonable minds could differ about whether the city had acted reasonably in its response to the allegedly dangerous conditions. The directed verdict was erroneously given, and the judgment was reversed [*De La Rosa v. City of San Bernardino* (1971) 16 CA3d 739, 747, 94 CR 175] .

- A minor who was injured after diving into an above-ground swimming pool sued the manufacturer for failure to provide an adequate warning. The trial and the appellate courts both found that the danger of spinal damage from diving into a shallow above-ground pool was not "open and obvious" to an 11-year-old as a matter of law, so that the assumption of the risk defense did not apply and the trial court correctly denied a directed verdict for the manufacturer. The case went to the jury on factual issues pertaining to the product liability claim, of the extent to which a manufacturer must anticipate the misuse of its product and the adequacy of a product warning [*Bunch v. Hoffinger Indus., Inc.* (2004) 123 CA4th 1278, 1300, 20 CR3d 780] .

14.15[4] Time Limits for Opposing Motion for Directed Verdict. Papers opposing a noticed motion must be filed with the court and a copy served on each party at least 10 calendar days before the hearing [CCP § 1005].

 Cross Reference:

Discussion of time limits, see *Ch. 12, Motion for Nonsuit and Other Motions During Trial*, 12.10[1].

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawDirected Verdicts



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14.16 Opposing Party May Move to Amend Complaint or Answer.

The court may allow the amendment of any pleading, even after trial has commenced, in the furtherance of justice and on proper terms [CCP § 576]. When a party is allowed to prove facts to establish one cause of action, an amendment that would allow the same facts to establish another cause of action is favored. The trial court abuses its discretion by prohibiting such an amendment when it would not prejudice another party. A variance between pleading and proof does not justify the denial of an amendment to conform pleading to proof unless the unamended pleading misled the adverse party to its prejudice in maintaining that action or defense on the merits [*South Bay Bldg., Inc. v. Riviera Lend-Lease, Inc.* (1999) 72 CA4th 1111, 1124, 85 CR2d 647 (reversing judgment to permit plaintiff to amend complaint to include two new theories and to proceed to trial on new pleading)].

Strategic Point:



When evidence is admitted that supports a cause of action or affirmative defense that does not appear in the pleadings on file, and an otherwise appropriate motion to dismiss is considered as to the causes of action and defenses at issue, the party against whom the motion is made should consider bringing a motion to conform to proof, which can be made at any time, including during trial.

➡ Cross References:

Discussion of amending pleadings, see *Ch. 12, Motion for Nonsuit and Other Motions During Trial*, 12.22 -12.26.

Detailed discussion/forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 34, Amended and Supplemental Pleadings.

California Points and Authorities, Ch. 16, Amended and Supplemental Pleadings (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureTrialsJudgment as

Matter of LawDirected Verdicts



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14.17 Opposing Party May Ask to Reopen Case and Present More Evidence.

The party opposing a motion for directed verdict may ask to reopen its case. This request is more likely to be granted if the motion for directed verdict was made before all parties rested their case [*see, e.g., Nuffer v. Insurance Co. of N. Am.* (1965) 236 CA2d 349, 361, 45 CR 918 (when motion for directed verdict was brought after defendant's opening state ment, defendant was allowed to state additional facts that it intended to prove)].

There is older authority that requiring a motion for directed verdict to be made as a condition precedent to a motion for judgment notwithstanding the verdict is done to give the other party an opportunity to introduce evidence to overcome the grounds of the motion [*see Gibson v. Southern Pac. Co.* (1955) 137 CA2d 337, 346, 290 P2d 347] .

If the motion for directed verdict is brought after the parties have rested, the request to reopen will be granted only on a showing of good cause. The opposing party must show why the new evidence was not previously available, and the trial court has discretion to deny the motion [*Sanchez v. Bay Gen. Hosp.* (1981) 116 CA3d 776, 793, 172 CR 342] .



Strategic Point:

If the request to reopen is denied, counsel should immediately stand up, ask to reopen or make an offer of proof outside the presence of the jury, and make sure that the record demonstrates adequate grounds at that point. A rule of thumb in a trial is that if there is to be any dispute on appeal about the procedure or the court's rulings or conduct, make sure that the court has an opportunity to correct that ruling or conduct immediately. If it is necessary to have a case reopened, make sure that the grounds for such a motion are specified on the record, preferably in writing no matter how succinct, but at least in a discussion on the record, in a sidebar or otherwise, or that the court notes the objection and permits counsel to make a more complete record at the next break in the trial or the end of the day.

Examples:

- In an action arising from a patient's wrongful death in a hospital, a directed verdict against the hospital based on *res ipsa loquitur* was proper because the death was the result of the hospital's negligence. After a lengthy trial, the court proposed to grant a directed verdict for the plaintiff, at which

time the hospital offered to present additional evidence. The evidence covered areas that the hospital had already covered at great length. The facts of the nursing staff's negligence were essentially uncontradicted. The trial court did not abuse its discretion in denying the hospital's request to present more evidence and granting the directed verdict motion [*Sanchez v. Bay Gen. Hosp. (1981) 116 CA3d 776, 793, 172 CR 342*] .

■ In a car accident case, the plaintiff sued the car's owner for damages. The owner moved for a directed verdict at the close of evidence on the ground that it had not authorized the driver's use of the car. The trial court denied the plaintiff's request to reopen the case to present the driver's testimony because the plaintiff had not taken the driver's deposition or required the driver to attend the trial [*Engstrom v. Auburn Auto. Sales Corp. (1938) 11 C2d 64, 72, 77 P2d 1059*] .

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Amended Pleadings General Overview Civil Procedure Trials Judgment as Matter of Law Directed Verdicts Civil Procedure Judgments Relief From Judgment General Overview



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14.18 CHECKLIST: Seeking Review of Order Granting Directed Verdict.

☐ Make motion to reconsider.

Grounds:

Motion must be based on new facts, circumstances, or law.



Timing:

Before matter goes to jury, and within 10 days of notice of order granting directed verdict.

Authority:

CCP § 1008(b)

Discussion:

See 14.26

☐ Make motion for judgment notwithstanding verdict.



Timing:

After entry of judgment and within the earlier of 15 days of mailing or service of notice of entry of judgment, or 180 days after entry of judgment.

Grounds:

Motion may be brought based on any cause that materially affects substantial rights of moving party, including insufficiency of evidence to support verdict.

Authority:

CCP § 629

Discussion:

See 14.20

- ☐ Make motion to correct verdict.

**Timing:**

Immediately after verdict is rendered.

Grounds:

Mistake.

Authority:*CCP § 619***Discussion:**

See 14.21

- ☐ Make motion to vacate judgment and for new trial.

**Timing:**

After entry of judgment and within the earlier of 15 days of mailing or service of notice of entry of judgment, or 180 days after entry of judgment.

Grounds:

Insufficiency of evidence, new evidence.

Authority:*CCP §§ 657, 659, 663a***Discussion:**

See 14.22

- ☐ Make timely appeal from final judgment.

**Timing:**

Earlier of 60 days after service of notice of entry of judgment, or 180 days after entry of judgment.

Authority:*CCP § 902; Cal Rules Ct, Rule 8.104***Discussion:**

See 14.23

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJudgment as Matter of

LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil
ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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14.19 Options and Strategies.

When a motion for directed verdict is granted, the opposing party may respond in any of the following ways:

- Move to reconsider [*see 14.26*].
- Move for judgment notwithstanding the verdict [*see 14.20*].
- Move to correct the verdict [*see 14.21*].
- Move to vacate the judgment and for new trial [*see 14.22*].
- File a timely appeal of the final judgment [*see 14.23*].

An order granting a motion for directed verdict is an adjudication on the merits as to that issue or party unless the court specifies otherwise in its order directing entry of the verdict [*CCP* § 630(c)]. However, it is not a final order in itself--it must be incorporated into the final judgment before the opposing party can appeal [*see 14.23*].

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState Court Review



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14.20 Move for Judgment Notwithstanding the Verdict.

A trial court must render judgment notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted [CCP § 629]. A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support of it [*Sweatman v. Dep't of Veterans Affairs* (2001) 25 C4th 62, 68, 104 CR2d 602, 18 P3d 29] .

Cross Reference:

Substantial evidence defined, see 14.07[1].

A party intending to move for judgment notwithstanding the verdict must do so within 15 days of service of the written notice of entry of judgment [CCP §§ 629, 659] or service of a file-stamped copy of the judgment [*Palmer v. GTE California, Inc.* (2003) 30 C4th 1265, 1267-1268, 135 CR2d 654, 70 P3d 1067] . Filing for a motion for JNOV does not extend the time to file a motion for a new trial, so the court will rule on both motions, if filed, at the same time [CCP § 629].



Strategic Point:

If new evidence or law is presented following the granting of a motion for directed verdict, a motion for JNOV may be appropriate.

Cross Reference:

Discussion of motion JNOV, see *Ch 20, Motion for Judgment Notwithstanding the Verdict*, 20.03 -20.14.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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14.21 Move to Correct Verdict.

If the verdict incorrectly reflects the court's decision, the affected party may move to correct the verdict [CCP § 619]. For instance, the court's order may be overinclusive, granting a directed verdict against more parties than the proponent requested.



Strategic Point:

This comes up in the context of administrative errors (such as an internal inconsistency) in the verdict. In the case of a motion to correct a directed verdict, the jury rarely becomes involved once the correct ruling is made, but may be directed in its special or general verdict form to decide the case consistently with the corrected ruling.



Cross Reference:

Discussion of correcting verdict, see *Ch. 18, Jury Verdicts, 18.32[1]*; *Ch. 28, Correcting and Modifying Judgment, 28.03 -28.11*.

Detailed discussion/forms, see California Forms of Pleading and Practice, Ch. 322, Juries and Jury Selection (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc Relief



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14.22 Move to Vacate Judgment and for New Trial.

The verdict may be vacated and a new or further trial granted on all or part of the issues for any cause that materially affects the substantial rights of the moving party, such as jury misconduct, newly discovered evidence, or insufficiency of the evidence [CCP § 657]. If, in the opinion of the court, the evidence is unreliable, the court must grant a new trial. It may grant a new trial even when there is substantial evidence to sustain the verdict if it believes that the evidence preponderates against the verdict [*Hunt v. United Bank & Trust Co. (1930) 210 C 108, 117, 291 P 184*] .

Example:

In a personal injury action, the trial court declined to continue a trial date when the experienced, prepared trial counsel for the defendant had good cause for a continuance. The plaintiff presented evidence at trial without the defendant or its counsel, and the trial court directed a verdict for the plaintiff. The trial court denied the defendant's timely motions to vacate the judgment and for a new trial. The appellate court found that the trial court abused its discretion by refusing to continue the case, thus forcing the defendant to go to trial without counsel, which amounted to a terminating sanction [*Oliveros v. County of Los Angeles (2004) 120 CA4th 1389, 1400, 16 CR3d 638* (judgment reversed)].

Counsel must file and serve a notice of intention to move for new trial, either before entry of judgment or within the earlier of 15 days of date of mailing notice of entry of judgment or service of written notice of entry of judgment, or 180 days after the entry of judgment [CCP § 659].



Cross References:

Discussion of motion to vacate and form new trial, see *Ch. 21, Motion for New Trial, 21.03 -21.12; Ch. 27, Motion to Vacate Judgment and Enter Different Judgment, 27.03 -27.08*.

Detailed discussion/forms, see *California Forms of Pleading and Practice, §§ 371.60 et seq., 371.90 et seq.* (Matthew Bender).

California Points and Authorities, § 155.255 (memorandum supporting motion for new trial where motion for directed verdict improperly denied) (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureJudgmentsRelief From
JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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14.23 Appeal Final Judgment.

14.23[1] Timely Appeal Lies From Final Judgment. A party may appeal the final judgment in a case in which a directed verdict was granted on any applicable legal ground [*see, e.g., Mycogen Corp. v. Monsanto Co. (2002) 28 C4th 888, 123 CR2d 432, 51 P3d 297* (in second lawsuit between parties, trial judge entered directed verdict for plaintiff on issue of breach of contract and jury awarded damages; defendant successfully appealed on doctrine of res judicata)].

A notice of appeal from a judgment must be filed on the earliest of (1) 60 days from date the court clerk serves a notice of entry of judgment, (2) 60 days of service by any party of a notice of entry of judgment, or (3) 180 days after date of entry of judgment [*Cal Rules Ct, Rule 8.104(a)*]. A notice of appeal filed after rendition of the judgment but before its entry is deemed to have been filed immediately after entry of judgment [*Cal Rules Ct, Rule 8.104(e)*].

► Cross Reference:

Detailed discussion/forms, see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview et seq. (Matthew Bender).

14.23[2] Partial Directed Verdict Is Not Appealable As Final Judgment. An appeal lies from the judgment entered on the directed verdict, not the order granting the directed verdict. If the court grants a motion for directed verdict on some but not all of the issues involved in the action, the case will proceed to trial on the remaining issues. The court will not enter a final judgment until the action terminates. The final verdict will reflect the directed verdict as ordered by the court [*CCP § 630(b)*]. The judgment entered on the final verdict is appealable.

► Cross Reference:

Discussion of review of proceedings to set aside judgments and order, see Ch. 29, *Setting Aside Judgments and Orders*, 29.66 -29.70.

14.23[3] Presumption on Appeal Against Order Granting Directed Verdict. Appellate review of trial court orders granting nonsuits, directed verdicts, or judgments notwithstanding the verdict--orders that finally terminate claims or lawsuits--is strict. All inferences and presumptions are against such orders [*People v. Ault (2004) 33 C4th*

1250, 1266, 17 CR3d 302, 95 P3d 523 ; see, e.g., *Garrett v. Young* (2003) 109 CA4th 1393, 1 CR3d 134 (breach of medical privacy case--directed verdict for doctor sustained)).

The standard on appeal for review of the grant of a directed verdict and for review of grant of a nonsuit is the same [*Heller v. Pillsbury Madison & Sutro* (1996) 50 CA4th 1367, 1392, 58 CR2d 336 (applying standard of review for grant of directed verdict to review of grant of nonsuit and finding that no substantial evidence supported plaintiff's cause of action for intentional interference with economic advantage)]. If the appealing party's evidence, when most favorably viewed, provides substantial evidence in support of each element of a prima facie case without any affirmative defense, a judgment against the appealing party is improper and must be reversed [*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.* (1993) 16 CA4th 202, 211, 20 CR2d 62 (applying standard to grant of nonsuit)].

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleEvidenceInferences & PresumptionsInferencesEvidenceInferences & PresumptionsPresumptions



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14.24 CHECKLIST: Seeking Review of Order Denying Directed Verdict.

☐ Determine appropriate method of attack.

☐ Nonappealable order may be challenged by special writ.

Discussion:

See 14.25

☐ Motion to reconsider.

Grounds:

Motion must be based on new facts, circumstances, or law.



Timing:

Before matter goes to jury, and within 10 days of notice of order denying directed verdict.

Authority:

CCP § 1008(a)

Discussion:

See 14.26

☐ Motion for judgment

Grounds:

Motion for directed verdict should have been granted; there is no substantial evidence to support verdict.

**Timing:**

Within 10 days after jury is dismissed without a verdict and decided within 30 days (plus holidays) after jury is dismissed.

Authority:

CCP § 630(f)

Discussion:

See 14.26

- ☐ Motion for judgment notwithstanding verdict.

Grounds:

Motion may be brought based on any cause that materially affects substantial rights of moving party, including insufficiency of evidence to support verdict.

**Timing:**

After a verdict is reached, within same period as motion for new trial.

Authority:

CCP § 629

Discussion:

See 14.20

- ☐ Motion to vacate judgment and for new trial.

Grounds:

Insufficiency of evidence, new evidence.

**Timing:**

After entry of judgment and within the earlier of 15 days of mailing or service of notice of entry of judgment, or 180 days after entry of judgment.

Authority:

CCP §§ 657, 663a

Discussion:

See 14.27

- ☐ Timely appeal lies from final judgment.

**Timing:**

Earlier of 60 days after service of notice of entry of judgment, or 180 days after entry of judgment.

Authority:

CCP § 902; Cal Rules Ct, Rule 8.104

Discussion:

See 14.28

Standard Procedure Checklist:

See *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 26.39 et seq.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureAppealsAppellate JurisdictionState
Court Review



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14.25 Options and Strategies.

A motion for directed verdict does not waive the right to trial by jury if the motion is denied [*CCP* § 630(a)]. Thus, when a motion for directed verdict is denied, the matter proceeds to the jury. If the motion was brought before all parties presented their evidence, the trial will proceed with the presentation of evidence.

The moving party may bring a motion to reconsider based on new facts, circumstances, or law [*see* 14.26]. If the jury is deadlocked and is dismissed without a verdict, the proponent can renew the motion for a directed verdict (now called a motion for judgment) [*see* 14.06[3]]. After an adverse jury verdict, counsel can move for a judgment notwithstanding the verdict [*see* 14.20], or move to vacate the judgment and for a new trial [*see* 14.27]. Counsel may also bring a timely appeal of the final judgment [*see* 14.28].



Strategic Point:

The trial judge may be more receptive to a motion for directed verdict after rendition of a jury verdict to avoid retrying the case if there is reversal on appeal.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJury TrialsRight to Jury Trial



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14.26 Move to Reconsider or Renew Motion for Directed Verdict.

A motion to reconsider must be based on new facts, circumstances, or law [*CCP* § 1008(b)]. It should be brought before the case is submitted to the jury.

A motion to reconsider must be brought within 10 days after being served with written notice of entry of the order denying the directed verdict [*CCP* § 1008(a)]. It cannot be considered after entry of judgment, even if it was filed before entry of judgment [*APRI Ins. Co. v. Superior Court* (1999) 76 CA4th 176, 181, 90 CR2d 171 (vacating order granting motion on reconsideration)].



Strategic Point:

If new facts have arisen, counsel may instead want to consider moving to reopen the case, especially if the evidence will defeat a motion for a directed verdict.



Cross References:

Discussion of reopening case, see Ch 12, Motion for Nonsuit and Other Motions During Trial, 12.48 et seq.

Discussion of motions to reconsider, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 29, Motions to Reconsider and Renewed Motions.

Under some circumstances a motion for directed verdict may be renewed. A motion for directed verdict may be brought and granted, even if the same party's previous motion for a directed verdict was denied, after the jury is discharged without reaching a verdict [*CCP* § 630(f)], such as after a mistrial. This motion is sometimes called a motion for judgment, although it arises under a different statute from a true motion for judgment [*CCP* § 631.8].

Examples:

- In an employment termination case, the trial court denied the defendant's motion for a directed

verdict and then granted its motion for judgment under *CCP* § 630(f), using the "substantial evidence" standard for directed verdict. The appellate court found that no substantial evidence supported the plaintiff's cause of action for intentional interference with prospective economic advantage, and therefore the trial court did not err in granting the motion for judgment [*Heller v. Pillsbury Madison & Sutro* (1996) 50 CA4th 1367, 1392-1393, 58 CR2d 336] .

■ In a personal injury action by a switchboard operator against the employer, the trial court denied the defendant's motion for a directed verdict, and subsequently granted the defendant's motion for judgment after the jury became deadlocked and a mistrial was declared. The appellate court reversed the trial court after examination of the facts of that case: The jury could reasonably have inferred from the evidence that the plaintiff's injuries were caused by defective telephone cords, and it could not be said as a matter of law that that inference could not be drawn [*Jaehne v. Pacific Tel. & Tel. Co.* (1951) 105 CA2d 683, 234 P2d 165] .

Notice of a motion to reconsider must be given within 10 days of the jury's discharge. The court's power to act expires 30 days from the date of the jury's discharge, extended for any holidays [*CCP* § 630(f)].

Cross References:

Comparing motion for directed verdict with motion for judgment, see 14.02[3].

Discussion/forms, see *Ch. 13, Motion for Judgment*, 13.02[2].

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend



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14.27 Move to Vacate Judgment and for New Trial.

The verdict may be vacated [CCP § 663a] and a new or further trial granted on all or part of the issues for any cause that materially affects the substantial rights of the moving party, such as jury misconduct, newly discovered evidence, or insufficiency of the evidence [CCP § 657]. If, in the opinion of the court, the evidence is unreliable, the court must grant a new trial. It may grant a new trial even when there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict [*Hunt v. United Bank & Trust Co. (1930) 210 C 108, 117, 291 P 184*] .



Strategic Point:

A party may lose a motion for directed verdict but win a motion for a new trial, because the court can consider the credibility of witnesses on a motion for new trial but not on a motion for directed verdict [*In re Estate of Flood (1933) 217 C 763, 768-769, 21 P2d 579*] .

Counsel must file and serve a notice of intention to move to vacate judgment or for new trial within the earlier of (1) 15 days of date of mailing notice of entry of judgment or service of written notice of entry of judgment, or (2) 180 days after entry of judgment [CCP §§ 659, 663a; *Palmer v. GTE Cal., Inc. (2003) 30 C4th 1265, 1267-1268, 135 CR2d 654, 70 P3d 1067*]



Cross References:

Discussion/Forms, see *Ch. 21, Motion for New Trial, 21.03 et seq.*; *Ch. 27, Motion to Vacate Judgment and Enter Different Judgment, 27.03 et seq.*

Detailed discussion/forms, see *California Forms of Pleading and Practice, §§ 371.60 et seq., 371.90 et seq.* (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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14.28 File Timely Appeal.

When a plaintiff appeals from a judgment based on a directed verdict in favor of defendant, the appellate court will view the evidence in the light most favorable to the plaintiff. Conflicts in the evidence are resolved, and inferences from the evidence are drawn, in the plaintiff's favor. The appellate court will reverse if there is substantial evidence to support plaintiff's claim and if the law supports that claim [*Woods v. Union Pacific Railroad Company* (2008) 162 CA4th 571, 576, 75 CR3d 748 (railroad could not be liable to employee under Safety Appliance Act when Act did not prohibit vertical handholds on railroad car)].

Example:

A police academy applicant failed a medical test due to severe hearing impairment, but because of a clerical error, was admitted to the police academy. When his hearing impairment adversely affected his performance as a patrolman, he was retested and then terminated. He sued for disability discrimination. The police department unsuccessfully moved for a nonsuit and later for a directed verdict on the theory that the plaintiff could not have been wrongfully discharged because he was not qualified to be hired for the position, and therefore had not proven a key element of the prima facie case. The trial court denied both motions, but the appellate court agreed with the defendant and reversed with directions to enter judgment for defendant [*Quinn v. City of Los Angeles* (2000) 84 CA4th 472, 475-476, 100 CR2d 914] .

The standard on review is strict: Only if there was no substantial evidence in support of the verdict against the appealing party could it have been error for the trial court earlier to have denied the appealing party's motion for directed verdict. The appellate court will not reweigh the evidence. Its authority is limited to determining whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, in support of the judgment [*McMahon v. Albany Unified Sch. Dist.* (2002) 104 CA4th 1275, 1282, 129 CR2d 184 (holding that trial court did not err in refusing to give directed verdict)].



Strategic Point:

The substantial-evidence standard on appeal for sustaining a directed verdict is difficult. If the evidence is in conflict and the evidence supports the loser on the motion for a directed verdict, plaintiff or defendant, the directed verdict should be set aside.

**Timing:**

A notice of appeal from a judgment must be filed on the earliest of (1) 60 days from date the court clerk mails a notice of entry of judgment, (2) 60 days of service by any party of a notice of entry of judgment, or (3) 180 days after date of entry of judgment [*Cal Rules Ct, Rule 8.104(e)*]. A notice of appeal filed after rendition of the judgment but before its entry is deemed to have been filed immediately after entry of judgment [*Cal Rules Ct, Rule 8.104(e)*].

**Cross Reference:**

Detailed discussion/forms, see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview, et seq. (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureAppealsReviewabilityTime Limitations



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14.29 Notice of Motion and Motion for Directed Verdict.

Notice of Motion and Motion for Directed Verdict.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION FOR DIRECTED
Defendant.	)	VERDICT [, 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 _____ [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 pursuant to *Section 630 of the Code of Civil Procedure*, for an order directing entry of a verdict for the _____ [moving party, e.g., Defendant] and against the _____ [opposing party, e.g., Plaintiff] on _____ [all the issues or the following issues only: _____ (describe issues, e.g., whether the Plaintiff's claim against Defendant for damages is barred as a matter of law by the doctrine of assumption of the risk)]. The motion will be made on the grounds that _____ [specify legal grounds, e.g., giving to Plaintiff's evidence all the value to which it is legally entitled, including all reasonable and logical inferences that may be drawn from that evidence, as a matter of law there is no substantial evidence to support a verdict for Plaintiff on any of the claims asserted by Plaintiff or on Plaintiff's claim for damages based on Defendant's alleged negligence, and thus such evidence is wholly insufficient to warrant submission of the case to the jury].

The motion will be based on this notice of motion, on the _____ [affidavits(s) or declarations] of _____ [name(s)], the supporting memorandum served and filed this motion, on the records and file in this matter, [on such portions of the transcript of the trial and supplemental affidavits or declarations and memoranda that may be filed subsequently in this matter] 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 _____ [moving party]

NOTES

Authority:

CCP § 630; Cal Rules Ct, Rule 3.1112(d)



Timing:

See 14.06

Grounds:

See 14.07

Related Form of Memorandum:

See 14.30

Related Form of Declaration:

See 14.31

Related Form of Order:

See 14.32

Related Form of Memorandum:

See California Points and Authorities, § 155.255 (Matthew Bender)



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14.30 Memorandum Supporting Motion for Directed Verdict.

Memorandum Supporting Motion for Directed Verdict.

[Caption may be omitted, and title may stand alone, if the memorandum is referred to by, and served with, the notice of motion]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) MEMORANDUM SUPPORT-
) ING _____ [name's] MOTION FOR
) DIRECTED VERDICT
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

[Table of contents and table of authorities is required if memorandum exceeds 10 pages]

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and pages on
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pear]

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Texts

*[List
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cited
and
page(s)
on
which
they
appear]*

Law Reviews

*[List
law re-
views
or
journ-
als
cited
and
page(s)]*

on
which
they
appear]

I. SUMMARY OF ARGUMENT

_____ [Summarize the arguments set out in the memorandum. Introduce every main issue and the conclusion].

II. STATEMENT OF FACTS

_____ [State all relevant and material facts].

III. ARGUMENT

_____ [Set out every main issue with a heading and text arguing the relevant law and facts. Anticipate and refute the major opposing arguments, e.g.,

A. Court May Decide as Matter of Law That Plaintiff Is Barred by Acts of Plaintiff's Agent. The matter at issue in this lawsuit involves only a question of California law, in that Plaintiff John Smith does not contest that third party Richard Roe was at all relevant times the agent of Plaintiff, or that Richard Roe's acts caused the fire that damaged Plaintiff's property. Defendant Mary Jones consequently maintains that Plaintiff is barred from proceeding against Defendant by the legal doctrines of intervening cause, proximate cause, and respondeat superior, and the equitable doctrine of unclean hands. [Discuss law and cite authorities.] The court may properly decide this question of law on a motion for directed verdict [cite].

[OR]

A. Plaintiff Has Not Presented Substantial Proof That Driver of Plaintiff's Automobile Was a Permissive Driver. All of Plaintiff John Smith's evidence has concerned the actions of Defendant Richard Roe, the driver of the automobile in question. Plaintiff may argue that the fact that Roe was in possession of the automobile raised an inference that Roe had the permission of Defendant Mary Jones, the owner of the automobile. This inference is speculative [cite] and insufficient to meet the standard in opposition to a motion for directed verdict [cite].

Furthermore, the attached Declaration of Defendant Mary Jones states positively that Roe did not have Jones's permission to drive the automobile on any day, and that Defendant Mary Jones was not aware that Roe was driving the automobile on the day in question. This uncontradicted evidence squarely refutes any such inference [cite]. Consequently, Plaintiff has presented no substantial evidence to support Plaintiff's claim that Defendant Mary Jones has any liability for the acts complained of. [Discuss law and cite authorities.] The court may properly grant Defendant's motion for directed verdict if there is no substantial evidence to support Plaintiff's claim [cite].

[OR as the case may be]

IV. CONCLUSION

_____ [Brief summary of argument, conclusions, and request for favorable ruling from the court].

Dated: _____

Respectfully submitted,

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [moving party]

NOTES

Authority:

CCP § 630; Cal Rules Ct, Rule 3.1113

**Timing:**

See 14.06

Discussion:

See 14.11[3]

Related Form of Motion:

See 14.29

Related Form of Order:

See 14.32

Related Form of Memorandum:

See California Points and Authorities, § 155.255 (Matthew Bender)



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14.31 Declaration Supporting Motion for Directed Verdict.

Declaration Supporting Motion for Directed Verdict.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	NO. _____
Plaintiff,	)	DECLARATION IN SUPPORT
vs.	)	OF _____ [name's] MOTION FOR
_____ [name],	)	DIRECTED VERDICT
Defendant.	)	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 Defendant Mary Jones or other statement as appropriate] and make this declaration in support of _____ [specify, e.g., Defendant Mary Jones's motion for directed verdict].

2. _____ [Specify facts supporting directed verdict, e.g., I am the owner of the automobile alleged to have caused Plaintiff's damages. I did not drive my automobile on the date in question. I am not and never have been acquainted with the alleged driver, Richard Roe. I did not know that Richard Roe or anyone else was driving my

automobile on the date in question. At no time did I ever give Richard Roe or anyone else permission to drive my automobile on the date in question].

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 § 630; Engstrom v. Auburn Auto. Sales Corp. (1938) 11 C2d 64, 69-72, 77 P2d 1059

Discussion:

See 14.11[4]

Related Form of Motion:

See 14.29

Related Form of Order:

See 14.32

Related Form of Memorandum:

See California Points and Authorities, § 155.255 (Matthew Bender)



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14.32 Order Granting Motion for Directed Verdict.

Order Granting Motion for Directed Verdict.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER GRANTING MOTION FOR DIRECTED
_____ [name],	)	VERDICT [AS TO DEFENDANT MARY JONES <i>or</i>
Defendant.	)	<i>as the case may be</i>]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

The motion for directed verdict being brought by _____ [party, e.g., Defendant Mary Jones] for an order _____ [specify, e.g., directing a verdict in her favor and against Plaintiff John Smith on the issue of liability for the damages claimed] came on regularly for hearing by the court on _____ [date]. Plaintiff appeared by counsel _____ [name]; Defendant appeared by counsel _____ [name].

On a showing made to the satisfaction of the court that the motion ought to be _____ [granted or denied] _____ [if appropriate, specify party or issue, e.g., as to Defendant Mary Jones],

IT IS ORDERED that the motion for directed verdict be, and hereby is, _____ [granted or denied].

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

CCP § 630

Discussion:

See 14.11[5]

Related Form of Motion:

See 14.29

Related Form of Memorandum:

See California Points and Authorities, § 155.255 (Matthew Bender)



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Chapter 15 Closing Argument

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Chapter 15 Closing Argument
I. STRATEGY

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15.01 Scope.

This chapter covers:

- Objectives and strategy for making closing arguments [see 15.02].
- Closing argument fundamentals [see 15.03 -15.08].
- Reviewing argument strategies and tactics [see 15.09 -15.14].
- Preparing closing argument content [see 15.15 -15.20].
- Presenting Closing Argument [see 15.21 -15.24]
- Objecting to closing argument and responding to objections [see 15.25 -15.34].

Core Statutes:

CCP §§ 607, 631.7

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 15 Closing Argument
I. STRATEGY

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15.02 Objective and Strategy.

The closing argument is the attorney's last opportunity to persuade the jury to find in his or her client's favor. In closing argument, the attorney can perform the following important functions [*Richmond v. Dart Indus., Inc. (1987) 196 CA3d 869, 877-878, 242 CR 184*] :

- Marshall the important facts from the evidence and present them to a jury in a logical and persuasive manner.
- Clarify the issues presented in the case. In theory, the issues have only been explained to the jury during opening statement. Following the presentation of the evidence, a clear restatement of the issues can profoundly affect the jury's deliberations.
- Explain how the facts pertain to the law as instructed by the trial court.

Strategic Point--Waiver:



Because of closing argument's importance, it is not recommended to waive the argument. This allows the other side to impose an unchallenged spin on the case's critical event, which the factfinder will use as a frame of reference when considering the evidence.

Strategic Point--Strength of Case:



The closing argument is the opportunity to pull together the whole the case and frame the evidence that fits the party's themes and theories. For a strong case, the argument emphasizes the weight of all the evidence to reach a compelling result. For a weak case, this is counsel's opportunity to focus on the elements that may derail the opponent's position. Determine the strength of the case and tailor the argument accordingly.

Strategic Point--Contradictory Evidence:



During the questioning of witnesses, it is often a strategic tactic to elicit contradictory evidence from witnesses but to refrain from asking follow up questions during examination. This serves the dual purpose of prohibiting the witness from following up with an explanation, and to avoid asking an argumentative question that will raise an objection (e.g., "Isn't it true you were not telling the truth when you gave your statement during deposition?"). Save this question and make it a statement for closing argument where counsel can highlight the contradictions and repeatedly remind the jury that the witness is untrustworthy and the reasons and motives for not answering truthfully. Prepare a list of contradictions throughout trial and weave them into closing argument to attack the opponent's case by destroying witness credibility. Trial counsel considering an argument of this nature should be prepared for the anticipated "assumes facts not in evidence" objection.

**Strategic Point--Tone of Argument:**

This is the time during a trial that counsel can "turn on" the argument. Counsel should take advantage of the opportunity, but remember that the jury has become conditioned to counsel's particular style. Avoid the temptation to change into a firebrand if up to that point the approach has been to act been demure and calm. Changes in style during closing argument can hurt the credibility built up during trial. On the other hand, do not pull any punches in the actual argument. A blistering, scathing presentation need not be blustery and loud.

**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:
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15.03 CHECKLIST: Closing Argument Fundamentals.

- ☐ Purpose of closing argument is to convince jury to find in client's favor.

Discussion:

See 15.04

- ☐ Closing argument may be more argumentative and adversary than opening statements.

Authority:

Hartman v. Shell Oil Co. (1971) 68 CA3d 240, 251, 137 CR 244

Discussion:

See 15.05

- ☐ Parties have right to make closing arguments in jury trial, but at court's discretion in bench trial.

Authority:

CCP § 607(7)

Discussion:

See 15.06

- ☐ Order of presentation.

- ☐ Plaintiff usually makes first and last closing arguments.
- ☐ Defendant presents defense arguments and rebuttal to plaintiffs' first argument in

one presentation.

Authority:

CCP § 607(7)

Discussion:

See 15.07

☐ Court may limit length and scope of closing arguments.

Authority:

Bates v. Newman (1953) 121 CA2d 800, 812, 264 P2d 197

Discussion:

See 15.08

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.04 Closing Argument Purpose Is to Convince Jury to Find in Client's Favor.

When a trial goes as the attorney hoped, closing argument is the icing on the cake, meant to guide the jury to decide in the party's favor. However, in most cases, trials do not go perfectly. The closing argument thus offers the attorney a final opportunity to refocus the jury on a new theme or new issue to find in the party's favor.

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.05 Difference Between Opening Statement and Closing Argument.

The basic differences between a closing argument and an opening statement are:

- The opening statement is made before the introduction of any evidence; thus, it must fairly state the facts the attorney expects to prove. Overstating the case or failing to support the opening statement by evidence will likely hurt a party [*People v. Berryman* (1936) 6 C2d 331, 336, 57 P2d 136] .
- The closing argument takes place after the evidence is in and is intended as argument. The attorney may be more explicitly persuasive in the closing argument, which is an "argument" and not merely a "statement." The attorney has great flexibility to characterize the evidence in the manner that best supports his or her case and most completely discredits the opponent's case [see *People v. Farnam* (2002) 28 C4th 107, 200, 121 CR2d 106, 47 P3d 988] .

Legal Topics:

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

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15.06 Party Has Right to Make Closing Argument in Jury Trial, but at Court's Discretion in Bench Trial.

After the evidence is presented, unless the case is submitted without argument, the parties may present their argument [CCP §§ 607(7), 631.7]. The right to argue the case is absolute in a jury trial, but in a nonjury trial, the court has discretion to allow argument [*Gillette v. Gillette* (1960) 180 CA2d 777, 781, 4 CR 700] . The court has the right to limit the length of the argument in either a jury or nonjury trial [*Oil Workers Int'l Union v. Superior Court* (1951) 103 CA2d 512, 581, 230 P2d 71] .

Legal Topics:

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

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II. CLOSING ARGUMENT FUNDAMENTALS

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15.07 Order of Presentation

15.07[1] Plaintiff Usually Makes First and Last Closing Arguments. Generally, the plaintiff opens and closes jury argument [CCP § 607(7)]. The trial court may alter this order for "special reasons" [CCP § 607]. This order may also be altered if the plaintiff waives the right to open argument [see *Kling v. Crown Fin. Corp.* (1944) 63 CA2d 33, 35, 146 P2d 54] .

Exception:

In eminent domain proceedings, the defendant opens and closes argument [CCP § 1260.210].

15.07[2] Plaintiff's Last Closing Argument Is Restricted. The plaintiff's rebuttal argument is limited to addressing issues argued in the defendant's closing argument [*Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 CA3d 783, 800, 121 CR 200] .

15.07[3] Defendant Presents Defense Arguments and Rebuttal to Plaintiffs' First Argument in One Presentation. Arguments are not conducted together, so one party has to start. Because the plaintiff bears the burden of proof, the plaintiff is given the first and last opportunity to argue before the jury. The defense therefore gives both argument and rebuttal to the plaintiff's argument in one presentation.

15.07[4] Party May Waive Closing Argument. A party may waive the right to argument either expressly or implicitly [*Kenny v. Trust Oil Co.* (1963) 215 CA2d 305, 307, 29 CR 909] . The trial court may not pressure parties to waive their right to argument [*Shippy v. Peninsula Rapid Transit Co.* (1925) 197 C 290, 295, 240 P 785] .



Warning:

Waiving closing argument is rarely warranted. In a properly conducted trial, there will have been minimal argument, and the jury has been presented with the evidence from witnesses who, in most cases, participated in the events at different times and from different viewpoints. Closing argument is the one time that counsel can confirm what was promised in opening statements and explain the story supported by the evidence that came in at trial. Waiving this opportunity severely hampers the prospects of prevailing. Also, most jury research confirms that jurors seldom reach the same conclusions before beginning deliberation. Closing argument is the opportunity to provide "ammunition" to jurors favoring

counsel's position, and thus helping them to help counsel in their deliberations against jurors favoring the other side.



Strategic Points:

- Some jury research results show that few results are altered by closing argument. If a case has not been tried with a coherent theme, or the evidence has been presented in a confusing manner, no closing argument will salvage the result. This alone is not a reason to waive closing argument, however.

- In court trials, as in arbitrations, a trial judge may want to limit argument. Some courts prefer that counsel select, in a non-jury trial, whether they want to brief argument in writing or engage in oral argument. Experience suggests that the court's preference is probably the best approach, but that no amount of writing substitutes for oral argument. In cases in which courts indicate that argument will be in briefs, it would be wise to ask for a short oral hearing in which to address questions left open or otherwise raised by the briefs.

- In the rare instance trial counsel believes the evidence supporting his/her client's claims is so overwhelming that argument would only "belabor the obvious" and further impose on the jury's time, argument might be waived. This obviously opens the door to opposing counsel to give an un-rebutted argument. When a defendant fails to follow a plaintiff's argument with one of his/her own, the jury will be left with no argument or summation to consider from both sides. Under such circumstances the jury may, understandably, give credence to the only argument it heard.

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.08 Court May Limit Length and Scope of Closing Arguments.

The trial court is empowered to determine the scope and length of the closing argument, including the number of counsel to argue for a party and how time is to be divided between parties [*see Rosenfield v. Vosper (1948) 86 CA2d 687, 695, 195 P2d 530*]. The importance of closing argument increases in direct relation to the length of the trial and the amount of controversy over the facts [*see Richmond v. Dart Indus., Inc. (1987) 196 CA3d 869, 877-878, 242 CR 184*].

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Chapter 15 Closing Argument
III. REVIEWING CLOSING ARGUMENT STRATEGIES AND TACTICS

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15.09 CHECKLIST: Reviewing Closing Argument Strategies and Tactics.

- ☐ Start preparing closing argument as early as possible.

Discussion:

See 15.10

- ☐ Presentation may be dramatic.

Discussion:

See 15.11

- ☐ Remind the jurors of the burden of proof.

Discussion:

See 15.12

- ☐ Use simple visual aids.

Discussion:

See 15.13

- ☐ Plaintiff should present all matters in initial closing argument that are anticipated to be addressed in rebuttal argument.

Discussion:

See 15.14

Legal Topics:

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

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15.10 Counsel Should Start Preparing Closing Argument As Early As Possible.

It is up to the judge to decide how much time the attorneys have after the end of evidence to present their closing arguments. Therefore, trial lawyers should begin planning the content of their closing arguments even before the trial begins. Basic trial preparation overlaps with preparing a closing argument. Before and during the trial, counsel should note the following:

- The elements of the causes of action the plaintiff proposes to prove.
- Any affirmative defenses the defense plans to prove.
- The testimony and other evidence counsel anticipates will prove each of the elements.
- As the trial progresses, whether the evidence was admitted and how it held up against the opposing counsel's attempts to discredit it.
- Any testimony or other evidence the opponent managed to produce that bears on each particular element of a cause of action or defense.

Legal Topics:

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15.11 Track Evidence Presented at Trial and Adjust Closing Argument Accordingly.

Generally, closing argument will have been on the counsel's mind from before the start of trial. Central themes and the theory of the case have guided the selection and presentation of evidence. However, the evidence admitted at trial does not always track what was intended.

Counsel often will have an outline of the closing argument prepared before trial. Amend and adjust this outline throughout trial as evidence and events unfold so the argument fits the overall narrative of the case.

Strategic Point--Counsel Credibility and Opening Statement:



Juries carefully assess counsel's credibility to help them decide what to believe, particularly in close cases. If counsel has promised evidence during opening statement that did not materialize during trial, the closing argument must address the absence, because opposing counsel will certainly bring up the matter. Use closing argument to explain the discrepancy in the best light possible and to remove the sting of opposing counsel's argument. When counsel has produced all of the evidence proffered during opening statement, remind the jury of this fact, and explain that the party has been forthright with the jury from the start.

Strategic Point--Preparing for Damaging Evidence:



The same method is applicable when evidence is offered during trial that is particularly harmful to a plaintiff and beneficial to the defendant. The plaintiff, under such circumstances, may be well served by defusing such evidence during the plaintiff's first closing argument and before it is argued by the defense.

Legal Topics:

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

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15.12 Explain Burden of Proof.

Even if the attorney explained the burden of proof during the opening statement (generally the preponderance standard [see *Evid Code* § 115]), remind the jury of the view the attorney wants them to take of the burden. In cases in which the evidence is closely balanced, the outcome may depend on the jury's understanding and acceptance of the burden.

If a prayer for punitive damages based on an allegation of oppression, fraud, or malice in an action not arising from contract is at issue, the jury must also understand the "clear and convincing evidence" burden [see *CC* § 3294(a)].



Cross Reference:

Discussion of burdens of proof, see Ch. 9, Burden of Proof and Persuasion.

Legal Topics:

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

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DamagesEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural
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15.13 Use Simple Visual Aids.

Using visual aids that have been used during the presentation of evidence may help explain the issues to the jury. Visual aids during closing argument are allowed only if they are relevant to the issues [*Weisbart v. Flohr* (1968) 260 CA2d 281, 292-293, 67 CR 114] .



Strategic Point--Software Programs:

Many software programs are available for creating visual aids, such as Trial Director and Visionary. In contrast to traditional charts and diagrams made before trial, these computer-based visual aids can be edited during the course of trial to conform to proof. Also, facts that may have been the focus of the anticipated closing argument may not be the facts that are selected for emphasis after the close of evidence. By using interactive software, counsel can easily adapt the argument to the evidence and the opposing counsel's argument.

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.14 Plaintiff Should Present All Matters in Initial Closing Argument Anticipated to Be Addressed in Rebuttal Argument.

The plaintiff's rebuttal argument is limited to addressing issues argued in the defendant's closing argument [*Cortez v. Macias* (1980) 110 CA3d 640, 657, 167 CR 905 ; *Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 CA3d 783, 800, 121 CR 200] .



Strategic Point--Plaintiff:

The plaintiff has the scheduling advantage of addressing the jury first and last because the plaintiff bears the burden of proof. The plaintiff makes the primary argument and then stops, followed by the defendant combining both the defense's primary argument and rebuttal into one address to the jury. The plaintiff then presents the rebuttal. Attempts to "hold" information for the last opportunity before the jury when the plaintiff knows the defendant cannot speak, sometimes referred to as "sandbagging," is greatly disfavored. And it is dangerous to reserve an issue to be addressed solely on rebuttal because the other party may not address it, thus drawing a sustainable objection for arguing outside the scope of rebuttal. If the plaintiff wants the last word before the jury on a vital topic, raise it so strongly during the initial argument that the defense cannot help but counter it during the defendant's argument. This will set up the topic so the plaintiff has the final word on the matter. Also, "sandbagging" raises the possibility that the defendant may be aware of the tactic and waive closing argument, thereby preventing the plaintiff from presenting the argument to the jury. In a situation in which the defendant is not aware of the sandbagging, but watches it unfold during plaintiff's rebuttal, defense counsel may successfully request that they be given an opportunity to respond, in a "surreply." This can be devastating to the plaintiff when the jury has been previously told that the plaintiff goes first and then last. Defense counsel can refer to that statement and indicate that the plaintiff sought to add information in the reply to the defendant's argument that has permitted a response by the defendant, even arguing that the result is to prevent sandbagging.



Strategic Points--Defendant:

- If the plaintiff misses an important issue during the initial argument, carefully weigh whether raising the matter is important for the defense. Be prepared to object quickly if the matter is raised during plaintiff's rebuttal to prevent any discussion. The court's sustaining of the objection on grounds of improper argument will raise the question in the jury's mind of whether the matter was so unimportant that the plaintiff did not even argue it when there was the chance to do so. Objecting, if sustained, may remove the matter from the argument for the purposes of permitting a response. Consider whether the objection should be made at all, or if made, whether it should be made by approaching the bench, objecting, and indicating that counsel should be permitted to respond to the point. Also, the defendant, having only one opportunity to argue to the jury, should cover all points raised and all points not raised that are pertinent or intrinsically important to defendant's case. Finally, anticipate the plaintiff's likely rebuttal. It can be effective to pose a series of questions that the plaintiff will not be able to answer.

- Counsel representing defendants during trial should be alert for the opportunities to underscore why the defense has but one opportunity to address the jury in closing. Reminding the jury that the plaintiff's burden is so significant that our system of justice, in an effort to "level the playing field," gives plaintiff the opportunity to speak twice. Counsel might further remind the jury, as the circumstances dictate, that just because the defense is, in essence, "glued to its chair" after it completes its closing, the jury should not construe the defendant's silence as acquiescing to the plaintiff's arguments.

Legal Topics:

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

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15.15 CHECKLIST: Preparing Closing Argument Content.

☐ Use various rhetorical tools in closing arguments.

- ☐ Syllogisms.
- ☐ Proverbs, historical quotations, and axioms.
- ☐ Analogy.
- ☐ Parables.
- ☐ Emotional appeals.

Discussion:

See 15.17

☐ Closing argument should have an introduction, body, and conclusion.

- ☐ Use introduction to gain jury's attention.
- ☐ Closing argument should have body.
- ☐ Use element-by-element approach.

☐ Use issue-by-issue approach.

☐ Use witness-by-witness approach.

☐ Use narrative approach.

☐ Use conclusion to motivate juror's to find in client's favor.

Discussion:

See 15.18

☐ Scope of closing argument is wide.

☐ Counsel may argue the law.

☐ Counsel may make personal comments.

Discussion:

See 15.19, 15.20

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.16 Options and Strategy for Closing Argument's Content.

The closing argument is the attorney's last chance to convince the jury to find in his or her client's favor. The key to an effective closing argument is an engaging presentation that emphasizes counsel's key trial themes and shows the factfinder that the party has engaged in a cohesive presentation throughout the trial process that support the opening statement.

Closing argument is the opportunity to continue counsel's position as not only an advocate for his or her party, but as a reliable source of information for the jury to understand the intricacies of the trial. For many jurors this is their first trial, and counsel being seen as one who is helping them understand the process goes a long way with establishing credibility. Jurors can tell which party is doing its best to clarify rather than obfuscate, and understand the motives attendant with either position. Being known as the party who wants the jury to understand the entire process supports the position that the law and facts clearly support the party's position.

 Cross Reference:

Scripts of opening statements that include introductions, explaining the trial process to the jury and evidentiary issue, as well as defenses and damages, see *California Trial Guide*, §§ 90.20 -90.204 (Matthew Bender).



Strategic Point:

No matter the theme or "script," in closing, counsel should not overlook the importance of walking the jury through their charge, namely to weigh and consider the evidence and reach a fair verdict. In that regard, counsel should tell the jury, in detail, what answers they should reach on the special verdict form, if used, and what their ultimate decision should be. It is extremely important to show the jury the actual verdict form and physically demonstrate how to fill in the form. Use an overhead projector for an effective demonstration.

Legal Topics:

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

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15.17 Rhetorical Tools May Be Useful in Closing Arguments.

To persuade the jury to find in their clients' favor, attorneys may use rhetorical tools in their closing arguments, such as:

- Syllogism (a kind of logical argument in which a conclusion is inferred from two other propositions).
- Proverbs, historical quotations, and axioms.
- Analogy.
- Parables.
- Emotional appeals.

However, the attorney should be careful that the opposing attorney will not twist the proverb or analogy into favoring the opposing party.

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.18 Closing Argument Should Have Introduction, Body, and Conclusion.

15.18[1] Closing Argument Should Have Introduction. The most important purpose of the introduction to the closing argument is to gain the jury's attention. This may be accomplished by such rhetorical devices as a dramatic statement, an interesting question, or a relevant story. Once the lawyer has the jury's attention, the introduction also can do one or more of the following:

- Reestablish a relationship with the jury.
- Refocus on the theme set forth in the opening statement or introduce a theme that relates to the evidence the jury heard during the trial.
- Describe what counsel expects to accomplish during the closing argument.
- In a rebuttal argument, cut off any momentum that the opposing counsel's argument may have generated.



Cross Reference:

Scripts of opening statement introductions, see *California Trial Guide*, §§ 90.60 -90.68 (Matthew Bender).

15.18[2] Counsel May Approach Main Body of Closing Argument in Different Ways.

15.18[2][a] Counsel May Use Chronological Approach. One way to organize the closing argument is to use a chronological approach. This may be useful in a short trial where the presentation of evidence was straightforward and fit a simple narrative. However, the jury may not look favorably on a rehash of what they have already seen. In a long trial, using this method may be just as confusing as the presentation of evidence over a period of months. Consider using the chronological approach in small segments combined with another approach when the order of a series of events is a key element to the case.

15.18[2][b] Counsel May Use Element-by-Element Approach. One common organizational scheme for a

closing argument is the element-by-element approach, in which counsel addresses every element required to prove the cause of action. For plaintiffs' attorneys, the element-by-element approach offers a clear, logical framework for a closing argument. However, defense attorneys may not want to use an element-by-element scheme. Instead, they may choose to focus their argument on the issue or issues they expect will turn the verdict in their client's favor.

► **Cross Reference:**

Additional discussion of the element-by-element approach, see *California Trial Guide*, § 90.03[4] (Matthew Bender).

15.18[2][c] Counsel May Use Issue-by-Issue Approach. At the end of many trials, one or more issues may appear critical to the outcome, such as a witness's credibility, the defendant's knowledge or state of mind, whether a party's behavior met community standards, and so forth. Trial lawyers are trained to recognize critical issues. However, jurors may not necessarily know which issues are important and which are irrelevant. Thus, trial lawyers find it useful to sort out the issues for the jury and then focus on the crucial issues that will determine the outcome of the case.

► **Cross Reference:**

Additional discussion of the issue-by-issue approach, see *California Trial Guide*, § 90.03[5] (Matthew Bender).

15.18[2][d] Counsel May Use Witness-by-Witness Approach. Except for simple, one- or two-witness cases, the witness-by-witness approach is the least favored organizational scheme for closing arguments. It provides the jury with little assistance in linking the evidence with the issues in the case. However, it is used in parts of nearly every closing argument. For example, when several witnesses have given different versions of the same event, it is natural to compare their testimony and credibility witness-by-witness.

► **Cross Reference:**

Additional discussion of the witness-by-witness approach, see *California Trial Guide*, § 90.03[3] (Matthew Bender).

15.18[2][e] Counsel May Use Narrative Approach. Most plaintiffs' attorneys favor telling a story for opening statements. However, many attorneys shift to an element-by-element approach or an issue-by-issue approach for the closing argument. By the end of the evidence, the jury will have heard various versions of the story several times. Another telling of the story will likely not capture the jury's attention as it did the first time around.

► **Cross Reference:**

Additional discussion of the narrative approach, see *California Trial Guide*, § 90.03[2] (Matthew Bender).

15.18[2][f] Scripts are Available for Preparing Body of Closing Argument. Prepared scripts are available on the following topics for closing argument:

- Credibility of evidence and witnesses.
- Burdens of proof and presumptions.
- Elements of torts and contracts.
- Emotional responses.
- Damages

 Cross Reference:

Body of argument scripts, see *California Trial Guide*, § 90.80 *et seq.* (Matthew Bender).

15.18[3] Closing Argument Should Have Conclusion. The conclusion may be the most critical part of the closing argument, and possibly the entire trial. The conclusion is meant to tie the various threads of the case together and motivate the jurors to vote for the attorney's client. A plaintiff can use the conclusion of the closing argument to serve one or more of the following purposes:

- Leave the jurors with empathy toward the plaintiff and the plaintiff's case.
- Restate and reinforce the theme of the plaintiff's case.
- Boil down the key issues of the case and turn them to the plaintiff's advantage.
- Highlight the plaintiff's damages.
- Remind the jurors of their role and responsibility in terms that favor the plaintiff.

A defendant can use the conclusion to serve one or more similar purposes, although with a different emphasis:

- Negate any empathy jurors may feel for the plaintiff or the plaintiff's case.
- Develop empathy for the defendant and the defendant's case.
- Restate and reinforce the theme of the defendant's case.
- Emphasize the key issues and turn them to the defendant's advantage.
- Minimize the plaintiff's damages.
- Thank the jurors for their attention throughout the trial.
- Remind the jurors of their role and responsibility in terms that favor the defendant.

 Cross Reference:

Additional discussion and concluding scripts for closing argument, see *California Trial Guide*, § 90.120 *et seq.* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.19 Scope of Proper Argument Is Wide, With Limits.

An attorney arguing a case to the jury is accorded "wide latitude" [*Grimshaw v. Ford Motor Co. (1981) 119 CA3d 757, 798, 174 CR 348*]. Counsel may indulge in all fair arguments in favor of his or her client's case but may not assume facts not in evidence or, in a jury trial, invite the jury to speculate as to unsupported inferences [*Neumann v. Bishop (1976) 59 CA3d 451, 479, 130 CR 786*]. However, counsel may argue all reasonable inferences from the evidence and may comment on the witness's demeanor and how that may indicate their credibility [*Brokopp v. Ford Motor Co. (1977) 71 CA3d 841, 860-861, 139 CR 888*]. Specifically, in closing argument, an attorney may:

- Argue all facts shown by the evidence or judicially known, and all reasonable inferences arising from those facts [*Malkasian v. Irwin (1964) 61 C2d 738, 747, 40 CR 78, 394 P2d 822*].
- Argue facts that are within the jurors' common knowledge [*People v. Mendoza (1974) 37 CA3d 717, 725, 112 CR 565*].
- Refer to illustrations from common experience, history, or literature [*People v. Harrison (2005) 35 C4th 208, 248, 25 CR3d 224, 106 P3d 895*].
- Argue in a way that is not strictly logical, provided the lawyer does not misstate the evidence or resort to facts not admitted into evidence [*People v. Eggers (1947) 30 C2d 676, 693, 185 P2d 1*].
- Vigorously argue his or her client's position, even to the point of using hyperbole when the circumstances warrant [*People v. Poggi (1988) 45 C3d 306, 340, 246 CR 886, 753 P2d 1082*].
- Use epithets or harsh language to the extent warranted by the evidence [*People v. Sanders (1995) 11 C4th 475, 527, 46 CR2d 751, 905 P2d 420*].
- Address the jury collectively rather than individually [*Neumann v. Bishop (1976) 59 CA3d 451, 473, 130 CR 786*].
- Use props or visual aids that illustrate or clarify matters in evidence [*People v. Caldaralla (1958) 163 CA2d 32, 45, 329 P2d 137*].

The following have been held to be improper argument:

- Counsel alluding to personal knowledge about the case [*Menchaca v. Helms Bakeries, Inc.* (1968) 68 C2d 535, 545, 67 CR 775, 439 P2d 903] .
- Using insulting and derogatory characterizations of the adverse party [*Garden Grove Sch. Dist. v. Hendler* (1965) 63 C2d 141, 143, 45 CR 313, 403 P2d 721] .
- Appealing to the jurors' economic self-interest [*Cassim v. Allstate Ins. Co.* (2004) 33 C4th 780, 796, 16 CR 3d 374, 94 P3d 513] .
- By innuendo impugning the adverse party's motives and purpose [*Garden Grove Sch. Dist. v. Hendler* (1965) 63 C2d 141, 143, 45 CR 313, 403 P2d 721] .
- Making a "golden rule" argument (that is, asking jurors in calculating damages to place themselves in the plaintiff's shoes and award the amount they would charge to undergo the same disability, pain, or suffering) or a variant of the rule [*Cassim v. Allstate Ins. Co.* (2004) 33 C4th 780, 797-798, n4, 16 CR 3d 374, 94 P3d 513] .
- Appealing to the jury's sympathy based on the defendant's size and corporate status [*Brokopp v. Ford Motor Co.* (1977) 71 CA3d 841, 859-862, 139 CR 888] .
- Appealing to the jury's self-interest as taxpayers [*Brokopp v. Ford Motor Co.* (1977) 71 CA3d 841, 859-862, 139 CR 888] .
- Arguing a matter not in evidence and contrary to the pertinent expert testimony [*Jonte v. Key Sys.* (1949) 89 CA2d 654, 659, 201 P2d 562] .
- Commenting on the adverse party's counsel failure to call certain witnesses when the witnesses were equally available to subpoena by either party [*Smith v. Covell* (1980) 100 CA3d 947, 956-957, 161 CR 377] .
- Assuming facts not in evidence or inviting the jury to speculate [*Malkasian v. Irwin* (1964) 61 C2d 738, 745-747, 40 CR 78, 394 P2d 822] .
- Asserting as facts matters not in evidence or excluded because they are inadmissible [*People v. Fosselman* (1983) 33 C3d 572, 580, 189 CR 855, 659 P2d 1144] .
- Arguing facts admitted for a limited purpose beyond the scope of that limited admission [Evid Code § 355].
- Arguing from the particular facts of unrelated, unsubstantiated cases [see *People v. Pelayo* (1999) 69 CA4th 115, 122, 81 CR2d 373] .
- Appealing to the jurors' passions or prejudices [*Dumas v. Stocker* (1989) 213 CA3d 1262, 1270, 262 CR 311] .
- Attacking the opposing party, the party's attorney, the judge, or any witnesses personally [*Garden Grove Sch. Dist. v. Hendler* (1965) 63C2d 141, 143, 45 CR 313, 403 P2d 721] .

- Appealing to the jurors' personal interests or warn them of the effects of public opinion on their verdict [*Cassim v. Allstate Ins. Co.* (2004) 33 C4th 780, 796, 16 CR3d 374, 94 P3d 513] .
- Using props or visual aids that have nothing to do with the issues as a diversion [*Weisbart v. Flohr* (1968) 260 CA2d 281, 292-293, 67 CR 114] .

Legal Topics:

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

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewEvidenceInferences & PresumptionsInferences



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15.20 Counsel May Argue the Law.

In arguing the law during closing argument, counsel may:

- Argue the pertinent law and its application to the facts, as long as any statement of the law is correct [*People v. Hill* (1998) 17 C4th 800, 829-830, 72 CR2d 656, 952 P2d 673] .
- Read from pleadings, including the complaint and its prayer for damages [see *Beagle Vasold* (1966) 65 C2d 166, 172-173, 53 CR 129, 417 P2d 673] .

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.21 CHECKLIST: Presenting Closing Argument.

- ☐ Review the courtroom presentation techniques covered in opening statements

Discussion:

See 15.22

- ☐ Determine how dramatic presentation should be relative to opening statement and evidence produced at trial.

Discussion:

See 15.23

- ☐ Prepare evidence and visual aids for use in argument.

Discussion:

See 15.24

Legal Topics:

For related research and practice materials, see the following legal topics:
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15.22 Review Presentation Techniques Used for Opening Statement.

The techniques for closing argument presentation are similar if not the same for closing argument. Review the techniques discussed for opening statement and apply them for closing argument. Topics to review are:

- A natural versus staged style of presentation.
- Position in the courtroom.
- Eye contact.
- Speech cadence.
- Gestures.
- Pacing.
- Use of notes.



Cross Reference:

Discussion of courtroom presentation techniques, see *Ch. 10, Opening Statement, 10.26-10.28*.

Legal Topics:

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

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral Overview



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15.23 Presentation of Closing Argument May Be More Dramatic Than Opening Statement.

In general, practical and strategic advice relating to presentation of opening statement also applies to closing arguments. However, the closing argument can be more dramatic. The highs can be higher and the lows can be lower when it comes to volume, inflection, and pitch of the attorney's speech. The pace can be faster at times and slower other times. Gestures can be more frequent and more expansive.

► **Cross Reference:**

Discussion of opening statements, see Ch. 10, Opening Statement.

Counsel should be careful not to be *too* dramatic in closing argument, because the jury has become accustomed to counsel's particular style and tone of presentation. The added inflective and pitch elements can be extremely helpful, but they should not detract from the relationship counsel has established with the jury by presenting a person they have never seen and have not grown accustomed to seeing before them.

► **Cross Reference:**

Discussion of manner of presenting closing argument, see 15.02.

Keep in mind that closing argument is precisely that, argument. Unlike an opening statement, which should be devoid of argument and a statement of counsel's views on the evidence, closing is nearly the opposite. Counsel may, and indeed is expected, to comment on the evidence and the demeanor of witnesses. If counsel believes a witness lied on the stand, counsel may say so, although in reality more diplomatic wording might be used.

Legal Topics:

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

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15.24 Have Evidence and Visual Aids Prepared for Uninterrupted Presentation.

The closing argument should flow and be free of interruptions or long pauses. Have visual aids and the important marked pieces of evidence at the ready. If using video, have the machine cued to the part of the tape to be shown; or if different sections will be shown, have the time locations on the tape registered so they can be quickly found. If counsel loses his or her place and cannot immediately regain it, or has a technology failure, ask the court for a recess to get organized.

Strategic Points:



- Counsel using visual aids and other demonstratives should be facile in their use, and should practice with them as much as necessary so that the very use of those aids is not distracting. Ready access, technology that works seamlessly, and ease of presentation are essential. If counsel is in command of these visuals, counsel will be seen by the jury to be in command of the case. Credibility can be lost by a bungled presentation.

- Counsel should not, however, use visual aids as a substitute for giving a personalized closing. Visuals, for example, have not reached the level of technological sophistication that they can move back and forth in front of the jury box and look jurors in the eye as impassioned comments are made.

Legal Topics:

For related research and practice materials, see the following legal topics:
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VI. OBJECTING TO CLOSING ARGUMENT AND RESPONDING TO OBJECTIONS

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15.25 CHECKLIST: Objecting to Closing Argument and Responding to Objections.

- ☐ Object during opponent's closing argument if appropriate.

Discussion:

See 15.27

- ☐ File motions in limine to limit need for objections.

Discussion:

See 15.28

- ☐ Make timely objections and request admonitions.

☐ Object to improper procedures.

☐ Object to mischaracterizations of law and juror duties.

☐ Object to mischaracterizations of evidence, discussion of limited evidence, and attempts to introduce new evidence.

☐ Object to arguments violating constitutional rights, against public policy, and demeaning the judicial process.

Discussion:

See 15.29 -15.33

☐ Seek remedies for closing argument misconduct.

- ☐ Admonishment.
- ☐ Mistrial.
- ☐ Contempt.
- ☐ New trial.
- ☐ Reversal on appeal.

Discussion:

See 15.34

Legal Topics:

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

Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsObjectionsCivil ProcedureTrialsMotions for MistrialCivil ProcedureSanctionsContemptGeneral Overview



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15.26 Options and Strategy for Objecting to Closing Argument and Responding to Objections.

Improper closing argument is considered attorney misconduct [*City of Los Angeles v. Decker (1977) 18 C3d 860, 870, 135 CR 647, 558 P2d 545*]. This misconduct may justify a mistrial or a new trial. Factors to consider when determining whether to object to a closing argument include:

- Objecting may avoid waiver of a possible appeal issue.
- Objecting may interrupt the flow of opposing counsel's argument.
- On the other hand, objecting may annoy the jury by lengthening the trial and may elicit retaliation by the opposing party.

Cross Reference:

Discussion of mistrial, see Ch. 22, Mistrial.



Strategic Point--Objector:

Objecting during closing breaks the flow of the opponent's argument. However, by the time of closing argument the jury often will realize when counsel is objecting solely for the purpose of interrupting opposing counsel or objecting on very thin grounds. Over-objecting gives the impression that counsel has something to hide. Yet, if opposing counsel is making an improper argument, by all means object. The court's sustaining of the objection and admonishment will raise doubts about the remainder of counsel's argument.



Strategic Point--Responder:

If opposing counsel is "objecting to just to object," request the court admonish opposing counsel. Do not let the objection throw off the argument. To regain the rhythm of the argument, summarize counsel's place in the argument when the objection was made. If the

objection has a chance of being sustained, use the proffer to the court to continue on the line of argument and educate the jury along with the court. An objection in these instances can expose the opponent's weakness that caused the objection as well as bolster counsel's own argument at the same time. By the same token, be mindful of the objection that is sustained and modify the argument to avoid a continual string of sustained objections.

Legal Topics:

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

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15.27 Do Not Shy Away From Objecting During Opponent's Closing Argument.

Counsel should not hesitate to object to a material misstatement of fact or law made in closing argument. Notwithstanding any reticence about interrupting the opponent's closing argument with an objection out of fear of appearing discourteous, counsel's obligation to the client demands that objection be made. Failure to do so has two adverse consequences: (1) it allows the jurors to carry the misstatement of fact or law with them into the jury room, and (2) it waives the issue on appeal [*see Weeks v. Baker & McKenzie (1998) 63 CA4th 1128, 1163, 74 CR2d 510*] .

Legal Topics:

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

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15.28 File Motions In Limine to Limit Need for Objections.

Counsel may make motions in limine to request that the court, in advance of a proceeding, make orders determining questions of procedure or evidence or restricting conduct during closing argument. The motion is used primarily to preclude parties, their counsel, and witnesses from communicating or disclosing to jurors or prospective jurors irrelevant or otherwise inadmissible matters that are so prejudicial or confusing that their effect cannot be nullified by a subsequent admonition or direction from the court [*Kelly v. New W. Fed. Sav. (1996) 49 CA4th 659, 669, 56 CR2d 803*] .



Warning:

A motion in limine to exclude evidence, whether or not granted, may not be sufficient to preserve a specific evidentiary objection for appeal [see *Evid Code § 353(a)*]. The better practice is to renew the objection at trial at the evidence's first raising or on the record at the start of trial out of the presence of the jury.



Cross Reference:

Discussion of motions in limine, see *Ch. 4, Final Pretrial Conference, 4.20* et seq.

Legal Topics:

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

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15.29 Objecting Party Must Make Timely Objection and Request Admonition.

15.29[1] Objecting Party Must Make Timely Objection. An objection to a closing argument must be made promptly [*Grimshaw v. Ford Motor Co. (1981) 119 CA3d 757, 798, 174 CR 348*]. The objecting party must make a timely objection to the improper argument or the right to complain is waived [*People v. Gionis (1995) 9 C4th 1196, 1215, 40 CR2d 456, 892 P2d 1199*]. Thus, misconduct of counsel during jury argument may not be raised on appeal when the complaining party's counsel made no objection during the argument, but only moved for a mistrial at the conclusion of the argument [*Warner Constr. Corp. v. City of Los Angeles (1970) 2 C3d 285, 303, 85 CR 444, 466 P2d 996*].

15.29[2] Objecting Party Must Request Court to Admonish Jury. Not only must the objecting party object to any possible misconduct by counsel making a closing argument, but the objecting party must expressly request the court to instruct the jury to disregard the improper statements, unless the misconduct is so persistent that an admonition would be inadequate to cure the resulting prejudice [*Neumann v. Bishop (1976) 59 CA3d 451, 468, 130 CR 786*]. The reason for this rule is that the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury [*People v. Bonin (1988) 46 C3d 659, 689, 250 CR 687, 758 P2d 1217*].

Legal Topics:

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

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsObjectionsCivil ProcedureAppealsReviewabilityPreservation for Review



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Chapter 15 Closing Argument

VI. OBJECTING TO CLOSING ARGUMENT AND RESPONDING TO OBJECTIONS

1-15 MB Practice Guide: Trial & Post-Trial Civil Proc 15.30

15.30 Object to Improper Procedures in Closing Argument.

15.30[1] Party Waived Closing Argument. A party may not make a closing argument if the party waived it. A waiver merely of the right to make the first closing argument, distinguished from the right to go first and to make a rebuttal closing argument, does not preclude the party from making the closing argument in reply to the opposing argument [*Kling v. Crown Fin. Corp.* (1944) 63 CA2d 33, 35, 146 P2d 54] .

Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.20 (Matthew Bender).

15.30[2] Party Is Exceeding Time Limits. The trial court has discretion to limit the time for closing arguments. Whether the trial court abuses its discretion in limiting any specific argument depends on the length and complexity of the trial and the issues involved [see *Galloway v. Moreno* (1960) 183 CA2d 803, 808, 7 CR 349] .

Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.21 (Matthew Bender).

15.30[3] Party Is Violating Order of Closing Arguments. A trial must proceed in the following order, unless the court, for special reasons, otherwise directs: When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument; If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in argument [CCP § 607]. A court may have a "special reason" for changing the order of the argument when, for example, the case turns on an affirmative defense asserted by the defendant [see, e.g., *Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 CA3d 684, 701, 237 CR 667 ; *Ferguson v. Dam* (1934) 140 CA 701, 703, 35 P2d 1072] .

Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.22 (Matthew Bender).

15.30[4] Party Is Addressing Individual Jurors. It is generally improper to address individual jurors by name [*Neumann v. Bishop* (1976) 59 CA3d 451, 474, 130 CR 786] .



Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.41 (Matthew Bender).

15.30[5] Party Is Improperly Using Props. Props may not be used as a means of arguing matters not in evidence, although they may be used for illustration [*People v. Mullen* (1953) 115 CA2d 340, 345, 252 P2d 19] .



Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.45 (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsObjections



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1-15 MB Practice Guide: Trial & Post-Trial Civil Proc 15.31

15.31 Object to Mischaracterizations of Law and Juror Duties.

15.31[1] Party Is Improperly Commenting on Jury Instructions. Counsel may object to the opposing counsel's argument if the opposing counsel is misstating the jury instructions. Counsel may argue that it is the court's job to say what the law is [see *CCP* § 607(9)], and the jury should be admonished to disregard counsel's statement and to limit their deliberations to those principles of law on which they are instructed by the trial court [see *Hodges v. Severns* (1962) 201 CA2d 99, 114, 20 CR 129] .

➡ Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.25 (Matthew Bender).

15.31[2] Party Is Improperly Urging Jurors to Ignore Facts and Law and Decide Case According to Their Own Moral Judgment. Counsel may not suggest that the jurors disregard the facts and law and engage in jury nullification, i.e., decide the case based on their own value judgment [*People v. Williams* (1994) 25 C4th 441, 449, 106 CR2d 295, 21 P3d 1209] .

15.31[3] Party Is Requesting Jurors to Place Themselves in Party's Place. It is improper for a party to suggest to the jurors that they place themselves in the position of the plaintiff when calculating the amount of damages (an improper "golden rule" argument) [*Cassim v. Allstate Ins. Co.* (2004) 33 C4th 780, 797-798, 16 CR3d 374, 94 P3d 513] .

➡ Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.43 (Matthew Bender).

15.31[4] Party Is Reading From Case Excerpts or Statutes. Parties should not read from cases or statutes. It is the trial court's function to instruct the jury on the applicable law. Counsel's argument will only confuse the jury regarding the governing legal principles[*People v. Lockheed Shipbuilding & Constr. Co.* (1975) 50 CA3d Supp 15, 34, 123 CR 778] .

➤ **Cross Reference:**

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.27 (Matthew Bender).

15.31[5] Party Is Appealing to Jurors' Self-Interest. Appeals to the self-interest of the jury as taxpayers or as targets of public opinion encourage subjective, biased decisions and therefore constitute misconduct [see *Cassim v. Allstate Ins. Co.* (2004) 33 C4th 780, 796, 16 CR3d 374, 94 P3d 513] .

➤ **Cross Reference:**

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.44 (Matthew Bender).

15.31[6] Party Is Appealing to Jury for Sympathy. It is improper to appeal to the jury for sympathy on a client's behalf. However, an appeal for sympathy is proper when it is made in good faith and is consistent with the evidence [*Hoffman v. Brandt* (1966) 65 C2d 549, 553, 55 CR 417, 421 P2d 425] .

➤ **Cross Reference:**

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.36 (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsObjections



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15.32 Object to Mischaracterizations of Evidence, Discussion of Limited Evidence, and Attempts to Introduce New Evidence.

15.32[1] Party Is Improperly Referring to Pleadings. A reference to the pleadings may be improper if the opposing party failed to lay the necessary foundation for the pleading's admission [*Zanotto v. Marogna* (1954) 124 CA2d 329, 331, 268 P2d 826] . The trial court has discretion to permit an attorney to read from a complaint or other relevant pleadings during argument [*Beagle v. Vasold* (1966) 65 C2d 166, 172, 53 CR 129, 417 P2d 673].



Strategic Points:

- It is more likely that reference to the pleadings will be permitted in cases where it has been requested, and objections dealt with, before the parties have closed their case and begun argument. In fact, unless the pleadings contain admissions, they constitute hearsay generally, and should not be admitted into evidence.
- Typically, courts are unwilling to allow the reading of pleadings, particularly when the pleading sets forth legal arguments which differ from the instructions the court has given or intends to give. Exceptions may be made when, after advance approval by the court, limited sections of a pleading setting forth facts which are in evidence, may be read.



Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.26 (Matthew Bender).

15.32[2] Party Is Improperly Referring to Evidence Admitted for Limited Purpose. When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request must restrict the evidence to its proper scope and instruct the jury accordingly [*Evid Code* § 355].

 Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.29 (Matthew Bender).

15.32[3] Party Is Improperly Commenting on Settlements, Insurance, or Taxes. Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it [*Evid Code* § 1152]. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it [*Evid Code* § 1154]. Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing [*Evid Code* § 1155]. However, reference to insurance may be proper if evidence of insurance was previously admitted without objection as an admission of liability [*Hawke v. Burns* (1956) 140 CA2d 158, 166-167, 294 P2d 1008] .

 Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.35 (Matthew Bender).

15.32[4] Party Is Improperly Referring to Facts Not in Record. Counsel may not argue facts not in evidence [*People v. Bandhauer* (1967) 66 C2d 524, 529-530, 58 CR 332, 426 P2d 900] , but counsel may refer to literary or biblical sources and matters of common knowledge or common experience [*People v. Samuels* (2005) 36 C4th 96, 133-134, 30 CR3d 105, 113 P3d 1125] . However, reading from a particular book or newspaper may be improper argument if counsel is attempting to introduce material not previously admitted into evidence to bolster the case [*People v. Mendoza* (1974) 37 CA3d 717, 725, 112 CR 565] .

 Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.34 (Matthew Bender).

15.32[5] Party Is Improperly Referring to Personal Knowledge. An attorney may not assert personal knowledge of the facts at issue, except when testifying as a witness [*Cal Rules Prof Conduct*, Rule 5-200(E); *People v. Fosselman* (1983) 33 C3d 572, 580, 189 CR 855, 659 P2d 1144] .

 Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.33 (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsObjections



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15.33 Object to Arguments Violating Constitutional Rights, Against Public Policy, and Demeaning the Judicial Process.

15.33[1] Party Is Improperly Commenting on Party's Failure to Call Witness. In closing argument, a party may not comment on the opponent's failure to call a particular witness if that witness was equally available to subpoena by either party [*Patton v. Royal Indus., Inc. (1968) 263 CA2d 760, 769, 70 CR 44*] . However, a defendant's attorney, during closing argument, may comment on the plaintiff's failure to produce evidence to rebut testimony presented by the defense and to invite the jury to draw an adverse inference against the plaintiff [*Neumann v. Bishop (1976) 59 CA3d 451, 480, 130 CR 786*] .

► Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California TrialGuide*, § 90.30 (Matthew Bender).

15.33[2] Party Is Improperly Commenting on Parties' Status. In general, during the liability phase of a trial, comments on the size or wealth of a party are improper [*Hoffman v. Brandt (1966) 65 C2d 549, 552-553, 55 CR 417, 421 P2d 425*] . However, when liability and punitive damages are tried in a single proceeding, evidence of wealth is admissible as to the proper amount of punitive damages [*Las Palmas Assocs. v. Las Palmas Ctr. Assocs. (1991) 235 CA3d 1220, 1242, 1 CR2d 301*] .

► Cross Reference:

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.31 (Matthew Bender).

15.33[3] Party Is Improperly Commenting on Person's Race, Nationality, or Religion. It is misconduct for an attorney to refer to the nationality, religion, or race of a party, counsel, or a witness, unless that fact is relevant to the issues to be determined [see, e.g., *People v. Simon (1927) 80 CA 675, 679-682, 252 P 758*] .

Example:

A plaintiff's race may be relevant in an employment discrimination action [see *Oldenkott v. American*

Elec., Inc. (1971) 14 CA3d 198, 205, 92 CR 127] .

➤ **Cross Reference:**

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.32 (Matthew Bender).

15.33[4] Party Is Improperly Making Personal Attacks on Opposing Parties, Counsel, or Witnesses. Personal attacks on the character or motives of the adverse party, opposing counsel, or witnesses are misconduct [see *People v. Schmeck (2005) 37 C4th 240, 298-299, 33 CR3d 397, 118 P3d 451]* .

➤ **Cross Reference:**

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.40 (Matthew Bender).

15.33[5] Party Is Improperly Using Epithets or Harsh Language. In general, the use of epithets or harsh language is objectionable and improper, unless the epithets or harsh language are relevant to the evidence in the case [*People v. McDermott (2002) 28 C4th 946, 1002, 123 CR2d 654, 51 P3d 874]* .

➤ **Cross Reference:**

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.42 (Matthew Bender).

15.33[6] Counsel Is Asking Jurors to Place Themselves in Party's Place. It is improper argument for opposing counsel to suggest to the jurors that they place themselves in the position of the plaintiff when calculating the amount of damages (an improper "golden rule" argument) [*Cassim v. Allstate Ins. Co. (2004) 33 C4th 780, 797-798, n4, 16 CR3d 374, 94 P3d 513]* .

➤ **Cross Reference:**

How to frame an objection and response on this issue, and additional analysis of the topic, see *California Trial Guide*, § 90.43 (Matthew Bender).

Legal Topics:

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

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15.34 Remedies for Closing Argument Misconduct.

15.34[1] Counsel May Be Admonished and Jury Instructed. An objecting party must make a timely objection to the improper argument or the right to complain is waived [*People v. Gionis* (1995) 9 C4th 1196, 1215, 40 CR2d 456, 892 P2d 1199] . On the objecting party's request, the court may instruct the jury to disregard the improper statements, unless the misconduct is so persistent that an admonition would be inadequate to cure the resulting prejudice [*Neumann v. Bishop* (1976) 59 CA3d 451, 468, 130 CR 786] .

15.34[2] Objector May Move for Mistrial for Incurable Misconduct. If a party continues to include improper matter in a closing argument, the opposing party may move for a mistrial if the misconduct cannot be cured by admonishing the jury [see *Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 CA4th 352, 359, 70 CR2d 449] . However, counsel must object during closing argument. Counsel may not wait until a subsequent motion for a mistrial after the argument is over. Absent an objection and request for admonition that would cure the harm, the right to request a mistrial is waived [*People v. Arias* (1996) 13 C4th 92, 159, 51 CR2d 770, 913 P2d 980] .

➤ Cross Reference:

Discussion of motion for mistrial, see *Ch. 22, Mistrial*, 22.03 et seq.

15.34[3] Counsel May Be Held in Contempt. Contempt is any act in or out of court that "tends to impede, embarrass or obstruct the court in the performance of its duties" [*Blodgett v. Superior Court* (1930) 210 C 1, 14, 290 P 293] . Courts have inherent power to punish contempt for misconduct during closing argument [CCP § 128(a); *Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 CA4th 352, 371-372, 70 CR2d 449] . Potential punishments for contempt include incarceration, fine, liability for resulting attorney's fees [CCP § 1218], and report to the State Bar [B&P Code § 6086.7].

➤ Cross Reference:

Discussion of contempt, see *Ch. 23, Contempt*.

15.34[4] Misconduct May Be Grounds for New Trial. A new trial may be granted for an irregularity in the proceedings by which either party was prevented from having a fair trial [CCP § 657(1)]. Misconduct of counsel during

closing argument is such an irregularity and is grounds for a new trial [*City of Los Angeles v. Decker* (1977) 18 C3d 860, 872, 135 CR 647, 558 P2d 545] .



Cross Reference:

Discussion of new trial, see Ch. 21, Motion for New Trial.

15.34[5] Misconduct May Be Grounds for Reversal on Appeal. Attorney misconduct in closing argument may be cause for reversal if it is reasonably probable that a result more favorable to the opposing party would have occurred had the attorney refrained from the misconduct [*Cal Const art VI, § 13*; see *People v. Milner* (1988) 45 C3d 227, 253-254, 246 CR 713, 753 P2d 669] .

Legal Topics:

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

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsObjectionsCivil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureSanctionsContemptGeneral Overview



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Chapter 16 Jury Instructions

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§ 16.syn Synopsis to Chapter 16: Jury Instructions

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16.16 Party May Propose Its Own Jury Instructions in Lieu of Other Party's Proposed Instructions.

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16.18 Party May Oppose Other Party's Proposed Jury Instructions on Grounds Including Untimeliness.

16.18[1] Proposed Jury Instructions Are Untimely.

16.18[2] Proposed Jury Instructions May Confuse or Mislead Jurors.

16.18[3] Proposed Jury Instructions Are Erroneous or Inapplicable to Facts.

16.18[4] Proposed Jury Instructions Relate to Issue Not Properly Before Jury.

16.19 Options and Strategies.

16.20 Court May Give Jury Instructions at Any Phase of Case.

16.20[1] Court Gives Introductory Jury Instructions at Outset of Case.

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16.21 Court Must Determine Propriety of Proposed Jury Instructions.

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Chapter 16 Jury Instructions
I. STRATEGY

1-16 MB Practice Guide: Trial & Post-Trial Civil Proc 16.01

16.01 Scope.

This chapter covers:

- Drafting jury instructions [see 16.06 -16.08; forms, see 16.27 -16.30].
- Meeting deadlines for conferring with opposing counsel, drafting instructions, and serving and submitting proposed instructions [see 16.05, 16.09].
- Proposing additional instructions as the trial progresses [see 16.10].
- Opposing another party's proposed jury instructions, and raising the need to reject, modify, or add to those instructions [see 16.14 -16.18].
- Timing and manner of court's giving instructions to the jury [see 16.20 -16.24].
- Erroneous instructions as grounds for new trial or reversal on appeal [see 16.25, 16.26].

Core Statutes:

CCP §§ 607a, 608, 609

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureAppealsStandards of ReviewReversible Errors



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Chapter 16 Jury Instructions
I. STRATEGY

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16.02 Objective and Strategy.

The objective of jury instructions is to instruct the jury with regard to applicable questions of law raised in the pleadings and during trial, in a thorough, accurate, and unbiased manner, with respect to all theories of each party's case.

Counsel for each party must take the earliest opportunity after pleadings are filed and served to analyze all theories of the case, including those of the opponent. Existing published jury instructions may be used as a research tool to evaluate the case after the initial consultation with the client [*see* Judicial Council of California Civil Jury Instructions (CACI), Matthew Bender (MB) instructions in California Forms of Jury Instruction, California Jury Instructions, Civil (BAJI); LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI)]. For example, in a negligence case counsel may peruse CACI Series 400 to review the elements and defenses relevant to negligence cases generally.

If possible, counsel should use published jury instructions to draft proposed instructions. CACI are the official instructions for use in California [*Cal Rules Ct, Rule 2.1050(a)*], although if necessary to address issues not covered by CACI, a party may modify CACI, use other published instructions, or, as a last option, draft completely original instructions. Instructions other than substantially verbatim CACI, such as instructions from BAJI, are referred to as "special jury instructions" [*see Cal Rules Ct, Rule 2.1055(a)(1)(B)*].

Both parties should assure that all parties' proposed instructions are accurate and complete, particularly with regard to substantially modified CACI or other "special jury instructions" [*see Cal Rules Ct, Rule 2.1055(a)(1)(B)*].

If an opposing party's instructions are objectionable, counsel should attempt to have that instruction rejected, modified, or augmented, as appropriate, in a timely manner, and in any case before the court gives that instruction to the jury, keeping in mind that the court may instruct the jury at different phases of the trial, from the outset of the case to its conclusion [*see CCP § 607a*].



Strategic Point--Issues Not Raised in Pleadings:

Jury instructions proposed for issues not raised in the pleadings are not appropriate and should be objected to. Similarly, if there is an issue in the pleadings as to which no evidence is offered, an objection to any instruction being given on that issue may be appropriate. Note that introductory instructions [*see CACI 100 Series*] are almost never objectionable.

As the trial progresses, counsel should remain aware of additional questions of law raised by the evidence that were not disclosed by the pleadings. As these additional questions of law arise, counsel must draft, serve, and submit additional jury instructions in a timely manner [see *CCP § 607a*].

At all stages of the trial, counsel should bear in mind that erroneous instructions may result in a reversal of the judgment [see *Lundy v. Ford Motor Co. (2001) 87 CA4th 472, 479, 104 CR2d 545*]. Therefore, counsel should assure that every party's instructions, proposed at any stage of the trial, are accurate, complete, and unbiased.

Strategic Point--Using Jury Instructions:



Jury instructions can be used for more than just assessing your case initially. They are a useful resource for a quick, persuasive outline of the elements for a cause of action; and these elements are a good starting point for organizing a summary judgment motion. They are instrumental in crafting a closing argument, and since the opening statement should relate to and be tracked by the closing argument, it is extremely helpful to have fleshed out the instructions early. Jury instructions are also extremely helpful in assessing your opponent's case, or predicting what your opponent will do. Further, jury instructions can be used for educational purposes, specifically to teach young associates a new body of law applicable to a particular case. By understanding how jurors are instructed, young attorneys can better focus on how discovery should be directed.

Strategic Point--Submitting Jury Instructions:



Strategically, it is important to submit your instructions with the other side's instructions. Attorneys should avoid serving their instructions first without receiving the opposition's proposed instructions. However, instructions may be added throughout trial, depending on how the evidence is submitted.

Strategic Point--Local Rules, Local Practices, and Unique Rules:



Attorneys must familiarize themselves with the local rules of the county in which their case is being tried. Further, virtually all of the Superior Court judges in California have their own printed instructions on how they want trials to be handled with regard to documentary evidence and jury instructions. Attorneys should seek information on these "local" practices--in detail--at status conferences, and certainly no later than the final pre-trial conference. Attorneys should be mindful of the proscription against "local" rules that are inconsistent with code sections, judicial council Rules of Court, and local Superior Court Rules, as well. To the extent that there are rules unique to a specific judge, and that are not inconsistent with statutes and Rules of Court or local Superior Court rules, they of course should be followed. To the extent that the unique rules are inconsistent, a "better practice" would be to follow them if doing so is pursuant to a stipulation with the other side that no waiver of appeal rights results, or, if without any stipulation, the attorney determines that no waiver of appeal rights would result.

Judge's Perspective--Local Rules and Practices:

Timing for the submission of jury instructions vary widely between courts depending on the preference of the trial judge. Some judges request instructions as early as the trial readiness conference and fully resolve all issues and final versions before the jury is called. Complex cases may require the instructions be fully resolved before questioning jurors. Other judges may require the list of instructions at the start of trial, but leave resolving special instructions and the tailoring of CACI instructions until after the close of evidence so they can fine tune the instructions relative to the case presented. Counsel should determine

the court's preference at the trial readiness conference and plan accordingly.



Strategic Point--Querying Judges; Meet and Confer:

Trial attorneys should not hesitate to query individual judges at the pretrial conference or on the first day of trial if there is no pretrial conference as to their preferences regarding when proposed instructions can be submitted. In addition, it behooves attorneys not otherwise experienced with a particular judge's preferences to contact other attorneys practicing in the same community to determine such preferences. Often as a practical matter a judge will not look at instructions until midway through the case. It is also important to meet and confer with the other side and try to resolve issues before trial, to the extent possible, so you know what instructions will be given going in to trial. Further, jury instructions are a great starting point for a proof outline, so you should have a draft of what you will propose early in your trial preparation.



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 Trials Jury Trials Jury Instructions General Overview Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Appeals Standards of Review Reversible Errors Governments Courts Rule Application & Interpretation



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Chapter 16 Jury Instructions
II. PROPOSING, DRAFTING, AND SUBMITTING JURY INSTRUCTIONS

1-16 MB Practice Guide: Trial & Post-Trial Civil Proc 16.03

16.03 CHECKLIST: Proposing, Drafting, and Submitting Jury Instructions.



Determine timing.



Jury instructions must be submitted to court and served on other parties before first witness is sworn.

Authority:
CCP § 607a

Discussion:
See 16.09[1]



Consult local court rules for additional timing requirements that may advance the submission and service date before trial. Local court rules, such as in Los Angeles County, may advance the date as early as five days before the final status conference.

Authority:
See, e.g., Alameda Super Ct Rules, Rules 4.4(H)(8), (9); Los Angeles Super Ct Rules, Rules 7.9(h), 8.24; Sacramento Super Ct Rules, Rule 7.01; Santa Clara Super Ct Rules, Rule 6(D)(4)

Discussion:
See 16.09[2]



Analyze pleadings, ascertain theories of client's case, and consider which jury instructions are appropriate.

Authority:
CCP § 607a

Discussion:

See 16.06

- ☐ A party has a right to instruction on law applicable to its theories of case.

Authority:

National Med. Transp. Network v. Deloitte & Touche (1998) 62 CA4th 412, 419 n2, 72 CR2d 720

Discussion:

See 16.06[4]

- ☐ Analyze CACI, and determine which instructions are applicable to case.

Authority:

Cal Rules Ct, Rule 2.1050

Discussion:

See 16.06[1]

Forms:

See 16.28, 16.29

- ☐ Use LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI), a HotDocs©-based- document-assembly program.

Authority:

Cal Rules Ct, Rule 2.1050(e)

Discussion:

See 16.07[2]

- ☐ If CACI exist regarding a specific issue, but does not completely cover it, consider modifying CACI.

Authority:

Cal Rules Ct, Rule 2.1050(e)

Discussion:

See 16.06[2]

- ☐ Use LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI).

Authority:

Cal Rules Ct, Rule 2.1050(e)

Discussion:

See 16.07[2]

- ☐ If CACI do not exist for specific issue, consult other sources, such as Matthew Bender (MB) instructions in California Forms of Jury Instruction and BAJI instructions.

Authority:

Cal Rules Ct, Rule 2.1050(e)

Discussion:

See 16.06[2]

- ☐ If no official jury instructions are available for specific issue, draft original proposed instructions.

Authority:

Cal Rules Ct, Rule 2.1050(e)

Discussion:

See 16.06[2]

- ☐ Prepare jury instructions.

- ☐ In *LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI)*, a HotDocs©-based document-assembly program, format requirements are automatically followed.

Authority:

Cal Rules Ct, Rule 2.1050(e)

Discussion:

See 16.07[2]

Forms:

See 16.27 -16.30

- ☐ Proposed instructions must be typewritten, each on a separate sheet of paper.

Authority:

CCP § 607a

Discussion:

See 16.07[1][a]

- ☐ Counsel must conform proposed jury instructions with requirements under *Cal Rules Ct, Rule 2.100 et seq.*

Authority:

Cal Rules Ct, Rule 2.1055(b)(1)

Discussion:

See 16.07[1][b]

- ☐ Each instruction must contain instruction number and title of instruction at top of first page of instruction.

Authority:

Cal Rules Ct, Rule 2.1055(c)(2)

Discussion:

See 16.07[1][f]

- ☐ Do not include any blank lines or unused bracketed portions.

Authority:

Cal Rules Ct, Rule 2.1055(c)(3)

Discussion:

See 16.07[1][f]

- ☐ For "special jury instructions," include citation of authority supporting instruction at bottom of page.

Authority:

Cal Rules Ct, Rule 2.1055(d)

Discussion:

See 16.07[1][g]

- ☐ No citation is required for approved (i.e., CACI) instructions.

Authority:

Cal Rules Ct, Rule 2.1055(d)

Discussion:

See 16.07[1][g]

- ☐ Consult local court rules for additional requirements. For example:

- ☐ Alameda County requires use of point pages in cited authority.

Authority:

Alameda Super Ct Rules, Rule 4.6(3)

Discussion:

See 16.07[3]

- ☐ Serve on all parties and submit to court proposed jury instructions, within time limitations provided above.

Authority:

CCP § 607a

Discussion:

See 16.09[1]

- ☐ If court requires modification of any proposed instruction, draft modification, serve it on all parties, and submit to court within time limits ordered by court.

Authority:

See, e.g., Los Angeles Super Ct Rules, Rule 8.24

Discussion:

See 16.06[2]

- ☐ If necessary during trial, propose additional jury instructions.

- ☐ If questions of law are developed by evidence, and were not disclosed in pleadings, propose additional jury instructions.

Authority:

CCP § 607a

Discussion:

See 16.10[1]

- ☐ Serve additional jury instructions on all parties and submit them to court.

- ☐ Consult local court rules for availability of proposing additional instructions, and timing.

- ☐ Orange County Rules allow party to serve additional instructions on opposing counsel, and submit them to trial judge at or before the time the party rests.

Authority:

Orange County Super Ct Rules, Rule 362

Discussion:

See 16.10[3]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsGovernmentsCourtsRule Application & Interpretation



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Chapter 16 Jury Instructions

II. PROPOSING, DRAFTING, AND SUBMITTING JURY INSTRUCTIONS

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16.04 Options and Strategies.

Counsel must be aware of the deadlines provided by statute and local court rule for serving on all parties and submitting to the court proposed jury instructions. Well in advance of trial, counsel must ascertain theories of the case, carefully peruse the Judicial Council of California Civil Jury Instructions (CACI) and other sources for applicable instructions based on the pleadings, plan prospectively to cover necessary instructions, and anticipate the proposed instructions of the opposing party.

The most basic timing requirement provides that counsel deliver to the judge presiding at the trial, and serve on all parties, all proposed jury instructions covering the law as disclosed by the pleadings, *before the first witness is sworn* [CCP § 607a].

It is essential, however, that counsel also consult local court rules. For example, in some counties, proposed jury instructions must be completed before the pretrial conference [see Los Angeles Super Ct Rules, Rule 7.9(h)].

Counsel should therefore examine all the pleadings at the first opportunity, and develop theories of the case [see CCP § 607a]. Based on those theories, counsel should begin choosing and drafting the appropriate jury instructions.

Counsel proposing jury instructions should use the following drafting tools:

- First, peruse CACI, the official instructions for use in California [Cal Rules Ct, Rule 2.1050(a)].
- If CACI exist, but are not precisely applicable to the case, modify the CACI if possible to fit the situation [see Cal Rules Ct, Rule 2.1055(a)].

These special instructions are acceptable if allowed by the court, but are more difficult to propose. They must be drafted with special care to avoid erroneous statements of law, ensure completeness, and include citation to authority [see Cal Rules Ct, Rule 2.1055(d)].



Strategic Point:

In most cases in which modified, or specifically tailored or drafted instructions are

rejected, they seek to accomplish too much. Avoid instructing the jury on factual determinations or indirectly seeking to "overreach" on the law. Jury instructions that are simple, short, contain accurate, objective black letter statements of the law (neutral on their face) have a better chance of being given.

- If no CACI are applicable to the case, or if some of the instructions applicable to the case are not covered by CACI, even as modified, consult other sources, including the Matthew Bender (MB) instructions in California Forms of Jury Instruction and California Jury Instructions, Civil (BAJI) [see *Cal Rules Ct, Rule 2.1055(a)(1)(B)*].

Jury Instructions:

Background of CACI and BAJI generally, see *California Forms of Jury Instruction, Ch. 1A, MB 100A.04[1]* (Matthew Bender).

These instructions are acceptable if allowed by the court, but are more difficult to propose than CACI. They must be drafted with special care, and must include citation to authority [see *Cal Rules Ct, Rule 2.1055(d)*].



Strategic Points:

- Courts will reject proposed non-CACI instructions that are drafted for a specific case if they seek to accomplish too much, attempt to instruct the jury on factual determinations, or indirectly seek to "overreach" on the law. Jury instructions that are simple, short, contain accurate, objective black letter statements of the law (neutral on their face) have a better chance of being given.

- To the extent instructions are too specific, the jury may determine the facts in a given case do not fall within those specifics and, therefore, consider the instructions inapplicable. Under those circumstances, an adverse party might propose a contrary instruction with language far less favorable to the party proposing the overly specific version.

- Occasionally, a party must draft its own proposed jury instructions [see *Cal Rules Ct, Rule 2.1055(a)(1)(B)*].

As the trial progresses, counsel should take care to determine any questions of law developed by the evidence, and not disclosed by the pleadings. As additional issues arise, counsel must draft, serve, and submit additional jury instructions [see *CCP § 607a*].

In choosing the appropriate jury instructions, counsel must always keep in mind that errors may result in grounds for a new trial or reversal on appeal [see, e.g., *Chapman v. Enos (2004) 116 CA4th 920, 927-931, 10 CR3d 852*].



Warning:

An erroneous jury instruction may be ground for a motion for new trial [*CCP § 657; Maher v. Saad (2000) 82 CA4th 1317, 1325, 99 CR2d 213*], or reversal on appeal [see, e.g., *Chapman v. Enos (2004) 116 CA4th 920, 927-931, 10 CR3d 852*].

These dangers are particularly relevant when substantially modifying CACI or drafting other special instructions. However, counsel should also be cautious in the use of unmodified CACI. For example, an issue must be covered completely; and if one aspect of an issue is covered in one CACI, counsel for both sides must assure that all related issues required to be covered in the instructions are also provided in other CACI, or special jury instructions as appropriate [see, e.g., *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428-429, 72 CR2d 720 (requirement for additional instructions to augment incomplete instructions that were accurate but too general)].



Warning:

A party is deemed to waive a right to challenge an instruction on appeal for failure to request an additional or qualifying instruction to an instruction given by the court which, though correct as far as it went, was too general for the state of the evidence [*National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428-429, 72 CR2d 720] .



Strategic Points:

- The court need not be exactly clear as long as it is close. Thus, if you object to an instruction on vagueness grounds, you need to provide a more appropriate instruction. A wrong instruction is still appealable, without submitting a correct version.
- Courts will routinely reject jury instructions if they are convoluted, try to cover more than one simple subject, sound "unobjective" or slanted, as well as if they try to argue or characterize the facts. In terms of the content and reach of instructions, it cannot be stated enough that objective, simple, and clear language of black letter law, when susceptible of argument to the jury, is very helpful in advancing a view of one's case. Often the other side will overreach and try to put too much into an instruction. However, the simpler an instruction stands, the better chance you have of it being adopted. If it can be easily "argued" to the jury, then the point will stand a better chance of swaying a jury, supporting the evidence adduced, and also of matching up to what the jury was told in the opening statement the case would show.
- The scope of the proposed instructions provide guidance in the following fashions, among others. The instructions can guide the trial attorney in the conduct of discovery, the development of trial themes, and the framing of closing argument. Indeed, trial attorneys frequently incorporate into closing argument significant jury instructions, or those with language considered particularly persuasive.
- Attorneys want to propose instructions that will track their proof as closely as possible. Generally, plaintiffs will want more general instructions, but obviously this is case specific. Use your instructions to create a proof outline to see what holes need to be filled.



Judge's Perspective:

Counsel should endeavor to present evidence with attention to the critical instructions in the case. Be sure evidence follows each of the legal requirements of these critical instructions; and at closing argument, displaying a large sample of the instructions and matching the evidence to the each instruction is a very effective method for persuading the jury.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury
InstructionsStandard InstructionsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil
ProcedureAppealsStandards of ReviewReversible ErrorsGovernmentsCourtsRule Application & Interpretation



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Chapter 16 Jury Instructions
II. PROPOSING, DRAFTING, AND SUBMITTING JURY INSTRUCTIONS

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16.05 Counsel Must Plan for Timely Submission of Proposed Jury Instructions.

Counsel must plan far enough ahead to allow for the timely submission and service of proposed jury instructions. Counsel must deliver proposed instructions to the presiding judge, at the latest, before the first witness is sworn [*CCP* § 607a]. However, many local court rules shorten that time [*see, e.g., Alameda Super Ct Rules, Rule 4.4(H)(9)*].



Cross Reference:

Submitting instructions to court, see 16.09.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewGovernmentsCourtsRule Application & Interpretation



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Chapter 16 Jury Instructions

II. PROPOSING, DRAFTING, AND SUBMITTING JURY INSTRUCTIONS

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16.06 Substance of Jury Instructions.

16.06[1] Use of CACI Is Encouraged. The Judicial Council of California Civil Jury Instructions (CACI) are the official instructions for use in California [*Cal Rules Ct, Rule 2.1050(a)*]. These instructions are referred to as "approved jury instructions" [*Cal Rules Ct, Rule 2.1055(a)(1)(A)*]. The California Rules of Court strongly encourage use of CACI jury instructions and verdict forms [*Cal Rules Ct, Rule 2.1050(e)*].

CACI contains a "Guide for Using Judicial Council of California Civil Jury Instructions," which includes the requirement to modify CACI for multiple parties. Counsel should read this guide before searching CACI for relevant instructions.

Preparation of jury instructions using computer document assembly software can save time and increase accuracy. For a software program to prepare the Judicial Council civil jury instructions using HotDocs® document assembly automation, see *LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI)*.



Cross Reference:

California Forms of Pleading and Practice, § 326.12 (Matthew Bender).

Jury Instructions:

Judicial Council of California Civil Jury Instructions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.02[3] (Matthew Bender).

Preparation of Jury Instructions, see Ch. 1A, MB 100A.05[3] (Matthew Bender).

Some local court rules specifically require the use of CACI forms [see, e.g., Sacramento Super Ct Rules, Rule 7.01].



Cross Reference:

Use of CACI, see 16.06[1].

Consider:

If counsel starts with approved form instructions, counsel should not have difficulty in keeping the instructions unbiased. Otherwise, counsel should include specific case citations and track the language of the case as closely as possible.

Examples:

The following types of cases, among many others, are covered in CACI:

- Contracts [see *Judicial Council of California Civil Jury Instructions*, CACI No. 300 et seq. (LexisNexis Matthew Bender)].

- Negligence [see *Judicial Council of California Civil Jury Instructions*, CACI No. 400 et seq. (LexisNexis Matthew Bender)].

 Cross Reference:

Form, see 16.29.

- Products liability [see *Judicial Council of California Civil Jury Instructions*, CACI No. 1200 et seq. (LexisNexis Matthew Bender)].

- Fraud or deceit [see *Judicial Council of California Civil Jury Instructions*, CACI No. 1900 et seq. (LexisNexis Matthew Bender)].

- Insurance litigation [see *Judicial Council of California Civil Jury Instructions*, CACI No. 2300 et seq. (LexisNexis Matthew Bender)].

- Workers' compensation [see *Judicial Council of California Civil Jury Instructions*, CACI No. 2800 et seq. (LexisNexis Matthew Bender)].

- Fraudulent transfers [see *Judicial Council of California Civil Jury Instructions*, CACI No. 4200 et seq. (LexisNexis Matthew Bender)].

- Unlawful detainer [see *Judicial Council of California Civil Jury Instructions*, CACI No. 4300 et seq. (LexisNexis Matthew Bender)].



Strategic Points:

- Courts will rarely, if ever, accept jury instructions that are perceived as slanted or biased. While few attorneys would submit glaringly biased proposed instructions, many attorneys are so close to their case and the factual history, evidence, and theories of the case, that care should be taken to craft facially neutral instructions if the goal is to get them accepted by the court. Instructions that set forth clear and succinct black letter law taken directly from a case, and limited to one point per instruction, are more likely to be acceptable than instructions that "pitch" a theory, a fact, or a legal point.

- Proposed instructions that are not unbiased will prompt appropriate objections from adverse parties or from the court. The result, invariably, is a contrary instruction being offered that may be less favorably

worded. More important, the party offering one-sided jury instructions will lose credibility with the trial judge.

16.06[2] When to Use "Special Jury Instructions."

16.06[2][a] Special Jury Instructions Are Substantially Modified CACI, or Instructions From Other Sources. "Special jury instructions" are (1) instructions from sources other than the Judicial Council of California (i.e., CACI); (2) instructions specially prepared by the party; or (3) approved instructions (i.e., CACI) that have been substantially modified by the party [*Cal Rules Ct, Rule 2.1055(a)(1)(B)*].

16.06[2][b] Special Instructions Are Appropriate If No CACI Exist for Those Circumstances. Because CACI are the official instructions for use in California [*Cal Rules Ct, Rule 2.1050(a)*], counsel should draft special instructions only if no appropriate CACI exist.

Counsel may use other published jury instructions as sources for special instructions, including Matthew Bender (MB) instructions in California Forms of Jury Instruction and BAJI instructions, which were widely used before the adoption and publication of CACI.

Consider:

CACI was the result of a statewide committee of respected judges and practitioners. The adoption of CACI was intended to supplant BAJI as the accepted "official" instructions [*Cal Rules Ct, Rule 2.1050(a)*]. In some jurisdictions, the courts would prefer to use CACI, since those reflect a statewide effort, whereas BAJI was the proprietary result of Los Angeles Superior Court judges. As a result, attorneys should be attentive to the history of BAJI when seeking to use non-CACI, particularly when CACI has an applicable instruction. If modifying existing instructions, CACI should be the choice of preference for the starting point for the same reasons.

Jury Instructions:

Drafting suggestions, see *California Forms of Jury Instruction, Ch. 1A, MB 100A.04[1][a]* (Matthew Bender).

16.06[2][c] CACI May Be Modified If Necessary. If necessary, a party may modify CACI to fit the circumstances of the case [*see Cal Rules Ct, Rule 2.1055(a)(1)(B)* (substantially modified CACI are "special jury instructions")].



Warning:

A party should be extremely cautious in modifying CACI.

Example:

In a discrimination case brought under the FEHA (*Gov Code § 12900 et seq.*), the trial court erroneously modified a standard instruction concerning the definition of "supervisor." The court's modification of the BAJI instruction impaired the opposing party's rights under the governing statute, and incorrectly stated the statutory requirements for liability [*see Chapman v. Enos (2004) 116 CA4th 920, 931, 10 CR3d 852*].

16.06[2][d] Special Instructions Must Be Carefully Drafted. Counsel should take care to draft special instructions carefully. If verbatim CACI are not used, the possibility of drafting an inaccurate or incomplete instruction increases [*see, e.g., Thompson Pacific Construction, Inc. v. City of Sunnyvale (2007) 155 CA4th 525, 547-548, 66 CR3d 175* (trial court did not err in refusing proposed instruction containing inaccurate statements of law); *Chapman v. Enos (2004) 116 CA4th 920, 927-931, 10 CR3d 852* (modified BAJI impaired party's rights, resulting in instructional error)].

**Strategic Point:**

Counsel should also be alert to whether the perceived need to modify CACI is actually based on counsel's wish to have the court state a position, promulgate an argument, or "slant" a legal principle. Such an effort, while perhaps appropriate in counsel's final argument, is inappropriate in proposing special instructions. Such special instructions are likely to be rejected and risk creating error.

16.06[3] Jury Instructions Must Focus on Issues in Case. Jury instructions must focus on the issues in the case. The jury should not be required to consider wholly inapplicable legal propositions, which should not be requested by counsel in the first place. If they are requested, however, the trial judge must scrupulously delete them from the charge finally given [*Mantonya v. Bratlie* (1948) 33 C2d 120, 124-125, 199 P2d 677] .

**Warning:**

The doctrine of invited error bars a party from attacking a verdict that resulted from a jury instruction given at that party's request [*Lundy v. Ford Motor Co.* (2001) 87 CA4th 472, 477, 104 CR2d 545] .

16.06[4] Party Has Right to Instructions on Law Applicable to Its Theories of Case, but Not to Use of Any Particular Language. Parties have the right to have the jury instructed as to the law applicable to all their theories of the case that were supported by the pleadings and the evidence, whether or not that evidence was considered persuasive by the trial court [*Ayala v. Arroyo Vista Family Health Center* (2008) 160 CA4th 1350, 1358, 73 CR3d 486]. However, instructions should not be calculated to amount to argument to the jury in the guise of a statement of law. It is error to give instructions that unduly overemphasize issues, theories, or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition [*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 CA2d 675, 718, 39 CR 64].

**Strategic Point:**

Counsel should craft proposed instruction in as neutral a tone as possible, avoiding any recitation of facts or argumentary point of view. A well-crafted "neutral" instruction can be used, for emphasis, in final argument without risking a judicial rejection of the instruction itself.

**Strategic Point:**

A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable because the parties are entitled to an instruction on it if the evidence so viewed could establish the elements of the theory presented [*National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 419 n2, 72 CR2d 720] .

Distinguish:

However, a party has no right to require the court to use any particular phraseology. So long as the court correctly instructs on the issue, it is free to modify an instruction or give one of its own in lieu of the one offered [*Byrum v. Brand* (1990) 219 CA3d 926, 939, 268 CR 609] .

**Cross Reference:**

See California Trial Guide, § 91.20[1], [4][a] (Matthew Bender).

Legal Topics:

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

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16.07 Format of Jury Instructions.

16.07[1] Proposed Instructions Must Follow Format Rules.

16.07[1][a] Proposed Instructions Must Be Typewritten on Separate Sheets of Paper. All proposed instructions must be typewritten, each on a separate sheet of paper [*CCP § 607a; Cal Rules Ct, Rule 2.1055(c)(1)*] (each instruction must be on separate page)].

16.07[1][b] Counsel Must Use Form and Format Provided in California Rules of Court. All proposed instructions must be submitted to the court in the form and format prescribed for papers in *Cal Rules Ct, Rule 2.100 et seq.* [*Cal Rules Ct, Rule 2.1055(b)(1)*].

Exception:

Cal Rules Ct, Rules 2.100 et seq. do not apply to Judicial Council forms or local court forms [*Cal Rules Ct, Rule 2.119*].

The following form and format are required under *Cal Rules Ct, Rule 2.100 et seq.* [see *Cal Rules Ct, Rule 2.100 et seq.* (contains more detailed list)]:

- Recycled paper.
- Type not smaller than 12 points.
- Opaque, unglazed paper, white or unbleached, of standard quality not less than 20-pound weight, 8 1/2 x 11 inches.
- Courier, Times Roman, Helvetica, or the equivalent typeface.
- Blue-black or black print.
- One-sided paper, with 1 1/2-spaced or double-spaced lines.

- At least one-inch left margin; at least 1/2-inch right margin.
- Footers containing the title of the paper.

 Cross Reference:

See *California Forms of Pleading and Practice*, § 326.53; and Ch. 372, Motions and Orders (Matthew Bender).

Jury Instructions:

Preparation of Jury Instructions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.05[1] (Matthew Bender).

16.07[1][c] Set of Instructions Must Contain Cover Page, With Caption and Instruction Index. Each set of proposed jury instructions must have (1) a cover page, containing the caption of the case and stating the name of the party proposing the instructions, and (2) an index listing all the proposed instructions [*Cal Rules Ct, Rule 2.1055(b)(2)*].

16.07[1][d] Index Must Refer to Reference Numbers or Instruction Numbers, and Must Contain Checklist. In the index, approved jury instructions must be identified by their reference numbers (i.e., "CACI No. _____"), and special jury instructions must be numbered consecutively. The index must contain a checklist that the court may use to indicate whether the instruction was [*Cal Rules Ct, Rule 2.1055(b)(3)*]:

- Given as proposed;
- Given as modified;
- Refused; or
- Withdrawn.

16.07[1][e] Set of Instructions Must Be Bound Loosely. Each set of proposed jury instructions must be bound loosely [*Cal Rules Ct, Rule 2.1055(b)(4)*].

16.07[1][f] Each Instruction Must Be Entitled and Numbered, and Prepared Without Blank Lines or Brackets. Each proposed instruction must (1) contain the instruction number and title of the instruction at the top of the first page of the instruction; and (2) be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury [*Cal Rules Ct, Rule 2.1055(c)(2), (3)*].

16.07[1][g] Special Instructions Must Cite Authorities. For each special instruction, a citation of authorities that support the instruction must be included at the bottom of the page. No citation is required for approved instructions (i.e., CACI) [*Cal Rules Ct, Rule 2.1055(d)*].

 Cross Reference:

Preferred style of instructions, see 16.08[2].

16.07[1][h] Local Court Rule Cannot Contravene Format Rules. No local court form or rule for the filing or submission of proposed jury instructions may require that the instructions be submitted in any manner other than as prescribed by *Cal Rules Ct, Rule 2.1055* [*Cal Rules Ct, Rule 2.1055(e)*].

16.07[2] Computer Document Assembly Software Is Available From LexisNexis. Preparation of jury instructions using computer document assembly software can save time and increase accuracy. For a software program

that prepares CACI instructions using HotDocs® document assembly automation, see *LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI)*. Final instructions generated from HotDocs® will comply with California Rules of Court and local court rules.



Cross References:

California Forms of Pleading and Practice, § 326.23[2] (Matthew Bender).

California Trial Guide, § 91.20[1] (Matthew Bender).

Jury Instructions:

Preparation of Jury Instructions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.05[3] (Matthew Bender).

16.07[3] Local Court Rules May Control Format of Jury Instructions. Counsel should consult local court rules for additional format requirements. No local court form or rule for the filing or submission of proposed jury instructions may require that the instructions be submitted in any manner other than as prescribed by *Cal Rules Ct*, Rule 2.1055 [*Cal Rules Ct*, Rule 2.1055(e)].



Warning:

Local rules that still refer to BAJI instead of CACI are superceded. CACI, not BAJI, are the preferred form of instructions when both forms cover the subject matter at issue. Thus, for example, San Francisco County Super Ct Rules, Rule 6.3, and Orange County Super Ct Rules, Rule 362, *below*, must be read with CACI, rather than BAJI, in mind. Do not expect superior court judges who know about CACI to prefer BAJI. Judges have already rejected BAJI and directed the attorneys to replace them with CACI.

• **Alameda County Rules.** Proposed jury instructions must be prepared and submitted by counsel in compliance with applicable statutes, rules, and orders of the court. Counsel must refer to the specific page or pages containing the language relied on in cases cited as authority for any proposed instruction [Alameda County Super Ct Rules, Rule 4.6(3)].

• **Los Angeles County Rules.** All proposed jury instructions, excepting CACI instructions, must conform to the requirements of *Cal Rules Ct*, Rules 2.1050 and 2.1055, including placing on the instructions the citations of authorities, indication of the party requesting the instructions, and respects in which related CACI instructions have been modified. Any jury instructions requested after the conclusion of taking evidence must be in writing. The court, in its discretion, may permit instructions to be sent into the jury room in "Booklet Form." In "Booklet Format" the text of the instruction is printed continuously on the page and may result in several instructions to the page. The instructions may be accompanied by a Table of Contents [Los Angeles Super Ct Rules, Rule 8.26].

It is the responsibility of counsel to supply the court with any special instructions not available from the clerk's office in printed form in such form as to facilitate compliance with the "sanitizing" process [Los Angeles Super Ct Rules, Rule 8.52]. That is, care must be taken (1) to remove the title, citation of authority, and identity of the party requesting the instruction, and (2) to assure that stricken portions are totally obliterated and handwritten additions are completely legible [Los Angeles Super Ct Rules, Rule 8.52].

• **Orange County Rules.** Note that the Orange County Rules still refer to BAJI.

In all civil jury trials, insofar as practicable, the instructions contained in the latest edition of BAJI must be used. Counsel must, before the presentation of evidence, present to the clerk in the trial department a document setting forth in the usual style the title of the court, title and number of the action, and title of the document, namely, "Instructions Requested by _____." In addition to the copy supplied to the court, one copy must be supplied to each of the parties. In this document must be listed by number the BAJI instructions requested [Orange County Super Ct Rules, Rule 362]. When an instruction requested by a party is a modified BAJI instruction, the party must indicate it, by use of parenthesis or other appropriate means, the respect in which it is modified. On presenting this list to the clerk, the clerk must furnish to the court the instructions requested which are in print. This does not limit the right of counsel to submit additional instructions, properly numbered in consecutive order, nor does it relieve counsel from the responsibility of making any substantial modifications other than changes from singular to plural and in gender of the basic BAJI instructions [Orange County Super Ct Rules, Rule 362].

■ **Sacramento County Rules.** In civil jury trials, it is the policy of the court, so far as practicable, to use those instruction forms obtained from CACI. Photocopies of standard instructions may be obtained at the Sacramento County Public Law Library. On the first day of trial, each party must submit copies of a complete set of individual pre-printed requested instructions to the court, with service on each opposing party. All requested specially drafted instructions must be numbered consecutively, show the name of the party offering the instructions, and provide citations of authority supporting the request. Instructions must be presented in accordance with the provisions of *CCP § 607a* and *Cal Rules Ct, Rule 2.1055*. All jury instructions must utilize the format of the standard instructions [Sacramento Super Court Rules, Rule 7.01 (also referring to repealed Cal Rules Ct, Rule 517)].

All instructions must be on plain white paper or pleading paper. The name of the firm, attorney, or party must not appear on the instruction. Instructions must be double-spaced. The instruction number and the title of the instruction must be at the top of the page [Sacramento Super Court Rules, Rule 7.01].

■ **San Diego County Rules.** Jury instructions must be gender-neutral and double-spaced on plain paper. They may include instruction numbers, but the mere submission of a list of instruction numbers is not acceptable. Authority may be included on copies of special instructions submitted to the court, but should not appear on the originals [see San Diego Super Ct Rules, Div II, Rule 2.1.6].

■ **San Francisco County Rules.** No proposed instruction shall contain unfilled blanks or bracketed portions. Proposed instructions must be complete in all respects. Submission of BAJI, CACI, or CALJIC numbers is not sufficient. Instructions must conform to State Rules of Court and *CCP § 607a* [San Francisco County Super Ct Rules, Rule 6.4(D)].

When proposing instructions, counsel and parties in pro per must provide the court with one copy of the instructions containing appropriate points and authorities, and one copy without points and authorities or other writing on it, the latter copy being in the form appropriate for submission to the jury [San Francisco County Super Ct Rules, Rule 6.4(E)].

► **Cross References:**

California Forms of Pleading and Practice, § 326.10 (Matthew Bender).

California Trial Guide, § 91.20[3][e] (Matthew Bender).

Jury Instructions:

Preparation of Jury Instructions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.05[1] (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury
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1-16 MB Practice Guide: Trial & Post-Trial Civil Proc 16.08

16.08 Style of Jury Instructions.

16.08[1] Jury Instructions Must Be Written in Gender-Neutral Language. All instructions submitted to the jury must be written in gender-neutral language. If standard jury instructions are to be submitted to the jury, the court or, at the court's request, counsel must recast the instructions as necessary to ensure that gender-neutral language is used in each instruction [*Cal Rules Ct, Rule 2.1058*].

All CACI and Matthew Bender specific jury instructions are drafted in gender-neutral language.



Cross References:

California Forms of Pleading and Practice, 326.23[7] (Matthew Bender).

California Trial Guide, § 91.20[3][e] (Matthew Bender).

Jury Instructions:

Drafting Suggestions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.04[2] (Matthew Bender).

16.08[2] Preferred Style of Jury Instructions Includes Use of Clear, Plain English. Jury instructions should be written in plain English [see *Hildebrand v. Los Angeles Junction Ry. Co. (1960) 53 C2d 826, 831, 3 CR 313, 350 P2d 65*].

Jury Instructions:

Drafting Suggestions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.04[1][a] (Matthew Bender).

In drafting original jury instructions, counsel should follow the guidelines used by the Judicial Council in drafting CACI, including the following [see "Drafting Policies of Task Force on Jury Instructions Civil Subcommittee"]:

- Avoid redundancy.

- Use short sentences.
- Position the subject close to the verb.
- Do not use double negatives.
- Use concrete, rather than abstract terms.
- Do not include irrelevant material.
- Use a logical, clear structure.

All CACI and Matthew Bender specific jury instructions use clear, plain English.

 Cross Reference:

See California Trial Guide, § 91.20[3][d] (Matthew Bender).

Jury Instructions:

Drafting Suggestions, see *California Forms of Jury Instruction, Ch. 1A, MB 100A.04[1]* (Matthew Bender).

16.08[3] Local Court Rules May Control Style of Jury Instructions. Local court rules may control the style and format of jury instructions [see, e.g., San Diego Super Ct Rules, Div II, Rule 2.1.6 (gender-neutral language)].

 Cross Reference:

Local rules affecting format, see 16.07[3].

Legal Topics:

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

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16.09 Jury Instructions Must Be Submitted to Judge and Served in Timely Manner.

16.09[1] Proposed Jury Instructions Must Be Submitted to Judge and Served Before First Witness Is Sworn.

In every case that is being tried before the court with a jury, it is the duty of counsel for the respective parties, before the first witness is sworn, to deliver to the judge presiding at the trial, and serve on opposing counsel, all proposed instructions to the jury covering the law as disclosed by the pleadings [*CCP* § 607a].



Cross References:

Form, see 16.27.

General discussion, see *California Forms of Pleading and Practice*, § 326.22 (Matthew Bender); or

California Trial Guide, § 91.20[1] (Matthew Bender).

Jury Instructions:

Preparation of Jury Instructions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.05[1] (Matthew Bender).

16.09[2] Local Court Rules May Advance Timing of Jury Instructions.

■ **Alameda County Rules, Standing Pre-Trial Orders:** Each counsel and any self-represented party must prepare a proposed form of jury instruction regarding the burden(s) of proof involved in the case. Copies of the case summary and each party's proposed form of instruction must be personally served on opposing counsel, or any self-represented party, three court days before trial, and presented in triplicate to the trial judge at the first appearance in the trial department [see Alameda Super Ct Rules, Rule 4.4(H)(8), (9)]. The submission of a list of jury instructions is *not* acceptable (emphasis in original). The full text of the proposed instructions must be provided. Any proposed instruction that is not taken verbatim from jury instructions approved by the Judicial Council of California must include citations to the authorities on which it is based [Alameda Super Ct Rules, Rule 4.4(H)(9)].

■ **Alameda County Rules, Probate Department.** In probate cases, if the probate law provides for trial by jury in the case, each counsel and any unrepresented party must submit a set of proposed jury instructions, including the full text of each instruction, to the trial judge at the first appearance in the trial department [see Alameda Super Ct Rules, Attach C, § 10].

■ **Los Angeles County Rules, Case Management Conference:** For final trial preparation, parties must attend a final status conference. Counsel must exchange jury instruction requests (and other information) at least five days before that conference, subject to sanctions for violation of this rule [see Los Angeles Super Ct Rules, Rule 7.9(h)].

■ **Los Angeles County Rules, Jury Instruction Conference:** Before final argument and after submission to the trial judge of all proposed jury instructions, verdict and findings forms, a conference outside the presence of jurors will be held. Before that conference, counsel must meet to discuss each other's jury instructions and classify them into three categories, after which the court makes the appropriate determinations. The three categories are as follows [see Los Angeles Super Ct Rules, Rule 8.24]:

- ☐ Patently inappropriate proposed instructions that will be voluntarily withdrawn.
- ☐ Patent omission of instructions that are appropriate and may be given without objection.
- ☐ Modifications to which parties are willing to stipulate.

■ **Sacramento County Rules.** On the first day of trial, each party must submit copies of a complete set of individual pre-printed requested instructions to the court, with service on each opposing party [see Sacramento Super Court Rules, Rule 7.01]. The instructions must be obtained from CACI, unless specially drafted instructions are required [see Sacramento Super Court Rules, Rule 7.01].

► Cross Reference:

See 16.06[1].

■ **Santa Clara County Rules.** Unless the case was settled at the Mandatory Settlement Conference or dismissed in full prior to it, or unless otherwise ordered by the court, jury instruction requests, except for instructions that cannot reasonably be anticipated before trial, must be lodged in the department of the trial judge or, if none, with the court's calendar secretary, and served on all other parties by noon on the last court day before the date set for trial [Santa Clara Super Ct Rules, Rule 6(D)(4)].

Example:

In one case in Santa Clara County, deadlines for the submission of proposed jury instructions and verdict forms were set months in advance, and in advance of trial. When one party submitted proposed jury instructions late, regarding issues that were not new, the trial court in declining the instructions properly sought to maintain tight control over the case. The trial court required the parties to make prompt and complete disclosure of facts and legal theories so that the "parties' cards be on the table face up." The appellate court held that the party waited too long to make a full and candid disclosure of a particular theory; therefore the trial court made no error in refusing the jury instructions [*FMC Corp. v. Plaisted and Cos.* (1998) 61 CA4th 1132, 1163-1165, 72 CR2d 467] .

■ **San Diego County Rules, Trial Readiness Conference.** Lists of proposed standard jury instructions are included in the Joint Trial Readiness Conference Report, and filed at the Trial Readiness Conference. Copies of proposed Special Instructions are presented at the conference for review. However, the proposed instructions are not filed with the report. Violation of this rule may result in sanctions [see San Diego Super Ct Rules, Div II, App B(F), (G)].



Cross Reference:

Special jury instructions, see 16.06[2].

■ **San Diego County Rules, Scheduled Trial Date:** On the scheduled trial date, the parties must submit the full text of proposed jury instructions to the court [San Diego Super Ct Rules, Div II, Rule 2.1.6].

■ **San Francisco County Rules.** In all jury trials, counsel or parties in pro per must deliver all proposed instructions to the trial judge on the date of assignment. Failure to deliver the instructions is an interference with the court's proceedings, and in the absence of good cause will justify sanctions [San Francisco Super Ct Rules, Rule 6.4(A)]. In limited jurisdiction cases only, before the Conference to settle jury instructions, all counsel or parties in pro per are to meet and confer and notify the trial judge in writing which of the proposed instructions are acceptable to all parties [San Francisco Super Ct Rules, Rule 6.4(B)]. In unlimited jurisdiction cases only, within two court days after the date of assignment, all counsel or parties in pro per are to meet and confer and notify the trial judge in writing which of the proposed instructions are acceptable to all parties [San Francisco Super Ct Rules, Rule 6.4(C)].

16.09[3] Court May Require Electronic Transmittal of Proposed Jury Instructions. Counsel may be required in a specific case to transmit the proposed jury instructions electronically. California Rules of Court do not preclude a judge from requiring the parties in an individual case to transmit the jury instructions to the court electronically [see Advisory Committee Comment to *Cal Rules Ct, Rule 2.1055*].

Consider:

When judges require an electronic transmission, the purpose is usually to permit them to download the instructions and incorporate them into the final set. This means that transmittal by fax is typically not appropriate. Rather, transmittal should be by e-mail, or a CD with instructions in Word or WordPerfect format (not pdf or Acrobat Reader format). By transmitting instructions electronically, the court and its staff can readily revise proposed instructions after the jury instructions settlement conference.

Legal Topics:

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

Civil Procedure Trials Jury Trials Jury Instructions General Overview Governments Courts Rule Application & Interpretation



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16.10 Proposing Additional Jury Instructions.

16.10[1] Proposed Additional Jury Instructions Are Proper When Questions of Law Not Disclosed by Pleadings Are Developed by Evidence. After proposed jury instructions based on pleadings are delivered to the court, and before the commencement of the argument, counsel may deliver to the judge, and serve on opposing counsel, additional proposed instructions to the jury on questions of law developed by the evidence and not disclosed by the pleadings [*CCP § 607a*].

➡ **Cross Reference:**

Submission to court, see *16.09[1]*.

16.10[2] Party Should Propose Additional Jury Instructions When Submitted Instruction Is Too General or Incomplete. Parties should take care to propose and approve jury instructions that are complete. If a proposed instruction is incomplete, the parties should propose any additional instructions that would render the existing instruction complete [*see, e.g., White v. Inbound Aviation (1999) 69 CA4th 910, 925, 82 CR2d 71 ; National Med. Transp. Network v. Deloitte & Touche (1998) 62 CA4th 412, 428-429, 72 CR2d 720*].

➡ **Cross Reference:**

Waiver for failure to request additional instruction, see *16.15*.

16.10[3] Local Court Rules May Advance Timing of Additional Jury Instructions. Local court rules may control the submission of additional jury instructions. In Orange County, after the initial proposed jury instructions have been submitted, and at or before the time the party rests, counsel may present to the trial judge and serve on opposing counsel, additional proposed instructions to the jury on questions of law developed by the evidence and not disclosed by the pleadings [*see Orange County Super Ct Rules, Rule 362*]. The rules in Orange County requiring counsel to submit a list of instructions to the clerk does not limit the right of counsel to submit additional instructions, properly numbered in consecutive order [*see Orange County Super Ct Rules, Rule 362*].

➡ **Cross Reference:**

Local rules affecting format, see *16.07[3]*.

In Los Angeles County, any jury instructions requested after the conclusion of taking evidence must be in writing [Los Angeles Super Ct Rules, Rule 8.26].

Legal Topics:

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

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16.11 Jury Instructions and General or Special Verdict Are Often Considered Together on Appeal.

16.11[1] Jury Instructions May Be Analyzed in Connection With Related Special Verdict Form. The propriety of a given jury instruction sometimes depends on the substance of a related special verdict form. If issues are covered both in the jury instruction and in the special verdict form, the jury instruction may be deemed appropriate based on that connection [see, e.g., *Lambert v. General Motors* (1998) 67 CA4th 1179, 1182 n1, 79 CR2d 657] .

Example:

In a product liability case, although the complaint alleged only strict products liability (1) the jury received instructions on a negligence claim; (2) the plaintiff's attorney discussed a negligence theory in closing argument; and (3) a special verdict form asked the jury to decide whether the defendant was negligent in the design of the product. Therefore, the jury was properly instructed on a negligence claim [*Lambert v. General Motors* (1998) 67 CA4th 1179, 1182 n1, 79 CR2d 657] .

► **Cross Reference:**

Special verdicts, see Ch. 18, Jury Verdicts.

16.11[2] Erroneous Jury Instructions Given with General Verdict Presenting Multiple Theories Is Basis for Reversal. When two theories are presented to a jury, of which only one is supported by substantial evidence, and a general verdict is returned in the plaintiff's favor, it is presumed that the verdict was based on the theory that is supported by the evidence. However, when the jury is permitted to choose between two factual theories, is misinstructed as to the legal requisites for one of them, and there is no way to eliminate the likelihood that the jury chose the theory affected by the instructional error, it is likely that the jury, following the instructions, reached an improper verdict. In that case, reversal is required [*Lundy v. Ford Motor Co.* (2001) 87 CA4th 472, 480, 104 CR2d 545] .

► **Cross Reference:**

General verdicts, see Ch. 18, Jury Verdicts, 18.03 -18.10.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral
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16.12 CHECKLIST: Objecting to Proposed Jury Instructions, and Proposing Alternate Instructions.

☐ Determine whether the opposing party's proposed jury instructions are objectionable on the following grounds:

☐ Untimeliness.

Authority:
CCP § 607a

Discussion:
See 16.09, 16.18[1]

☐ Likelihood of confusing or misleading jurors.

Authority:
See, e.g., Mitchell v. Gonzales (1991) 54 C3d 1041, 1048, 1 CR2d 913, 819 P2d 872

Discussion:
See 16.18[2]

☐ Inaccurate statement of law.

Authority:
See, e.g., Chapman v. Enos (2004) 116 CA4th 920, 931, 10 CR3d 852

Discussion:
See 16.18[3]

- ☐ Irrelevance to case.

Authority:

See, e.g., *Webber v. Inland Empire Inv., Inc.* (1999) 74 CA4th 884, 908, 88 CR2d 594

Discussion:

See 16.18[3], [4]

- ☐ Incompleteness.

Authority:

See, e.g., *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428-429, 72 CR2d 720

Discussion:

See 16.15

- ☐ Lack of specificity.

Authority:

See, e.g., *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428-429, 72 CR2d 720

Discussion:

See 16.15

- ☐ If proposed jury instruction is incomplete or too general, propose other or additional instructions that cure this defect.

Authority:

See, e.g., *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428-429, 72 CR2d 720

Discussion:

See 16.15

**Warning:**

Failure to request an additional or qualifying instruction to an instruction given by the court which, although correct as far as it went, was too general for the state of the evidence, constitutes a *waiver* of the right to challenge an instruction on appeal [*National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428-429, 72 CR2d 720] .

**Timing:**

Additional proposed jury instructions must be drafted, served, and submitted to the court in a timely manner so as to allow those instructions to be approved by the judge and ultimately given to the jury, and in any case before commencement of the argument.

Authority:

See *CCP § 607a*

Discussion:

See 16.10

- ☐ If proposed jury instruction requires modification, propose the modified instruction.



Warning:

Counsel should take care modifying a proposed instruction, particularly any Judicial Council of California Civil Jury Instruction (CACI).

Authority:

See *CCP § 647*

Discussion:

See 16.17

- ☐ Object to any proposed jury instruction that is untimely, incorrect, or inapplicable.

Authority:

See *CCP § 647*

Discussion:

See 16.18

- ☐ Failure to object to the giving of an instruction, the refusal to give an instruction, or a requested modification, does not waive this issue on appeal.

Authority:

See *CCP § 647*

Discussion:

See 16.14

- ☐ If proposed jury instruction should be replaced with a different instruction, propose another instruction in lieu of it.

Authority:

See, e.g., *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 427-428, 72 CR2d 720

Discussion:

See 16.16

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsObjections to Instructions



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16.13 Options and Strategies.

Counsel analyzing another party's proposed jury instructions must determine whether the instructions are objectionable based on the theories of the case and the law supporting the instructions. Counsel should note the problems with the proposed instructions, including, for example, the following:

- Untimeliness.
- Inaccurate statement of the law.
- Irrelevance to the case.
- Incompleteness or oversimplicity with regard to issues in the case.

If the problem can be remedied by providing additional instructions, counsel must draft those instructions, and serve and submit them in a timely manner [*see CCP § 607a*]. This option is important because if the proposed instructions are incomplete or too general, the failure to propose additional instructions to remedy those problems waives the claim of error on appeal [*National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428-429, 72 CR2d 720] .

If the problem can be remedied by modifying the proposed instructions, counsel should draft a modified version of that instruction, keeping in mind that this tactic is risky, particularly with CACI.

Counsel should oppose the acceptance of instructions that are inaccurate or irrelevant, or would tend to confuse or mislead the jury [*see, e.g., Mitchell v. Gonzales* (1991) 54 C3d 1041, 1048, 1 CR2d 913, 819 P2d 872] .

Inasmuch as an erroneous instruction may cause the judgment to be reversed [*see Soule v. General Motors Corp.* (1994) 8 C4th 548, 574, 580, 34 CR2d 607, 882 P2d 298] , counsel should be aware during the entire trial that as additional issues requiring new or modified jury instructions arise, crucial factors such as accuracy, relevance, and completeness must be addressed. When all the proposed instructions are either given during the trial, or about to be given at the conclusion of the case, counsel should once again determine that those instructions taken as a whole will stand up on appeal [*see, e.g., Webber v. Inland Empire Inv., Inc.* (1999) 74 CA4th 884, 905-906, 88 CR2d 594] .

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureAppealsStandards of ReviewReversible Errors



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16.14 Objections to Giving Instructions, Refusing Instructions, or Modifying Instructions Are Deemed Made.

An exception is an objection on a matter of law to a decision made, either before or after judgment, by a court in an action, among other things. The following are deemed excepted to [CCP § 647]:

- Giving an instruction.
- Refusing to give an instruction.
- Modifying an instruction requested [see, e.g., *Chapman v. Enos* (2004) 116 CA4th 920, 927-928, 10 CR3d 852] .

To hold that it is the duty of a party to correct the errors of the adversary's instructions would be in contravention of CCP § 647, which gives a party an exception to instructions that are given. Although the exception is of no avail when an instruction states the law correctly but is deficient merely by reason of generality, in other cases the party will not be foreclosed from claiming error and prejudice [*Chapman v. Enos* (2004) 116 CA4th 920, 928, 10 CR3d 852] .



Cross Reference:

California Forms of Pleading and Practice, § 326.29[1] (Matthew Bender); or

California Trial Guide, § 91.20[1], [3][g] (Matthew Bender).

Jury Instructions:

Automatic Objection to Instructions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.12 (Matthew Bender).

When Giving or Failing to Give Instructions is Appealable, see *California Forms of Jury Instruction*, MB 100A.13[4] (Matthew Bender).

Legal Topics:

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

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16.15 Failure to Request Additional Jury Instructions to Cure Proposed Incomplete Instructions Waives Claim on Appeal.

A party is deemed to waive a right to challenge an instruction on appeal for failure to request an additional or qualifying instruction to an instruction given by the court that, although correct as far as it went, was too general for the state of the evidence [*Metcalf v. County of San Joaquin* (2008) 42 C4th 1121, 1130-1131, 72 CR3d 382, 176 P3d 654 ; *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428-429, 72 CR2d 720] .

Example:

In a negligence action, a party that claimed that the trial court erred in failing to give a more specific or elaborate instruction on the meaning of "competence," waived this claim by failing to request the instruction at trial. If the law applicable to the facts of a case is stated correctly in a general charge to the jury, a party may not, in the absence of a request for a more specific or elaborate instruction, complain that a more specific or elaborate instruction should have been given [see *White v. Inbound Aviation* (1999) 69 CA4th 910, 925, 82 CR2d 71] .



Strategic Point:

If the judge asks for additional authority to support a proposed jury instruction, provide that authority in a timely manner [see *Webber v. Inland Empire Inv., Inc.* (1999) 74 CA4th 884, 907, 88 CR2d 594] .

Distinguish:

When a trial court gives a jury instruction that is prejudicially erroneous as given, i.e., that is an incorrect statement of law, the party harmed by that instruction need not have objected to the instruction or proposed a correct instruction of its own to preserve the right to complain of the erroneous instruction on appeal [CCP § 647; *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 428, 72 CR2d 720 ; *Suman v. BMW of No. America, Inc.* (1994) 23 CA4th 1, 9, 28 CR2d 133] .



Strategic Point:

Always put objections on the record. That is, it is always better to preserve the objection since counsel would not want to face the argument on appeal that something was waived. In addition, other instructions may not be clear, yet may cover the subject in a broad or vague enough way that an appellate court could determine the objectionable instruction to which no objection was preserved was therefore "harmless error." Thus, to repeat: It is always preferable to object and to put the objections on the record.

Cross Reference:

Objections to instructions, see 16.14.

A party that does not accept the opposing party's proposed jury instruction on that ground must object to that instruction in a timely manner [see, e.g., *Metcalf v. County of San Joaquin* (2008) 42 C4th 1121, 1130-1131, 72 CR3d 382, 176 P3d 654].

Strategic Point:



The objection must be specific, and must be clearly noted in the record. The objecting party should also propose a jury instruction that reflects its objection, and incorporates changes that rectify the defect [see, e.g., *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 427-428, 72 CR2d 720] . It may also be helpful to determine whether an erroneous instruction was the court's instruction or a party's proposed instruction. Very few judges are willing to risk error by proposing an instruction. However, the far better practice, again, is to propose a proper instruction and object to the offending one.

Warning:

The objection and alternate proposal must be carefully crafted. On appeal, a party claiming error based on an erroneous jury instruction may be charged with inviting the error, or waiving the objection if the objection is not thoroughly and accurately lodged during trial [see, e.g., *Metcalf v. County of San Joaquin* (2008) 42 C4th 1121, 1130-1131, 72 CR3d 382, 176 P3d 654].

Judge's Perspective:

Whenever a proposed instruction is rejected, counsel is responsible for making sure that a proper record is kept. Jury instruction conferences may not be recorded and multiple instructions are often reviewed at a time. Review of instructions may at times be conducted very quickly, and what is rejected might not be fully documented. If the jury instruction review was not recorded, counsel should enter into the record at the first opportunity all rejected instructions. From past experience, the record on jury instructions may not be clear, and counsel for both sides should make sure the record distinguishes between instructions that were rejected versus instructions that were withdrawn.

Legal Topics:

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

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16.16 Party May Propose Its Own Jury Instructions in Lieu of Other Party's Proposed Instructions.

A party that does not accept the opposing party's proposed jury instruction must take every opportunity to draft a different jury instruction that corrects the perceived problem, particularly if the judge has invited counsel to propose a different instruction [see, e.g., *Metcalfe v. County of San Joaquin* (2008) 42 C4th 1121, 1130-1131, 72 CR3d 382, 176 P3d 654].



Warning:

The alternate proposal for a jury instruction must be carefully crafted. On appeal, a party claiming error based on an erroneous jury instruction may be charged with inviting the error, or waiving the objection if the opposition is not thoroughly and accurately lodged during trial [see, e.g., *Metcalfe v. County of San Joaquin* (2008) 42 C4th 1121, 1130-1131, 72 CR3d 382, 176 P3d 654].

Legal Topics:

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

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16.17 Party May Request Modification of Other Party's Proposed Jury Instructions.

In the proper case, a party should consider requesting a modification of another party's proposed jury instruction [see, e.g., *Cal Rules Ct, Rule 2.1055(b)(3)(B)* (checklist in index includes indication that instruction was given as modified)].



Warning:

A party should be extremely cautious in modifying or acquiescing to the modification of CACI.

Example:

In a discrimination case brought under the FEHA (*Gov Code § 12900 et seq.*), the trial court erroneously modified a standard instruction concerning the definition of "supervisor." The court's modification of the BAJI instruction impaired the opposing party's rights under the governing statute, and incorrectly stated the statutory requirements for liability [see, e.g., *Chapman v. Enos (2004) 116 CA4th 920, 931, 10 CR3d 852*].

Legal Topics:

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

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16.18 Party May Oppose Other Party's Proposed Jury Instructions on Grounds Including Untimeliness.

16.18[1] Proposed Jury Instructions Are Untimely. A proposed jury instruction may be declined on the ground that it was submitted in an untimely manner [*see, e.g., Webber v. Inland Empire Inv., Inc. (1999) 74 CA4th 884, 909, 88 CR2d 594* (instruction was not submitted until after initial instructions had been given, and after initial oral argument)].

► Cross Reference:

Submission of instructions to court, *see* 16.09.

16.18[2] Proposed Jury Instructions May Confuse or Mislead Jurors. A proposed jury instruction may be declined on the ground that it may tend to confuse or mislead jurors [*see, e.g., Mitchell v. Gonzales (1991) 54 C3d 1041, 1048, 1 CR2d 913, 819 P2d 872*].

Example--Confusion:

In a products liability case, BAJI No. 3.75, which concerned proximate cause, was given, causing jury confusion and ultimately prejudice and requiring reversal. The California Supreme Court described this instruction as "grammatically confusing and conceptually misleading," and disapproved its use in any negligence action [*Mitchell v. Gonzales (1991) 54 C3d 1041, 1048-1049, 1054-1056, 1 CR2d 913, 819 P2d 872*].

Example--No Confusion:

In a negligence action, instructions on vicarious liability, as a group, did not threaten to mislead or confuse the jury and were appropriate to the causes of action alleged by the plaintiffs, including negligent entrustment [*White v. Inbound Aviation (1999) 69 CA4th 910, 929-930, 82 CR2d 71*].

16.18[3] Proposed Jury Instructions Are Erroneous or Inapplicable to Facts. A party may oppose a proposed jury instruction if it is erroneous, for example, inaccurately stating the law; or is accurate but does not apply to the facts of the case [*see, e.g., Webber v. Inland Empire Inv., Inc. (1999) 74 CA4th 884, 908, 88 CR2d 594*].

Example:

In an action alleging intentional interference with contractual relationship, the trial court refused to give one instruction, among others, concerning the so-called manager's privilege. The appellate court held that this privilege is qualified, and does not apply to actions taken by one of the defendants to further his own interests. The trial court may have thought that the evidence showed only that the defendant was acting in his own interests, not the interests of his controlled corporations. If so, the qualified privilege would not apply and the trial court properly refused the proposed jury instruction [*Webber v. Inland Empire Inv., Inc.* (1999) 74 CA4th 884, 908, 88 CR2d 594] .

 Cross Reference:

See California Trial Guide, § 91.20[3][b] (Matthew Bender).

Jury Instructions:

How to Use California Forms of Jury Instructions (Matthew Bender), see *California Forms of Jury Instruction, Ch. 1A, MB 100A.01[3]* (Matthew Bender).

16.18[4] Proposed Jury Instructions Relate to Issue Not Properly Before Jury. A proposed jury instruction may be opposed on the ground that the issue contained in the instruction is one that is not presented for the jury's determination [see, e.g., *Webber v. Inland Empire Inv., Inc.* (1999) 74 CA4th 884, 908, 88 CR2d 594 (jury instruction concerned equitable defense, which is not matter for jury decision)].

Legal Topics:

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

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16.19 Options and Strategies.

By the time the court gives instructions to the jury, counsel should have performed all the steps necessary to assure that the instructions are accurate and complete.

Counsel should be prepared to draft additional instructions before closing arguments if questions of law were not covered by the pleadings, but were raised by the evidence. If during opposing counsel's argument issues are raised that were not covered by instructions given or refused, counsel should request additional instructions on that subject matter [CCP § 607a]. If the jury asks for further information or clarification during deliberations, counsel should quickly provide any information to the jury that will benefit his or her case, and preserve a record of all documents or new instructions submitted [see, e.g., *Lundy v. Ford Motor Co.* (2001) 87 CA4th 472, 476, 104 CR2d 545 (jury requested further information on jury instruction)].

Counsel should also keep in mind the factors supporting a reversal of judgment based on erroneously given or rejected jury instructions.

If counsel believes that opposing counsel's jury instructions are erroneous, he or she should preserve a record of the opposition to those instructions, the court's giving the instructions, and the effect that those instructions had on the jury, including the jury's request to have them reread or clarified. Counsel should also note the connection between those instructions and evidence admitted at trial, closing arguments, and related verdict forms.

Strategic Points:



- There are strategic concerns surrounding the court's charge to the jury. However, raising such concerns can be a very delicate issue. For example, do you put on the record that the judge's nasal voice and droning tone put the jurors to sleep or rendered the instructions unintelligible? If the judge misreads an instruction, raise it immediately following the charge, and ask that it be reread correctly. One can also raise the issue at a break in the trial, or when the charging is completed. If it is a misreading that would mislead the jury, then it can be corrected, and if there is to be an appeal, the issue should be preserved on the record, whether the judge corrects the reading or not. Appellate cases seem to suggest that if the error

is corrected, then the appeal is lost. As a strategic matter, it is unclear whether the jury will catch the error or even care if it is corrected. If instructions are sent into the jury room in print, that would be more critical.

■ Counsel must be particularly vigilant in confirming that the trial judge reads the instructions correctly. If an instruction is incorrectly read, an objection might be stated. Another manner of preserving the record is to wait until the reading of the instructions is completed and asking for clarification before the jury starts its deliberations. In anticipation of such an issue arising, the best course is to determine from the trial judge how such issues are to be addressed before the jury is instructed.

Judge's Perspective:

Although the court will do its job, errors do happen, and counsel should be vigilant. Counsel should follow along with the reading of the instructions to not only watch for inadvertent reading, but also to catch errors that were not removed. Counsel should be ready to bring these matters to the court's attention and to request removing the improper language then and there from the instructions.

Cross Reference:

See Ch. 18, Jury Verdicts.

Legal Topics:

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

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16.20 Court May Give Jury Instructions at Any Phase of Case.

16.20[1] Court Gives Introductory Jury Instructions at Outset of Case. Introductory instructions, also referred to as "pre-trial instructions," provided in CACI are given at the outset of every case [*see Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender)].

Example:

CACI No. 100, which provides preliminary admonitions to the jury, e.g., "You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case," is given at the outset of the case [*see Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender)].

Jury Instructions:

Drafting Suggestions, see *California Forms of Jury Instruction, Ch. 1A, MB 100A.04[7]* (Matthew Bender).

In addition, the court admonishes the jury concerning their duties during the trial. If the jury are permitted to separate, either during the trial or after the case is submitted to them, they must be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial; and that it is their duty not to form or express an opinion on it until the case is finally submitted to them [*CCP § 611*].

Courts may wish to give this admonition only once, informing the jury that it applies to the entire trial. In Los Angeles County at the trial conference, the trial judge should request the parties to stipulate in writing and counsel should be encouraged to stipulate that after having given the admonition required by *CCP § 611*, the court at each subsequent recess or adjournment need not repeat or remind the jury of the admonition theretofore given [Los Angeles Super Ct Rules, Rule 8.20(g)].

16.20[2] Court May Give Jury Instructions During Trial As Needed. The court has the discretion to give jury instructions during the trial as needed, instead of waiting until after closing arguments to give all instructions [*see CCP § 607(7), (9)* (provision for giving instructions after closing arguments or conclusion of evidence)].

Consider:

Particularly in lengthy and/or complex cases, it is not uncommon for the court to give instructions during the trial. There appears to be nearly an equal division among judges who give instructions before argument and those who instruct afterward.

**Strategic Point:**

An attorney can object to instructions given piecemeal or throughout the trial on the ground that it tends to focus the jurors more on parts of the trial, and can lead to jurors forming an opinion about that portion before the rest of the trial has been completed. That said, it should be noted that jury research shows that most jurors will begin to make up their minds as they go along, notwithstanding admonitions from the court.

Judge's Perspective:

CACI suggests, or the judge may have a proclivity for, giving preliminary instructions to prepare the jurors throughout the trial. However, the court may also want to pre-instruct on certain elements of the cause of action that are not intuitive. Often it is good practice to preinstruct the jury on the substantive law that will apply to various causes of action, especially where the rules are not intuitive to the average person. For example, in a complex antitrust case, preinstruction provides the jury a framework that will assist the jury in interpreting the evidence.

Jury Instructions:

Drafting Suggestions, see *California Forms of Jury Instruction, Ch. 1A, MB 100A.04[7]* (Matthew Bender).

In a case involving jury instructions proposed to the trial court by a referee relating to discovery sanctions, the trial court itself properly modified the instructions at the direction of the court of appeal in a writ proceeding. The court of appeal had indicated it would issue a peremptory writ if the trial court did not impose less severe sanctions for the discovery abuse and appropriately tailored instructions [*Karlsson v. Ford Motor Co. (2006) 140 CA4th 1202, 1213, 45 CR3d 265*] .

16.20[3] Court Gives Concluding Jury Instructions After Closing Arguments. Some courts charge the jury after closing arguments, or after the conclusion of all evidence if there are no arguments, in the time honored fashion [see *CCP § 607(7), (9)*]. Some courts prefer to split the instructions and give introductory instructions and the substantive "case" related instructions before argument, and then procedural instructions such as the need to appoint a foreperson, after argument. In addition to jury instructions concerning the substance of the case, discussed in Part II, above, "Concluding Instructions" in *Judicial Council of California Civil Jury Instructions, CACI No. 5000 et seq.*, may be given, such as the following:

- Duties of the Judge and Jury [*Judicial Council of California Civil Jury Instructions, CACI No. 5000*].
- Witnesses [*Judicial Council of California Civil Jury Instructions, CACI No. 5003*].
- Predeliberation Instructions [*Judicial Council of California Civil Jury Instructions, CACI No. 5009*].

**Strategic Point:**

If the court has instructed the jury before argument, then a printed version of a particular instruction can

be used in closing argument. That can be done in any case, but if the court alters or rejects an instruction used in argument, the result can be, at a minimum, embarrassing.

**Timing:**

As noted in 16.20[2], there is a nearly equal division between judges who instruct before argument and those who instruct afterward. Those judges who instruct throughout the case typically do so when a procedure, which may be commonly known among attorneys, is first being presented to a lay jury, for example, when interrogatories are being offered into evidence or when the first expert witness is about to testify. Additionally, when complex issues are being decided, pertinent instructions related to those issues may be given throughout the trial.

**Judge's Perspective:**

Most judges prefer to read the instructions after both parties have concluded closing arguments. However, there are judges who will give the bulk of instructions before closing argument, leaving the concluding instructions for after closing arguments.

**Cross Reference:**

California Forms of Pleading and Practice, § 326.30 (Matthew Bender); or

California Trial Guide, § 91.20[4][e] (Matthew Bender).

Jury Instructions:

Drafting Suggestions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.04[7] (Matthew Bender).

Legal Topics:

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

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16.21 Court Must Determine Propriety of Proposed Jury Instructions.

16.21[1] On Request, Court Must Decide on Jury Instructions Before Argument Commences, but May Give Additional Instructions on Issues Raised During Argument. Before the commencement of the argument, the court, on request of counsel, must do all of the following [CCP § 607a]:

- Decide whether to give, refuse, or modify the proposed instructions;
- Decide which instructions must be given in addition to those proposed, if any; and
- Advise counsel of all instructions to be given.

However, if, during the argument, issues are raised that have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on that subject matter [CCP § 607a].

➤ **Cross Reference:**

California Forms of Pleading and Practice, § 326.22 (Matthew Bender); or

California Trial Guide, § 91.20[3][b] (Matthew Bender).

Jury Instructions:

Submission of Proposed Instructions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.06[2] (Matthew Bender).

16.21[2] Court Must Give or Refuse Special Instructions When Requested. When either party asks special instructions be given to the jury, the court must either give the instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or part [CCP § 609].

➤ **Cross Reference:**

California Forms of Pleading and Practice, § 326.27 (Matthew Bender); or

California Trial Guide, § 91.20[4][b] (Matthew Bender).

16.21[3] Court Need Not Instruct on Theory Not Supported by Evidence. A trial court is not obliged to, and should not, instruct on a theory that is *not* supported by evidence [*FMC Corp. v. Plaisted and Cos.* (1998) 61 CA4th 1132, 1211, 72 CR2d 467] .

A trial court is not required to give instructions on a party's theory of the case unless it is supported by substantial evidence [*Morey v. Vannucci* (1998) 64 CA4th 904, 915, 75 CR2d 573] .

 Cross Reference:

California Forms of Pleading and Practice, § 326.24[1] (Matthew Bender); or

California Trial Guide, § 91.20[1] (Matthew Bender).

Jury Instructions:

Drafting Suggestions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.04[4] (Matthew Bender).

16.21[4] Court Must Disregard Improper Instructions That Do Not Affect Substantial Rights of Parties. The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings that, in the opinion of the court, does not affect the substantial rights of the parties [CCP § 475].

Examples:

Any error that is harmless is an example of this rule's application. As another example, a court would disregard an instruction that states that every corporation acts through its employees, and the knowledge of one employee is imputed to the corporation when the case does not involve corporations or imputed knowledge. It is improper to instruct on partnership law, joint and several liability, and related agency issues if there is only a single plaintiff and single defendant in the case and no evidence of any other party's conduct is introduced.

No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless (1) it appears from the record that it was prejudicial; (2) it caused the complaining or appealing party to sustain and suffer substantial injury; and (3) a different result would have been probable if it had not occurred. There is no presumption that error is prejudicial, or that injury was done if error is shown [CCP § 475; *Lundy v. Ford Motor Co.* (2001) 87 CA4th 472, 476, 104 CR2d 545] .

16.21[5] Refusal to Give Requested Instructions Is Reversible Error If Omission Misleads and Confuses Jury, Resulting in Prejudice. Refusal to give a requested instruction is reversible error when the omission misleads and confuses the jury and it is reasonably probable a result more favorable to the requesting party would have been reached in the absence of the error [*Byrum v. Brand* (1990) 219 CA3d 926, 939, 268 CR 609 (no prejudice resulted from refused instructions)].

 Cross Reference:

California Forms of Pleading and Practice, § 326.26 (Matthew Bender); or

California Trial Guide, § 91.20[3][d] (Matthew Bender).

Jury Instructions:

Need to Request Complete Instructions, see *California Forms of Jury Instruction, Ch. 1A, MB 100A.08* (Matthew Bender).

16.21[6] Court Should Refuse to Give Instructions Wholly Inapplicable to Case. Jury instructions must focus on the issues in the case. The task of a jury of laymen to comprehend and apply pertinent instructions is onerous enough at best; it should not be unnecessarily aggravated by loading on them a congeries of wholly inapplicable legal propositions. Wholly inapplicable propositions should not be requested by counsel in the first place, but if requested, the trial judge must scrupulously delete them from the charge finally given [*Mantonya v. Bratlie* (1948) 33 C2d 120, 124-125, 199 P2d 677] .



Cross Reference:

California Trial Guide, § 91.20[4][a] (Matthew Bender).

Jury Instructions:

How to Use California Forms of Jury Instructions (Matthew Bender), see *California Forms of Jury Instruction, Ch. 1A, MB 100A.01[3]* (Matthew Bender).

Legal Topics:

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

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16.22 Local Court Rules May Allow Judge to Change Instructions After Notifying Parties.

Counsel should consult local court rules to determine the procedure used for changing instructions. In Los Angeles County, if, after the jury instruction conference and at any time before giving the instructions and verdict and findings forms to the jurors, the trial judge determines to make any substantive change in them, all parties should be so advised on the record outside the hearing of jurors [Los Angeles Super Ct Rules, Rule 8.27].

Legal Topics:

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

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IV. COURT'S INSTRUCTIONS TO JURY

1-16 MB Practice Guide: Trial & Post-Trial Civil Proc 16.23

16.23 Court Has Discretion to Give Jury Written Instructions, and Must Do So on Jury's Request.

In charging the jury, the court may state to them all matters of law that it thinks necessary for their information in giving their verdict; and, if it states the testimony of the case, the court must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, on request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of those points prepared and submitted by the counsel of either party [CCP § 608].

On the jury retiring for deliberation, the court must advise the jury of the availability of a written copy of the jury instructions. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests the court to supply a copy of the written instructions, the court must supply the jury with a copy [CCP § 612.5].



Cross Reference:

California Forms of Pleading and Practice, § 326.32[1] (Matthew Bender); or

California Trial Guide, § 91.20[4][a] (Matthew Bender).

Jury Instructions:

Drafting Suggestions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.04[7] (Matthew Bender).

Giving Jurors Copy of Instructions, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.07 (Matthew Bender).

Counsel should consult local court rules concerning procedure for providing written instructions to the jury. In Los Angeles County, the trial judge has the discretion to determine whether the jury, on retiring to deliberate, should take with them a copy of the written jury instructions. If this procedure is used, care must be taken to remove the title, citation of authority, if any, and identity of the party requesting the instruction. Care must also be taken to assure that stricken portions are totally obliterated and any handwritten additions are completely legible [Los Angeles Super Ct Rules, Rule 8.52].

Consider:

In light of the above rules, you may want to offer to make a copy of the instructions for each juror.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury DeliberationsCivil
ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewGovernmentsCourtsRule Application & Interpretation



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Chapter 16 Jury Instructions
IV. COURT'S INSTRUCTIONS TO JURY

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16.24 Jury May Ask That Jury Instructions Be Reread, or Request Clarification.

During deliberations, the jury may ask that specific jury instructions be reread [*see, e.g., Mitchell v. Gonzales (1991) 54 C3d 1041, 1055, 1 CR2d 913, 819 P2d 872*].

 Judge's Perspective:

Standard judicial practice is to have a set of instructions ready and given to the jury after the last concluding instruction. This practice reduces jury requests for rereading of instructions and makes deliberations more efficient.



Strategic Points:

- In most cases, particularly in Los Angeles Superior Court, the written instructions are merged so that they read as a series of related paragraphs without headings and without identification of which party proposed them. Those written instructions go to the jury room and are usually reviewed carefully. The jury that does not get written instructions and needs to have one or another re-read, may pay closer attention to one instruction than to the set of instructions as a whole. As pointed out in the Strategic Point, *below*, if the re-read instruction is erroneous, the fact that it was re-read helps on appeal. On the other hand, if there is an issue of whether an instruction is determinative of an issue in the jury's deliberations, having the written instructions permits them to go through all of the written instructions, and to deliberate the points made in them. Countervailing instructions are available to jurors with a different point of view and the deliberative process is enhanced. The downside of this latter view is that there would be no record that an erroneous instruction was relied on inordinately.

- If the jury rereads instructions that prove to be erroneous, that factor supports a finding that the instruction prejudiced the party opposing that instruction, which may cause reversal [*see, e.g., Mitchell v. Gonzales (1991) 54 C3d 1041, 1055, 1 CR2d 913, 819 P2d 872 ; Lundy v. Ford Motor Co. (2001) 87 CA4th 472, 479, 104 CR2d 545*]. In light of this, counsel with concerns that one or more instructions are erroneous may wish to argue against the jury being provided a copy of the instructions to take to the jury room. Otherwise, counsel will have no ready means of determining whether the purportedly erroneous

instruction (or instructions) were re-read. However, it should be noted that the judge may advise you that the jury is entitled to have a copy of the instructions in the jury room.



Cross Reference:

Prejudice for incorrect instruction, see 16.26[4][a].

In some cases, the jury may ask for assistance in following the jury instructions, for example, to receive a clarification of a term [see, e.g., *Lundy v. Ford Motor Co. (2001) 87 CA4th 472, 476, 104 CR2d 545*].



Strategic Point:

If during deliberations the jury asks for further information with regard to a jury instruction, counsel should take the opportunity to submit a proposed response to address that issue and preserve that response for the record [see, e.g., *Lundy v. Ford Motor Co. (2001) 87 CA4th 472, 476, 104 CR2d 545* (when jury requested clarification of term in jury instructions, only one party submitted proposed response defining term based on four-part dictionary definition; court rejected that definition)]. Note that it is not proper to send a dictionary into the jury room.

Counsel should consult local court rules for the procedure regarding rereading instructions to the jury. At the trial conference in Los Angeles County, the trial judge should request the parties to stipulate in writing and counsel should be encouraged to stipulate that in the absence of any counsel the court may, on the jury's request, read to the jury any or all instructions previously given [Los Angeles Super Ct Rules, Rule 8.20(g)(1)].



Judge's Perspective:

Often times, juries ask questions about the law. Better practice is to have the jury refocus on the instructions given, which often has an answer to their questions. Elaborating or departing from the carefully crafted instructions is an invitation to error.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsGovernmentsCourtsRule Application & Interpretation



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IV. COURT'S INSTRUCTIONS TO JURY

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16.25 Erroneous Jury Instructions That Materially Affect Substantial Rights of Aggrieved Party Are Grounds for New Trial.

The grant of a new trial is a proper remedy for the giving of an erroneous jury instruction when the improper instruction materially affected the substantial rights of the aggrieved party [*CCP* § 657; *Cristler v. Express Messenger Systems, Inc.* (2009) 171 CA4th 72, 82, 89 CR3d 34] .

When a new trial is granted on the basis of an erroneous instruction, the order will not be disturbed unless the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury [*Maher v. Saad* (2000) 82 CA4th 1317, 1325, 99 CR2d 213] .

Example--New Trial Required:

In a discrimination case brought under the FEHA (*Gov Code* § 12900 *et seq.*), the trial court erroneously modified a BAJI instruction that defined "supervisor." After finding that the error impaired the other party's rights under the statute, and incorrectly stated the statutory requirements for liability, the appellate court reversed the judgment and remanded the case for a new trial [*Chapman v. Enos* (2004) 116 CA4th 920, 927-931, 10 CR3d 852] .

Example--New Trial Not Required:

In a discrimination case brought under the FEHA (*Gov Code* § 12900 *et seq.*), the trial court granted a new trial based on purportedly erroneous jury instructions regarding burden of proof. However, the appellate court found that the jury instructions correctly articulated the shifting burden of proof and vacated the order granting a new trial [*Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 CA4th 189, 202, 48 CR2d 448] .

➡ Cross Reference:

See *California Forms of Pleading and Practice*, § 326.33 (Matthew Bender).

Legal Topics:

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

Civil Procedure Trials Jury Trials Jury Instructions General Overview Civil Procedure Judgments Relief From Judgment Motions for New Trials



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16.26 Erroneous Jury Instructions May Be Grounds for Reversal.

16.26[1] No Rule of Automatic Reversal or Inherent Prejudice Applies to Civil Instructional Error. The failure to give instructions may be more or less likely to cause actual prejudice, depending on the nature and context of the omissions. Particularly serious forms of error might almost invariably prove prejudicial in fact. However, courts may not automatically and monolithically treat a particular category of civil instructional error as reversible per se. *Cal Const, art VI, § 13*, requires examination of each individual case to determine whether prejudice actually occurred in light of the entire record. There is no rule of automatic reversal or inherent prejudice applicable to any category of civil instructional error, whether of commission or omission [*Cal Const, art VI, § 13*; *Soule v. General Motors Corp.* (1994) 8 C4th 548, 574, 580, 34 CR2d 607, 882 P2d 298] ; *Major v. Western Home Ins. Co.* (2009) 169 CA4th 1197, 1217, 87 CR3d 556 .

► **Cross Reference:**

See *California Forms of Pleading and Practice*, § 326.43[1] (Matthew Bender); or

California Trial Guide, § 91.20[1] (Matthew Bender).

Jury Instructions:

Requirement of Prejudicial Effect, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.13[1] (Matthew Bender).

16.26[2] Reversal Required Only If Error Resulted in Miscarriage of Justice. Error in instructing the jury is grounds for reversal only when the reviewing court, after an examination of the entire cause, including the evidence, concludes that the error has resulted in a miscarriage of justice [*Cal Const, art VI, § 13*; *Soule v. General Motors Corp.* (1994) 8 C4th 548, 574, 580, 34 CR2d 607, 882 P2d 298 ; *Mitchell v. Gonzales* (1991) 54 C3d 1041, 1054, 1 CR2d 913, 819 P2d 872 ; *Weiner v. Fleischman* (1991) 54 C3d 476, 490, 286 CR 40, 816 P2d 892] .

► **Cross Reference:**

See *California Forms of Pleading and Practice*, § 326.43[1] (Matthew Bender); or

California Trial Guide, § 91.20[1] (Matthew Bender).

Jury Instructions:

When Giving or Failing to Give Instructions Is Appealable, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.13[1] (Matthew Bender).

16.26[3] Reversal Required Only If It Is Probable That Instructional Error Prejudicially Affected Verdict.

An erroneous jury instruction requires reversal if the error was prejudicial [CCP § 475], resulting in a miscarriage of justice [*Cal Const*, art VI, § 13]. A miscarriage of justice occurs when it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error [*Ayala v. Arroyo Vista Family Health Center* (2008) 160 CA4th 1350, 1361, 73 CR3d 486].

Examples--Prejudicial Error:

In a discrimination case brought under the FEHA (*Gov Code* § 12900 *et seq.*), the trial court erroneously modified a BAJI instruction that defined "supervisor." After finding that the error impaired the party's rights under the statute, and incorrectly stated the statutory requirements for liability, the appellate court reversed the judgment and remanded the case for a new trial [*Chapman v. Enos* (2004) 116 CA4th 920, 927-931, 10 CR3d 852] .

In a professional-malpractice case against auditors arising from the auditors' premature withdrawal from the auditing engagement with the plaintiff company, the trial court's erroneous jury instruction on resignation foreclosed the jury's consideration of both the primary issue of liability and the primary defense, to-wit: whether the defendants had good cause to resign as auditors consistent with professional standards. The errors were therefore prejudicial, requiring reversal [*National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 432-434, 72 CR2d 720] .

In a medical-malpractice suit, the trial court committed prejudicial error by refusing the plaintiff's proposed jury instruction on concurrent causation, which would have clarified to the jury that there can be more than one cause of an injury. The appellate court noted that one of the critical issues to be resolved by the jury was causation, and that the principle of concurrent causation was a critical part of the plaintiff's case. The omission of this instruction prevented the plaintiff from receiving a fair trial, requiring a reversal of the judgment for the defendant, which was based on a jury decision finding negligence but not causation [*Logacz v. Limansky* (1999) 71 CA4th 1149, 1156-1166, 84 CR2d 257] .

Example--Nonprejudicial Error:

In a personal-injury action based on negligence, the trial court's omission of a BAJI instruction, "Witness Willfully False" (*now see Judicial Council of California Civil Jury Instructions*, CACI No. 107 (LexisNexis Matthew Bender)), proposed by the defendant, did not constitute prejudicial error. The appellate court found that there was no reasonable probability that had the BAJI instruction been submitted, the jury would have reached a different verdict [*Gargir v. B'Nei Akiva* (1998) 66 CA4th 1269, 1279, 78 CR2d 557] .

 Cross Reference:

California Forms of Pleading and Practice, § 326.43[1] (Matthew Bender).

Jury Instructions:

When Giving or Failing to Give Instructions Is Appealable, see *California Forms of Jury Instruction*, Ch. 1A, MB 100A.13[1] (Matthew Bender).

16.26[4] Determination of Prejudice.

16.26[4][a] Prejudice Is Determined According to Specified Factors, Including Jury's Requested Rereading of Instruction. In assessing prejudice from the giving of an erroneous instruction or the omission of a proposed instruction, the reviewing court considers, insofar as relevant, all of the following factors [*Soule v. General Motors Corp.* (1994) 8 C4th 548, 570-571, 580, 34 CR2d 607, 882 P2d 298 ; *LeMons v. Regents of Univ. of Cal.* (1978) 21 C3d 869, 876, 148 CR 355, 582 P2d 946 ; *Lundy v. Ford Motor Co.* (2001) 87 CA4th 472, 479, 104 CR2d 545 ; *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 432, 72 CR2d 720] :

- The degree of conflict in the evidence on critical issues;
- Whether the respondent's argument to the jury may have contributed to the instruction's misleading effect;
- Whether the jury requested a rereading of the erroneous instruction or of related evidence;
- The closeness of the jury's verdict; and
- The effect of other instructions in remedying the error.

Strategic Point:



This multifactor test is as pertinent in cases of instructional omission as in cases in which instructions were erroneously given [*National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 432, 72 CR2d 720] .



Cross Reference:

See *California Forms of Pleading and Practice*, § 326.43[2] (Matthew Bender).

Strategic Point--Party Seeking to Support Erroneous Omission of Jury Instruction:



An erroneous omission of a jury instruction is less likely to be considered prejudicial if it belongs to that class of instructions said to pertain to mere commonplace matters that jurors are presumed to know about and act on in the absence of being instructed on it [see, e.g., *Gargir v. B'Nei Akiva* (1998) 66 CA4th 1269, 1277, 78 CR2d 557] .

Example:

In a personal-injury action based on negligence, the trial court's omission of a BAJI instruction, "Witness Willfully False" (now see CACI No. 107), proposed by the defendant did not constitute prejudicial error. This instruction includes the following language: "[I]f you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said." The appellate court found that there was no reasonable probability that had the BAJI instruction been submitted, the jury would have reached a different verdict. The court stated that "[t]he instruction merely means what any person of common judgment would know without judicial instruction, that it is the part of wisdom and a duty on the part of jurors to carefully scrutinize with distrust or suspicion the entire testimony of a witness who has willfully perjured himself or herself regarding a material fact in the case" [*Gargir v. B'Nei Akiva* (1998) 66 CA4th 1269, 1277-1279, 78 CR2d 557] .

16.26[4][b] Actual Prejudice Is Assessed in Context of Trial Record. Instructional error requires reversal only when it seems probable that the error prejudicially affected the verdict. That determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place its full case before the

jury. However, the analysis cannot stop there. Actual prejudice must be assessed in the context of the individual trial record. The reviewing court should consider not only the nature of the error, including its natural and probable effect on a party's ability to place its full case before the jury, but the likelihood of actual prejudice as reflected in the individual trial record, taking into account the following [*Soule v. General Motors Corp.* (1994) 8 C4th 548, 580-581, 34 CR2d 607, 882 P2d 298 ; *Chapman v. Enos* (2004) 116 CA4th 920, 931, 10 CR3d 852 ; *National Med. Transp. Network v. Deloitte & Touche* (1998) 62 CA4th 412, 432, 72 CR2d 720] :

- The state of the evidence;
- The effect of other instructions;
- The effect of counsel's arguments; and
- Any indications by the jury itself that it was misled.



Cross Reference:

See *California Forms of Pleading and Practice*, § 326.43[2] (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral
OverviewCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error RuleCivil
ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsPrejudicial ErrorsCivil ProcedureAppealsStandards of
ReviewReversible Errors



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16.27 Request for Jury Instructions.

Request for Jury Instructions.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	REQUEST FOR JURY INSTRUCTIONS
Defendant.	)	
	)	
	)	

Plaintiff/Defendant _____ [name] respectfully requests this court to give the following [numbered CACI] jury instructions as well as any further or additional instructions requested hereafter.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [party's status and name]

NOTES.

Authority:

Cal Rules Ct, Rule 2.1050(a), (e)



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16.28 CACI Form of Proposed Jury Instruction.

CACI Form of Proposed Jury Instruction.

CACI No. _____.

[EITHER]

_____ [Quote text of CACI instruction]. Exact copy of CACI No. _____.

[OR]

_____ [Quote text of CACI instruction with deletion of optional bracketed material]. Exact copy of CACI No. _____, except adaptations.

[OR]

_____ [Quote text of CACI instruction that has been modified, with modifications appearing in parenthesis or indicated by other appropriate means]. CACI No. _____, as modified.

GRANTED: _____

GIVEN AS MODIFIED: _____

REFUSED: _____

WITHDRAWN: _____

_____[signature]
Judge of the Superior Court

NOTES.

Authority:

Cal Rules Ct, Rule 2.1050(a), (e)

Related Jury Instruction Form:

See 16.29

Drafting Instruction:

See 16.06 -16.08



Warning:

Each jury instruction must be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury [*Cal Rules Ct, Rule 2.1055(c)(3)*]. Counsel must completely fill out all instructions and remove blank lines and bracketed material. Use of the *LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI)*, a HotDocs© based document assembly program, to prepare your instructions can save time and increase accuracy.



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16.29 CACI Form of Proposed Jury Instruction--Causation: Multiple Causes.

CACI Form of Proposed Jury Instruction--Causation: Multiple Causes.

CACI No. 431.

A person's negligence may combine with another factor to cause harm. If you find that _____ [name of defendant]'s negligence was a substantial factor in causing _____ [name of plaintiff]'s harm, then _____ [name of defendant] is responsible for the harm. _____ [Name of defendant] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing _____ [name of plaintiff]'s harm.

GRANTED: _____

GIVEN AS MODIFIED: _____

REFUSED: _____

WITHDRAWN: _____

_____[signature]
Judge of the Superior Court

NOTES.

Authority:

Cal Rules Ct, Rule 2.1050(a), (e); Judicial Council of California Civil Jury Instructions, CACI No. 431
(LexisNexis Matthew Bender)

Related Jury Instruction Form:

See 16.28

Drafting Instruction:

See 16.06 -16.08



Warning:

Each jury instruction must be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury [*Cal Rules Ct, Rule 2.1055(c)(3)*]. Counsel must completely fill out all instructions and remove blank lines and bracketed material. Use of the *LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI)*, a HotDocs© based document assembly program, to prepare your instructions can save time and increase accuracy.

Jury Instructions:

Causation: Substantial Factor, see *Judicial Council of California Civil Jury Instructions, CACI No. 430* (LexisNexis Matthew Bender);

Causation: Third-Party Conduct as Superseding Cause, see *Judicial Council of California Civil Jury Instructions, CACI No. 432* (LexisNexis Matthew Bender);

Causation: Intentional Tort/Criminal Act as Superseding Cause, see *Judicial Council of California Civil Jury Instructions, CACI No. 433* (LexisNexis Matthew Bender);

Alternative Causation, see *Judicial Council of California Civil Jury Instructions, CACI No. 434* (LexisNexis Matthew Bender)



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Chapter 16 Jury Instructions
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16.30 General Form of Proposed Jury Instruction.

General Form of Proposed Jury Instruction.

[PLAINTIFF/DEFENDANT]'S PROPOSED INSTRUCTION

NO. _____

You are instructed that _____ [*text of instruction*].

GRANTED: _____

GIVEN AS MODIFIED: _____

REFUSED: _____

WITHDRAWN: _____

Judge of the Superior Court [signature]

Authorities:

NOTES.

Authority:

Cal Rules Ct, Rule 2.1050(e)



Warning:

Each jury instruction must be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury [*Cal Rules Ct, Rule 2.1055(c)(3)*]. Counsel must completely fill out all instructions and remove blank lines and bracketed material. Use of the *LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions (CACI)*, a HotDocs© based document assembly program, to prepare your instructions can save time and increase accuracy.



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Chapter 17 Dealing With the Jury

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.syn

§ 17.syn Synopsis to Chapter 17: Dealing With the Jury

17.01 Scope.

17.02 Objective and Strategy.

17.03 CHECKLIST: Acquainting Jury With Court Procedures at Start of Trial.

17.04 Options and Strategies for Acquainting Jury With Court Procedures at Start of Trial.

17.05 Court Provides Pretrial Instructions to Jurors.

17.05[1] Court Will Admonish Jurors Regarding Expected Conduct.

17.05[2] Court Should Provide "Roadmap" Instruction to Jurors.

17.05[3] Local Rules May Specify Pretrial Instructions to Be Given.

17.05[4] Counsel May Make Opening Statements to Jury Panel.

17.06 Counsel Should Use Opening Statement to Orient Jurors to Trial Procedures.

17.07 Judge Must Admonish Jury Before Separation.

17.08 Jurors May Take Notes of Proceedings.

17.08[1] Court Will Provide Pencils and Note Pads.

17.08[2] Jurors Leave Note Pads in Courtroom During Recess.

17.08[3] Jurors May Use Note Pads During Deliberations.

17.08[4] Jurors Will Be Cautioned Not to Let Note-Taking Interfere With Listening.

17.08[5] In Complex Cases, Counsel Should Provide Notebooks to Jurors.

17.09 Jurors Should Direct Procedural Questions to Bailiff.

17.10 Foreperson Should Write Substantive Questions for Court.

17.11 Court May Accommodate Ill or Otherwise Unavailable Juror or Replace With Alternate Juror Before Deliberations.

17.11[1] Court Has Discretion to Recess Trial When Juror Is Temporarily Unavailable.

17.11[2] Court May Dismiss Juror on Request If Good Cause Appears.

17.11[3] Court May Appoint Alternate to Replace Deceased, Ill, or Otherwise Unavailable Juror.

17.11[3][a] Alternates Receive Instructions at Beginning of Trial.

17.11[3][b] Alternates Listen to Testimony As If They Were Selected Jurors.

17.11[3][c] If Alternate Is Needed, Court Draws Alternate's Name.

17.11[4] If No Alternate Is Available, Parties May Agree to Proceeding With Trial.

17.11[4][a] Parties May Stipulate to Proceeding With Remaining Jurors.

17.11[4][b] Parties May Stipulate to Swearing in New Juror to Join Remaining Jurors and Beginning Trial Anew.

17.11[4][c] If Parties Will Not Stipulate, Jury Must Be Discharged.

17.12 Jurors Will Be Notified of Their Duties.

17.12[1] Jurors Are Exclusive Judges of all Questions of Fact.

17.12[2] Jurors Must Follow Law As Provided in Instructions.

17.13 CHECKLIST: Addressing Jurors' Questions to Witnesses During Trial.

17.14 Options and Strategies for Addressing Jurors' Questions to Witnesses During Trial.

17.15 Jurors May Not Question Witnesses Directly.

17.16 Jurors Should Put Questions in Writing.

17.17 Judge Has Discretion Whether to Allow Jurors to Question Witnesses.

17.17[1] Trial Judge May Consult Counsel to Discuss Response.

17.17[2] Jurors Should Not Guess at Reason If Question Is Not Asked.

17.17[3] Judge Has Ultimate Discretion in Whether to Ask Question.

17.18 CHECKLIST: Discovering and Dealing With Jury Misconduct During Trial.

17.19 Options and Strategies for Discovering and Dealing With Jury Misconduct During Trial.

17.20 Jurors May Not Discuss Case or Form Opinion.

17.20[1] Jurors May Not Discuss Case With Each Other Before Case Is Submitted to Jury.

17.20[2] Jurors May Not Pre-Judge Case.

17.20[3] Jurors May Not Discuss Case With Court Staff.

17.20[4] Jurors May Not Discuss Case With Attorneys, Parties, or Witnesses.

17.20[5] Jurors May Not Discuss Case With Anyone Else.

17.20[6] Jurors May Discuss Subjects Unrelated to Case With Others.

17.21 Jurors May Not Consider Material Outside Record.

17.21[1] Jurors May Not Conduct Own Investigation or Visit Scene.

17.21[2] Jurors May Not Conduct Experiments.

17.21[3] Jurors May Not Solicit Outside Opinions.

17.21[4] Jurors May Not Expose Themselves to Media Reports.

17.21[5] Jurors May Not Use Their Own Expertise Regarding Matters at Issue.

17.21[6] Jurors May Not Provide Their Own Translation of Testimony.

17.22 Jurors Must Be Attentive.

17.22[1] Jurors May Not Read or Do Puzzles During Testimony.

17.22[2] Jurors May Not Consume Alcohol.

17.22[3] Jurors May Not Sleep During Testimony.

17.23 Jurors May Bring Misconduct to Court's Attention.

17.24 Counsel Must Alert Court to Juror Misconduct.

17.24[1] Counsel Waives Issue of Juror Misconduct Once Verdict Is Rendered.

17.24[2] Counsel Should Request a Hearing Regarding Juror Misconduct.

17.24[3] Counsel Should Put Information Regarding Misconduct on Record.

17.25 Court Has Discretion in Responding to Juror Misconduct.

17.25[1] Court Engages in Fact Finding to Determine If Misconduct Occurred.

17.25[2] Court Can Admonish Juror or Jurors.

17.25[3] Court Can Replace Juror.

17.25[4] Court Can Issue Contempt Citation.

17.25[5] Court Can Order Mistrial.

17.25[6] Court Can Order New Trial.

17.25[7] Parties Can Address Misconduct on Appeal.

17.26 CHECKLIST: Instructing Jury.

17.27 Options and Strategies for Instructing Jury.

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17.32 Options and Strategies for Addressing Issues Arising During Deliberations and Replacing Juror After Deliberations Have Started.

17.33 Jurors May Ask Questions During Deliberations.

17.33[1] Jury Foreperson Should Put Question in Writing.

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17.34 Jurors May Want to Have Testimony Reread During Deliberations.

17.34[1] Jurors Should Put Request in Writing.

17.34[2] Court Reporter Reads Testimony in Presence of or After Notice to Counsel.

17.35 Jurors May Request Rereading of Original Instructions or New Instructions.

17.35[1] Judge Must Give Jury Written Copy of Instructions on Request.

17.35[2] Court Can Deny Request for Rereading.

17.35[3] Court Can Deny Request to Expand on Original Instructions.

17.36 Jurors May Ask to Visit or Revisit Scene of Incident.

17.37 Jurors May Request Exhibits.

17.37[1] Jurors May Take Exhibits Deemed Proper by Court.

17.37[2] Jurors May Not Take Depositions Into Jury Room.

17.38 Court May Need to Replace Juror During Deliberations With Alternate Juror.

17.38[1] Replacement Required Due to Illness or Inability to Perform.

17.38[2] If Court Appoints Alternate Juror, Jury Must Begin Deliberations Again.

17.38[3] If There Are No Alternate Jurors Available, Parties May Enter Into Stipulation.

17.38[3][a] Parties May Stipulate to Deliberations With Remaining Jurors.

17.38[3][b] Parties May Stipulate That Trial Begin Anew With New Juror.

17.38[4] If Parties Do Not Agree on Stipulation, Jury Will Be Discharged.

17.39 Responding to Jury's Claim of Being Deadlocked Because Sufficient Jurors Cannot Agree on Verdict.

17.39[1] Court May Admonish Jurors Regarding Importance of Reaching Verdict.

17.39[2] Court's Instructions May Not Coerce Jury Into Reaching Verdict.

17.40 Jurors May Alert Court to Jury Misconduct During Deliberations.

17.40[1] Jurors May Not Engage in Activities During Deliberations That Constitute Misconduct During Trial.

17.40[2] Jurors May Inform Court That Jurors Engaged in Prohibited Conduct.

17.40[2][a] Jurors May Not Reach "Chance" Verdict.

17.40[2][b] Jurors May Not Refuse to Deliberate.

17.40[2][c] Jurors May Not Ignore Instructions.

17.40[2][d] Jurors May Not Bring Outside Items Into Jury Room.

17.40[3] Counsel or Party May Learn of Misconduct Following Verdict.

17.41 Notice of Motion and Motion to Remove Juror.

17.42 Declaration in Support of Motion to Remove Juror.

17.43 Order Removing Juror.

17.44 Stipulation to Continue Trial With Remaining Jurors.

17.45 Stipulation to Begin Trial Anew With New Juror.

17.46 Stipulation to Deliberate With Remaining Jurors.



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Chapter 17 Dealing With the Jury
I. STRATEGY

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.01

17.01 Scope.

This chapter covers:

- Objectives and strategy for dealing with the jury [see 17.02].
- The manner in which the court and attorneys will acquaint the jury with court procedures at the beginning of trial [see 17.03 -17.12; Forms: [see 17.44, 17.45].
- Proper procedures when a juror has a question for a witness during trial [see 17.13 -17.17].
- Discovering and dealing with jury misconduct during trial, before the commencement of deliberations [see 17.18 -17.25; Forms: [see 17.41 -17.43].
- The mechanics of the court's instructions to the jury [see 17.26 -17.30].
- Handling jurors' requests for information during deliberations [see 17.31 -17.37].
- Replacement of one or more jurors during deliberations [see 17.38; Forms: [see 17.45, 17.46].
- The issue of juror misconduct during deliberations [see 17.39; Forms: [see 17.41 -17.43, 17.45, 17.46].

Core Statutes:

CCP §§ 233, 234, 611-619.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil
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Chapter 17 Dealing With the Jury
I. STRATEGY

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17.02 Objective and Strategy.

Although the court provides both the pretrial and pre-deliberation instructions to the jury, counsel still has an important role in dealing with the jury. Counsel should be keenly aware of proper juror conduct in the event a jury misconduct issue arises during trial. In addition, counsel may need to make a decision as to the best recourse if misconduct arises during deliberations. Counsel will also be involved in the decision-making process if the jurors have questions or request more information during deliberations. Finally, to the extent counsel will have input as to the procedural instructions the court reads to the jury, counsel should be aware of the options for those instructions.

Strategic Point:



The court instructs the jury and has a large amount of discretion in matters concerning the jury. The major roles of counsel in dealing with the jury include the following:

- Using the opening statement to orient the jury.
- Determining whether to stipulate to proceeding with 11 jurors or swearing in a new juror if a juror is unavailable and there is no alternate to step in.
- Being prepared to alert the court to juror misconduct: counsel should place this information on the record and request a hearing.
- Potentially moving for a mistrial or new trial in the event of juror misconduct.
- Using any juror misconduct as a potential ground for appeal.
- Conferring with the court and other counsel in the event the jurors have questions or want testimony read during deliberations.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 322, Juries and Jury Selection; Ch. 551, Trial (Matthew

Bender).

California Trial Guide, §§ 91.01 et seq., 91.10 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 ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil
ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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II. ACQUAINTING JURY WITH COURT PROCEDURES AT START OF TRIAL

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17.03 CHECKLIST: Acquainting Jury With Court Procedures at Start of Trial.

☐ Request that the court give the jurors the preliminary admonitions and overview of trial.

☐ Court is strongly encouraged to use CACI instructions.

☐ Check to see whether local rules specify pretrial instructions.

Authority:

Cal Rules of Ct, Rule 2.1050(e)

Discussion:

See 17.05

☐ Use opening statement to help orient jurors to the trial.

☐ General nature of action and defense.

☐ Facts to support the action or defense.

☐ Define issues.

☐ Outline facts counsel intends to prove.

Authority:

CCP § 607

Discussion:

See 17.06

- ☐ Be aware that jurors may be taking notes, and whether they may take notes varies from judge to judge.

Authority:

Los Angeles Super Ct Rules, Rule 8.38

Discussion:

See 17.08

- ☐ Be aware of options if juror becomes ill or otherwise unavailable during trial.

- ☐ Temporary recess of trial.

Authority:

CCP § 74

Discussion:

See 17.11[1]

- ☐ Appointment of alternate.

Authority:

CCP § 234

Discussion:

See 17.11[3]

- ☐ Proceed with remaining jurors if alternate is unavailable.

Authority:

CCP § 233

Discussion:

See 17.11[4][a]

Form:

See 17.46

- ☐ Swear in new juror if alternate unavailable.

Authority:

CCP § 233

Discussion:

See 17.11[4][b]

Form:

See 17.45

- ☐ Discharge juror if parties will not stipulate to options above.

Authority:

CCP § 233

Discussion:

See 17.11[4][c]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral
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17.04 Options and Strategies for Acquainting Jury With Court Procedures at Start of Trial.

At the final pretrial conference, counsel should clarify with the court all of the instructions that will be given to the jury at the start of trial, including any statements about the case. Normally, statements about the case must be agreed by the parties, and most courts will require a statement. If no statement is agreed, the court may simply allow counsel to commence trial. However, some introductory instructions are important, including what time to report each morning, and admonitions not to discuss the case with anyone before the start of deliberations.

The court will normally preinstruct the jury on procedures; this is one element that is usually covered in the final pretrial conference. Courts have expansive discretion in how to instruct jurors at the outset of a trial. Counsel should inquire as to the court's practice in instructing the jurors, including instructions concerning bathrooms and break rooms, what to do about coming to court daily, and all other practical details. Most courts have juror programs that provide such information and most judges are aware of the need to provide useful information to jurors.

 Cross Reference:

Discussion of court's directions to jury, see *17.05*.

Most courts will present a short statement to the jury, after it is empaneled, concerning the case. Usually this is a stipulated statement from counsel, and should also be covered during the final pretrial conference.

 Cross Reference:

Discussion of final pretrial conference, see Ch. 4, Final Pretrial Conference.

Counsel should ask the court to instruct jurors about not communicating with counsel, visually or verbally, and that jurors should excuse counsel's required reluctance to engage the jurors by eye contact or otherwise, which can be mistaken for rudeness. Jurors should be told to report to the clerk or bailiff any incidents where counsel or parties attempt contact, either eye contact or oral contact, with jurors during trial.

 Cross Reference:

Prohibitions on discussing case, see *17.20*.

Counsel may refer to juror procedures during opening statements. Counsel should indicate to a jury, during opening statement, that the opening statement and closing argument, as with voir dire (to the extent that was permitted) are the only times that counsel are permitted to communicate with a juror during trial.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewGovernmentsCourtsRule Application & Interpretation



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17.05 Court Provides Pretrial Instructions to Jurors.

17.05[1] Court Will Admonish Jurors Regarding Expected Conduct. At the outset, the court will admonish the jury regarding the rules that remain in effect throughout the trial [see *CCP* § 611].

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).



Cross References:

Discussion of admonitions at the end of each court day, see 17.07.

Discussion of prohibited juror conduct, see 17.20 -17.22.

17.05[2] Court Should Provide "Roadmap" Instruction to Jurors. Immediately after the jury is sworn, the trial judge may, in his or her discretion, preinstruct the jury concerning the elements of the charges or claims, its duties, its conduct, the order of proceedings, the procedure for submitting written questions for witnesses as set forth in *Cal Rules Ct, Rule 2.1033* [see 17.10] if questions are allowed, and the legal principles that will govern the proceeding [*Cal Rules Ct, Rule 2.1035*; see *CCP* § 607 (order of proceedings)].

Jury Instructions:

Overview of Trial, see *Judicial Council of California Civil Jury Instructions, CACI No. 101* (LexisNexis Matthew Bender).

17.05[3] Local Rules May Specify Pretrial Instructions to Be Given. The local rules for a particular county may provide greater detail regarding the substance of the pretrial instructions and admonitions. For example, Los Angeles County local court rules require jurors and alternates to be instructed regarding the following matters [*e.g.*, Los Angeles Super Ct Rules, Rule 8.37]:

- The prohibition against communicating about the trial.

- The prohibition against conducting an independent investigation.
- Jurors should transmit questions through the bailiff.
- Jurors should wear their badges throughout the day.
- The bailiff will attend to the jurors' needs as to facilities and supplies.
- The jurors will be supplied with note pads and pencils.
- The hours, schedule, and phone number of the court.
- Any substantive pre-instructions, in the discretion of the judge.
- That the opening statement is not evidence.

Cross References:

Discussion of admonitions at the end of each court day, see *17.07*.

Discussion of juror note-taking, see *17.08*.

Discussion of prohibited conduct for jurors, see *17.20*.

17.05[4] Counsel May Make Opening Statements to Jury Panel. Before the examination of prospective jurors, the trial judge may, in his or her discretion, permit brief opening statements by counsel to the jury panel [*Cal Rules Ct, Rule 2.1034*]. The 2007 California Rules of Court [*see Cal Rules Ct, Rules 2.1030-2.1036*] should be raised with the court at the final pretrial conference, if not earlier, to determine what discretionary procedures the court prefers.

Legal Topics:

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

Civil ProcedurePretrial MattersConferencesFinal Pretrial ConferencesCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewGovernmentsCourtsRule Application & Interpretation



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17.06 Counsel Should Use Opening Statement to Orient Jurors to Trial Procedures.

The court must allow the parties to make opening statements [CCP § 607]. Counsel may use the opening statement to briefly discuss the nature of the action and defense, the facts relied on by the client to support the action or defense, the matters at issue in the case, and the evidence counsel expects to present in support of the client's position [see, e.g., *Hawk v. Superior Court* (1974) 42 CA3d 108, 121, 116 CR 713] .



Cross Reference:

Discussion of opening statements generally, see Ch. 10, Opening Statement.

Legal Topics:

For related research and practice materials, see the following legal topics:
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17.07 Judge Must Admonish Jury Before Separation.

When the jury is permitted to separate, the court must admonish them that it is their duty not to converse with, or allow themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion on the trial until the case is finally submitted to them [CCP § 611].

Distinguish:

Courts may have their own specific local rules regarding when exactly the court needs to admonish the jury. For example, Los Angeles County Superior Court's local rules provide that in the absence of a stipulation waiving the necessity therefor, the court must admonish the jury at the conclusion of each court day and whenever the jury is permitted to separate overnight [Los Angeles Super Ct Rules, Rule 8.54].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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17.08 Jurors May Take Notes of Proceedings.

17.08[1] Court Will Provide Pencils and Note Pads. Jurors must be permitted to take written notes in all civil trials. At the beginning of a trial, the court must inform jurors that they may take written notes during the trial. The court must provide materials suitable for this purpose [*Cal Rules Ct, Rule 2.1031*]. Courts may also have local rules on this procedure [*see, e.g., Los Angeles Super Ct Rules, Rule 8.38*].

Jury Instructions:

Taking Notes During the Trial, *see Judicial Council of California Civil Jury Instructions, CACI No. 102* (LexisNexis Matthew Bender).

17.08[2] Jurors Leave Note Pads in Courtroom During Recess. The bailiff generally collects the note pads at the conclusion of the court day and maintains them in a secure place until the next session of court [*see, e.g., Los Angeles Super Ct. Rules, Rule 8.37*].

17.08[3] Jurors May Use Note Pads During Deliberations. The jurors may take their note pads into the jury room with them for use during deliberations. However, a juror's independent recollection of the evidence should govern the verdict and a juror should not allow himself or herself to be influenced by the notes of other jurors [*see People v. Whitt (1984) 36 C3d 724, 747, 205 CR 810, 685 P2d 1161*].

Jury Instructions:

Taking Notes During the Trial, *see Judicial Council of California Civil Jury Instructions, CACI No. 102* (LexisNexis Matthew Bender).

17.08[4] Jurors Will Be Cautioned Not to Let Note-Taking Interfere With Listening. The jurors should not let note-taking interfere with their ability to listen carefully to all of the testimony and to watch the witnesses as they testify [*see People v. Whitt (1984) 36 C3d 724, 747, 205 CR 810, 685 P2d 1161*].

Jury Instructions:

Taking Notes During the Trial, *see Judicial Council of California Civil Jury Instructions, CACI No. 102* (LexisNexis Matthew Bender)].

17.08[5] In Complex Cases, Counsel Should Provide Notebooks to Jurors. A trial judge should encourage counsel in complex civil cases to include key documents, exhibits, and other appropriate materials in notebooks for use by jurors during trial to assist them in performing their duties [*Cal Rules Ct, Rule 2.1032*].



Cross References:

Discussion of procedures in complex cases, see Deskbook on Complex Civil Litigation (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsNotes



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II. ACQUAINTING JURY WITH COURT PROCEDURES AT START OF TRIAL

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.09

17.09 Jurors Should Direct Procedural Questions to Bailiff.

If a juror has a question, for example regarding scheduling, he or she should direct it to the bailiff or court attendant [see, e.g., Los Angeles Super Ct Rules, Rule 8.37]. The jurors should also report attempts to communicate about the case to the bailiff or court attendant [see *Garden Grove Sch. Dist. v. Hendler* (1965) 63 C2d 141, 144, 45 CR 313, 403 P2d 721] .

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

Questions From Jurors, see *Judicial Council of California Civil Jury Instructions, CACI No. 112* (LexisNexis Matthew Bender).

Distinguish:

Although jurors should direct their procedural questions to the bailiff or court attendant, they must place questions for witnesses in writing and transmit them to the court through the bailiff or other courtroom staff. If a juror has a substantive question about the case, the jury foreperson should write the question and submit it to the court [see, e.g., Los Angeles Super Ct Rules, Rule 8.55].



Cross References:

Discussion of jurors' questions for witnesses, see 17.14 -17.17.

Discussion of jurors' questions during deliberations, see 17.33.

Legal Topics:

For related research and practice materials, see the following legal topics:
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17.10 Foreperson Should Write Substantive Questions for Court.

A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury [*Cal Rules Ct, Rule 2.1033*].

If a juror has a substantive question regarding the case, the trial judge should instruct the foreperson to write the question and submit it to the court through the bailiff or court attendant. On receipt of the question, the judge should review it with counsel outside the jury's presence and discuss with counsel an appropriate answer to be given to the jury. This conference should be reported on the record and the answer to the question should be stated to the jury in open court or written on the question form and returned to the jury. In the absence of a stipulation to the contrary, the written question and answer should be made part of the record [*Los Angeles Super Ct Rules, Rule 8.55*].

Record Keeping:

One of the key reasons for writing the questions is that these notes will be admitted into evidence so they are available for post-trial review.



Cross Reference:

Discussion of questions during deliberations, see 17.33.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Deliberations



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1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.11

17.11 Court May Accommodate Ill or Otherwise Unavailable Juror or Replace With Alternate Juror Before Deliberations.

17.11[1] Court Has Discretion to Recess Trial When Juror Is Temporarily Unavailable. If a juror is ill or unavailable for a brief time, the court may choose to call a recess [*see CCP § 74*].

17.11[2] Court May Dismiss Juror on Request If Good Cause Appears. The court may discharge a juror on the juror's own request when good cause appears for the discharge [*CCP §§ 233, 234*].

17.11[3] Court May Appoint Alternate to Replace Deceased, Ill, or Otherwise Unavailable Juror.

17.11[3][a] Alternates Receive Instructions at Beginning of Trial. During the pre-instructions phase, the court will instruct the alternates that they are bound by the same rules that govern the conduct of the jurors who are sitting on the panel [*CCP § 234*].

Jury Instructions:

Instruction to Alternate Jurors, see *Judicial Council of California Civil Jury Instructions, CACI No. 111* (LexisNexis Matthew Bender).

17.11[3][b] Alternates Listen to Testimony As If They Were Selected Jurors. Alternate jurors must be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and must take the same oath as the jurors already selected and must, unless excused by the court, attend at all times on the trial of the cause [*CCP § 234*].

17.11[3][c] If Alternate Is Needed, Court Draws Alternate's Name. If an alternate juror is needed to replace a deceased, ill, or otherwise unavailable juror, the court may draw the name of an alternate, who then takes his or her place in the jury box and is subject to the same rules and regulations as though selected as one of the original jurors [*CCP § 234*]. Typically the court draws the alternate's name, but sometimes there is a prior determination of what the order will be.

► Cross References:

Discussion of substitution of alternates during deliberations, see 17.38.

Discussion of replacing juror for misconduct, see 17.25[4].

Discussion of selection of alternate jurors, see *Ch. 6, Jury Selection*, 6.08[4].

17.11[4] If No Alternate Is Available, Parties May Agree to Proceeding With Trial.

17.11[4][a] Parties May Stipulate to Proceeding With Remaining Jurors. If a juror becomes unavailable and there is no alternate juror, the parties may stipulate that the trial and deliberations proceed with the remaining jurors [CCP § 233].

Consider:

In some courts, the judge may ask the parties to enter into such a stipulation during the pretrial conference [see, e.g., Los Angeles Super Ct Rules, Rule 8.20(c)].



Strategic Point:

Counsel being asked to stipulate to have the trial proceed in a trial where the requisite number of jurors is not present should consider whether those who remain are more or less inclined to return a verdict in favor of the party being asked to stipulate. If an attorney believes he or she "lost" someone on the jury who was leaning in favor of the interests of the party represented by that attorney who now will not be replaced, that attorney should consider not stipulating to proceed. The result of refusing to do so will be a mistrial with the consequent expense the party will incur. This may, or may not, be a significant factor as this new expense may lead to settlement opportunities that did not previously exist.



Cross References:

Form, see 17.44.

Discussion of continuing deliberations with remaining jurors, see 17.38[3][a].

17.11[4][b] Parties May Stipulate to Swearing in New Juror to Join Remaining Jurors and Beginning Trial Anew. If a juror becomes unavailable and there is no alternate juror, the parties may stipulate that a new juror be sworn and the trial begin anew [CCP § 233].



Cross References:

Form, see 17.45.

Discussion of swearing in new juror and beginning trial anew once deliberations have started, see 17.38[3][b].

17.11[4][c] If Parties Will Not Stipulate, Jury Must Be Discharged. If a juror becomes unavailable and the parties are unwilling to stipulate to proceeding either with the remaining jurors or to swearing in a new juror and beginning the trial anew, the jury must be discharged and a new jury impaneled [CCP § 233].



Strategic Point:

Many attorneys will not stipulate to proceeding with less than all jurors, and do not expect that the other side will do so. If the court is concerned, sufficient alternates must be provided. The decision whether to

stipulate may turn on whether the remaining jurors, after all alternates have been used, are seen as favorable to the party deciding whether to stipulate. This is difficult if being asked at the pretrial conference, and it is probably prudent not to agree to less than a full jury. If the case is likely to be a long one, the issue is whether after, for example, two months, counsel will want to retry the case for want of one or two jurors. That should depend on the facts and strength of the case and the client's resources and stamina, and the parties would have to agree, virtually in a vacuum, on the procedure if it is not the normal one. Failing to stipulate will lead to additional expenses to the parties which may, or may not, be a significant factor in making the decision whether or not to stipulate.

**Cross Reference:**

Discussion of mistrial, see Ch. 22, Mistrial.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJurorsRemovals



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17.12 Jurors Will Be Notified of Their Duties.

17.12[1] Jurors Are Exclusive Judges of all Questions of Fact. The court must inform the jury that they are the exclusive judges of all questions of fact. The jurors must decide the facts based on the evidence admitted in the trial [CCP § 608; see also Evid Code § 312(a)].

Jury Instructions:

Duties of the Judge and Jury, see *Judicial Council of California Civil Jury Instructions, CACI No. 5000* (LexisNexis Matthew Bender).



Cross Reference:

Discussion of factual or legal investigation as juror misconduct, see 17.21.

17.12[2] Jurors Must Follow Law As Provided in Instructions. The jurors must follow the law exactly as the judge gives it to them, even if they disagree with it [see CCP § 608].

Jury Instructions:

Duties of the Judge and Jury, see *Judicial Council of California Civil Jury Instructions, CACI No. 5000* (LexisNexis Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & Jury



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Chapter 17 Dealing With the Jury
III. ADDRESSING JURORS' QUESTIONS TO WITNESSES DURING TRIAL

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.13

17.13 CHECKLIST: Addressing Jurors' Questions to Witnesses During Trial.

☐ Be aware that jurors may not ask questions directly of witnesses.

Authority:

People v. Cummings (1993) 4 C4th 1233, 1305, 18 CR2d 796, 850 P2d 1

Discussion:

See 17.15

☐ If a juror submits a written question for a witness:

☐ Judge will consult with attorneys to determine whether question should be asked.

Authority:

Questions From Jurors, see *Judicial Council of California Civil Jury Instructions, CACI No. 112* (LexisNexis Matthew Bender)

Discussion:

See 17.17[1]

☐ If question is allowable, judge will determine whether to ask it himself/herself or leave it up to the attorneys.

Authority:

People v. Cummings (1993) 4 C4th 1233, 1305, 18 CR2d 796, 850 P2d 1

Discussion:

See 17.17[3]

☐ If judge leaves it up to discretion of attorneys, determine whether to ask the question of the witness.

Authority:

People v. Cummings (1993) 4 C4th 1233, 1305, 18 CR2d 796, 850 P2d 1

Discussion:

See 17.17[1]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Deliberations



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17.14 Options and Strategies for Addressing Jurors' Questions to Witnesses During Trial.

At the beginning of the trial, the judge will instruct the jury regarding proper procedures if a juror has a question for a witness. The judge will most likely consult the attorneys regarding the juror's question and then either ask the question himself or herself, leave it up to the attorneys to ask the question, or decide that the question should not be asked. Sometimes the judge may not consult with counsel before asking the juror question, and counsel should be prepared to politely ask the court for a sidebar or chambers conference to review the matter.

Strategic Points:



- If the judge leaves the decision to the attorneys on whether a jury question may be asked, the decision may turn on whether the question to be asked is likely to promote a favorable response. In general, it is safer to have the court ask the jury's question.
- A delicate issue presents itself when an attorney must object to a question which is being asked for the benefit of a juror. The objecting attorney must weigh whether the benefit of having the objection sustained outweighs the possibility members of the jury will become irritated with the attorney for seemingly interfering with its quest for further information.
- Be sure to think about why the juror asked the question, and try to address that root concern.

Legal Topics:

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

Civil Procedure Trials Jury Trials Jurors General Overview Civil Procedure Trials Jury Trials Jury Deliberations



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17.15 Jurors May Not Question Witnesses Directly.

Jurors may not directly question witnesses [*People v. Cummings* (1993) 4 C4th 1233, 1305, 18 CR2d 796, 850 P2d 1] .



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17.16 Jurors Should Put Questions in Writing.

A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury [*Cal Rules Ct, Rule 2.1033*]. If a juror has a question to ask of a witness, the juror may write out the question and send it to the judge through the judge's courtroom staff [*see People v. McAlister (1985) 167 CA3d 633, 644, 213 CR 271*].

Jury Instructions:

Questions From Jurors, see *Judicial Council of California Civil Jury Instructions, CACI No. 112* (LexisNexis Matthew Bender).

Record Keeping:

One of the key reasons for writing the questions is that these notes will be admitted into evidence so they are available for post-trial review.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Deliberations



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17.17 Judge Has Discretion Whether to Allow Jurors to Question Witnesses.

17.17[1] Trial Judge May Consult Counsel to Discuss Response. The trial judge will share the juror's question with the attorneys. The judge may decide to leave it to the discretion of counsel as to whether counsel should ask the witness the juror's question [*see, e.g., People v. Cummings (1993) 4 C4th 1233, 1305, 18 CR2d 796, 850 P2d 1*].

Jury Instructions:

Questions From Jurors, see *Judicial Council of California Civil Jury Instructions, CACI No. 112* (LexisNexis Matthew Bender).

17.17[2] Jurors Should Not Guess at Reason If Question Is Not Asked. The jurors should not try to guess at why a submitted question is not asked, because there may be legal reasons.

Jury Instructions:

Questions From Jurors, see *Judicial Council of California Civil Jury Instructions, CACI No. 112* (LexisNexis Matthew Bender).

17.17[3] Judge Has Ultimate Discretion in Whether to Ask Question. The decision of whether to allow a juror to ask a question is left to the discretion of the judge [*Cal Rules Ct, Rule 2.1033; People v. Cummings (1993) 4 C4th 1233, 1305, 18 CR2d 796, 850 P2d 1*].

Jury Instructions:

Questions From Jurors, see *Judicial Council of California Civil Jury Instructions, CACI No. 112* (LexisNexis Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsJury Deliberations



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1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.18

17.18 CHECKLIST: Discovering and Dealing With Jury Misconduct During Trial.

☐ Be aware of behavior that constitutes juror misconduct.

☐ Jurors may not discuss case with each other before commencement of deliberations.

Authority:

People v. Kramer (1897) 117 C 647, 649, 49 P 842 ; Los Angeles Super Ct Rules, Rules 8.37, 8.54

Discussion:

See 17.20[1]

☐ Jurors may not form an opinion on the case before the commencement of deliberations.

Authority:

CCP § 611

Discussion:

See 17.20[2]

☐ Jurors may not discuss the case with court staff.

Authority:

CCP § 611; Los Angeles Super Ct Rules, Rule 8.37

Discussion:

See 17.20[3]

- ☐ Jurors may not discuss the case with attorneys, parties, or witnesses.

Authority:

Garden Grove Sch. Dist. v. Hendler (1965) 63 C2d 141, 144-145, 45 CR 313, 403 P2d 721

Discussion:

See 17.20[4]

- ☐ Jurors may not discuss the case with others, such as family members, co-workers, neighbors, or clergy.

Authority:

CCP § 611

Discussion:

See 17.20[5]

- ☐ Jurors may not conduct their own investigation or visit the scene of any incident involved in the case.

Authority:

Lankster v. Alpha Beta Co. (1993) 15 CA4th 678, 682, 18 CR2d 923 ; Los Angeles Super Ct Rules, Rule 8.37

Discussion:

See 17.21[1]

- ☐ Jurors may not conduct experiments.

Authority:

Bell v. California (1998) 63 CA4th 919, 930-933, 74 CR2d 541 ; Los Angeles Super Ct Rules, Rule 8.37

Discussion:

See 17.21[2]

- ☐ Jurors may not solicit outside opinions, expert or otherwise.

Authority:

Weathers v. Kaiser Found. Hosps. (1971) 5 C3d 98, 106-107, 95 CR 516, 485 P2d 1132

Discussion:

See 17.21[3]

- ☐ Jurors may not watch or read media reports about the case.

Authority:

Hilliard v. A.H. Robins Co. (1983) 148 CA3d 374, 408, 196 CR 117

Discussion:

See 17.21[4]

- ☐ Jurors may not use their own expertise in deciding the case.

Authority:

In re Malone (1996) 12 C4th 935, 963, 50 CR2d 281, 911 P2d 468

Discussion:

See 17.21[5]

- ☐ Jurors may not use their own translation of testimony.

Authority:

People v. Cabrera (1991) 230 CA3d 300, 304-305, 281 CR 238

Discussion:

See 17.21[6]

- ☐ Jurors may not sleep, read, or do puzzles during the presentation of evidence or arguments.

Authority:

Boeken v. Philip Morris, Inc. (2004) 127 CA4th 1640, 1688, 26 CR3d 638

Discussion:

See 17.22[1], [3]

- ☐ Jurors may not consume alcohol during the presentation of evidence, arguments, or on lunch breaks.

Authority:

People v. Cox (1991) 53 C3d 618, 695-696, 280 CR 692, 809 P2d 351

Discussion:

See 17.22[2]

- ☐ Be aware that jurors may bring misconduct to court's attention.

Authority:

People v. McNeal (1979) 90 CA3d 830, 835-839, 153 CR 706

Discussion:

See 17.23

- ☐ If counsel has information regarding possible juror misconduct, counsel should tell the court immediately.

Authority:

Weathers v. Kaiser Found. Hosps. (1971) 5 C3d 98, 103, 95 CR 516, 485 P2d 1132

Discussion:

See 17.24[1]

- ☐ Counsel should request a hearing regarding the alleged misconduct.

Authority:

People v. Ray (1996) 13 C4th 313, 343, 52 CR2d 296, 914 P2d 846

Discussion:

See 17.24[2]

- ☐ Counsel should place all proceedings regarding the alleged misconduct on the record in the presence of the judge, all attorneys, and all parties.

Authority:

People v. Williams (1997) 16 C4th 153, 213, 66 CR2d 123, 940 P2d 710

Discussion:

See 17.24[3]

- ☐ Be prepared to request that the court respond to the juror misconduct, if appropriate, in a specific way:

- ☐ Court can admonish juror or jurors.

Authority:

People v. Mincey (1992) 2 C4th 408, 467, 6 CR2d 822, 827 P2d 388

Discussion:

See 17.25[2]

- ☐ Court can replace juror or jurors.

Authority:

CCP § 233

Discussion:

See 17.25[3]

Form:

See 17.42

- ☐ Court can issue contempt citation.

Authority:

CCP § 1209(a)(10)

Discussion:

See 17.25[4]

- ☐ Court can order mistrial.

Authority:

Rufo v. Simpson (2001) 86 CA4th 573, 613, 103 CR2d 492

Discussion:

See 17.25[5]

- ☐ Court can order new trial following the verdict.

Authority:

CCP § 657(1), (2)

Discussion:

See 17.25[6]

- ☐ Counsel can raise juror misconduct issue on appeal.

Authority:

Province v. Center for Women's Health & Family Birth (1994) 20 CA4th 1673, 1680, 25 CR2d 667

Discussion:

See 17.25[7]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJurorsRemovalsCivil
ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil
ProcedureAppealsReviewabilityGeneral Overview



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Chapter 17 Dealing With the Jury
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17.19 Options and Strategies for Discovering and Dealing With Jury Misconduct During Trial.

Counsel should be acutely aware of behavior constituting jury misconduct. If counsel or a party learns of jury misconduct, it must immediately be brought to the attention of the court, or the party risks waiving the issue. Counsel should always request a hearing regarding misconduct; whether or not to hold a hearing is in the court's discretion. Make sure there is a detailed record of the alleged juror misconduct, which may be made by way of an offer of proof, a record of the court's examination of the juror, and by a written motion or brief submitted to the court. Remedies for misconduct range from a simple admonition to a mistrial.

Common forms of juror misconduct include conducting outside research, consulting experts, discussing the case with the parties or the attorneys, consulting improper source material, reading or otherwise viewing media reports about the case, and not being sufficiently attentive during trial.

► Cross References:

Discussion of jury misconduct during deliberations, see *17.31 et seq.*

Discussion of jury misconduct resulting from voir dire, see *Ch. 6, Jury Selection, 6.29 -6.33.*

Detailed discussion of dealing with jury misconduct, see *California Trial Guide, § 91.10 et seq.* (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJurorsMisconduct



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17.20 Jurors May Not Discuss Case or Form Opinion.

17.20[1] Jurors May Not Discuss Case With Each Other Before Case Is Submitted to Jury. Jurors may not discuss the case among themselves before the court submits the case to them [*People v. Kramer (1897) 117 C 647, 649, 49 P 842* ; Los Angeles Super Ct Rules, Rules 8.37, 8.54].

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

17.20[2] Jurors May Not Pre-Judge Case. Jurors may not form an opinion about the case before its submission to them [*CCP § 611*; see *People v. Thomas (1994) 26 CA4th 1328, 1333, 32 CR2d 177* ; Los Angeles Super Ct Rules, Rule 8.37].

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

17.20[3] Jurors May Not Discuss Case With Court Staff. Jurors may not discuss the substance of the case or the parties or attorneys with court staff [see *CCP § 611*; Los Angeles Super Ct Rules, Rule 8.37].

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

Distinguish:

Jurors may and should communicate with the bailiff or court attendant regarding procedural matters such as scheduling, to report misconduct, and to transmit a question to the judge.



Cross References:

Discussion of communications with the court staff regarding procedural matters, see 17.09.

Discussion of communications with the court staff regarding misconduct, see 17.23.

Discussion of requirement that jurors transmit questions to judge through court staff, see 17.16.

17.20[4] Jurors May Not Discuss Case With Attorneys, Parties, or Witnesses. It is misconduct for the jurors to discuss the case with attorneys, parties, or witnesses [see, e.g., *Garden Grove School Dist. v. Hendler* (1965) 63 C2d 141, 144-145, 45 CR 313, 403 P2d 721 (discussion with attorney); Los Angeles Super Ct Rules, Rule 8.37].

Example:

One juror was excused after he tried to use the courthouse law library to research arson, malice, and financial gain, and then talked to an expert witness in the case about those topics [see *People v. Lopez* (1993) 13 CA4th 1840, 1843-1844, 17 CR2d 317] .

17.20[5] Jurors May Not Discuss Case With Anyone Else. Jurors may not discuss the case with anyone else (or allow anyone to discuss it with them), including family, friends, neighbors, spiritual leaders, therapists, and co-workers [see, e.g., CCP § 611; *Forman v. Alexander's Markets* (1956) 138 CA2d 671, 672, 292 P2d 257 ; Los Angeles Super Ct Rules, Rule 8.37].

After the trial is over and the judge has released the jurors from duty, they may discuss the case with anyone.

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

17.20[6] Jurors May Discuss Subjects Unrelated to Case With Others. There is no prohibition on discussions of unrelated topics with court staff, attorneys, parties, or witnesses. The jurors simply may not discuss "any subject of the trial" [CCP § 611].

Legal Topics:

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

Civil Procedure Trials Jury Trials Jurors Misconduct



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17.21 Jurors May Not Consider Material Outside Record.

17.21[1] Jurors May Not Conduct Own Investigation or Visit Scene. A juror may not conduct his or her own investigation of the facts, research any law, consult any reference books or other sources, or visit the scene of any event involved in the case [*see Lankster v. Alpha Beta Co. (1993) 15 CA4th 678, 682, 18 CR2d 923 ; see also Los Angeles Super Ct Rules, Rule 8.37*].

Example:

A new trial was granted after a juror extensively questioned her own doctor on the disputed issues in the trial in which she was a juror [*see Kritzer v. Citron (1950) 101 CA2d 33, 36, 224 P2d 808*] .

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

17.21[2] Jurors May Not Conduct Experiments. Jurors may not conduct any experiments to determine the validity of evidence or otherwise make a determination about the case [*see Bell v. California (1998) 63 CA4th 919, 930-933, 74 CR2d 541 ; see also Los Angeles Super Ct Rules, Rule 8.37*].

Example:

In a construction case involving faulty concrete and grading work, a mistrial was granted after one juror made a foundation model out of cardboard, broken crayons, and kitty litter, which she demonstrated for the other jurors [*see Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co. (1991) 234 CA3d 1724, 1749, 286 CR 435*] .

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

Distinguish:

Courts have held that it is not misconduct for jurors to perform experiments that are within the "scope and purview of the evidence" [*People v. Collins (2010) 49 C4th 175, 249, 110 CR3d 384, 232 P3d 32*]

(juror's use of home computer to make diagram based on trial testimony and demonstration in jury room were not prejudicial misconduct)].

17.21[3] Jurors May Not Solicit Outside Opinions. Jurors may not consult specialists or experts such as doctors or lawyers to assist them in forming an opinion regarding an issue in the case [see, e.g., *Weathers v. Kaiser Found. Hosps.* (1971) 5 C3d 98, 106-107, 95 CR 516, 485 P2d 1132] .

Example:

A juror improperly questioned her own doctor on the disputed issues in the trial in which she was a juror [see *Kritzer v. Citron* (1950) 101 CA2d 33, 36, 224 P2d 808] .

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

17.21[4] Jurors May Not Expose Themselves to Media Reports. Jurors may not read, listen to, or watch any news reports regarding the case [see, e.g., *Hilliard v. A.H. Robins Co.* (1983) 148 CA3d 374, 408, 196 CR 117] .

Jury Instructions:

Preliminary Admonitions, see *Judicial Council of California Civil Jury Instructions, CACI No. 100* (LexisNexis Matthew Bender).

17.21[5] Jurors May Not Use Their Own Expertise Regarding Matters at Issue. A juror may not express an opinion that is explicitly based on his or her own expertise or information from outside sources [see, e.g., *In re Malone* (1996) 12 C4th 935, 963, 50 CR2d 281, 911 P2d 468] .

Distinguish:

However, courts have held it is not misconduct for a juror to express an opinion on a technical subject as long as the opinion is based on the evidence at trial [see *People v. San Nicolas* (2004) 34 C4th 614, 648-650, 21 CR3d 612, 101 P3d 509] .

17.21[6] Jurors May Not Provide Their Own Translation of Testimony. A juror may not provide the other jurors with his or her own translation of testimony in a foreign language [*People v. Cabrera* (1991) 230 CA3d 300, 304-305, 281 CR 238] .

Jury Instructions:

Duty to Abide by Translation Provided in Court, see *Judicial Council of California Civil Jury Instructions, CACI No. 108* (LexisNexis Matthew Bender).



Cross Reference:

Discussion of translated testimony in general, see *Ch. 8, Interpreters, 8.20 -8.27.*

Legal Topics:

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

Civil Procedure Trials Jury Trials Jurors Misconduct Evidence Competency Interpreters



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17.22 Jurors Must Be Attentive.

17.22[1] Jurors May Not Read or Do Puzzles During Testimony. Jurors may not read books or other outside material during the presentation of evidence [*Boeken v. Philip Morris, Inc. (2004) 127 CA4th 1640, 1688, 26 CR3d 638* ; *Hasson v. Ford Motor Co. (1982) 32 C3d 388, 410-411, 185 CR 654, 650 P2d 1171*] .

17.22[2] Jurors May Not Consume Alcohol. Jurors may not drink alcoholic beverages during the presentation of evidence [*People v. Cox (1991) 53 C3d 618, 695-696, 280 CR 692, 809 P2d 351*] .

17.22[3] Jurors May Not Sleep During Testimony. It is misconduct for a juror to sleep during the presentation of evidence [*Boeken v. Philip Morris, Inc. (2004) 127 CA4th 1640, 1688, 26 CR3d 638*] .

Legal Topics:

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



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17.23 Jurors May Bring Misconduct to Court's Attention.

The court and counsel may learn of juror misconduct from another juror [*see, e.g., People v. McNeal (1979) 90 CA3d 830, 835-839, 153 CR 706*].

Consider:

Additionally, jurors may be found in contempt of court if they do not immediately disclose to the court receipt of a communication from a party or other person regarding the case [*CCP § 1209(a)(10)*]. Holding a juror in contempt for this act is rare, but counsel should bring it to the court's attention to impress on the juror the need to uphold the highest standards of conduct for trial.



Cross Reference:

Discussion of contempt, see Ch. 23, Contempt.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureSanctionsContemptGeneral Overview



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17.24 Counsel Must Alert Court to Juror Misconduct.

17.24[1] Counsel Waives Issue of Juror Misconduct Once Verdict Is Rendered. A party or attorney who learns of juror misconduct before the verdict is rendered must report that misconduct to the court promptly. Failure to do so waives the issue. Once a verdict is rendered, a party seeking a new trial on the ground of juror misconduct must sign an affidavit stating neither the party nor his or his attorney was aware of the misconduct until after the verdict was rendered [*Weathers v. Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516, 485 P2d 1132] .



Strategic Point:

To avoid waiver, counsel should inform the court of any juror misconduct immediately on learning of it firsthand, from the client, or from a juror. Even if waiver is unlikely, counsel should always raise juror misconduct as soon as it is discovered. Even if counsel's side appears to be "winning," and thus hesitant to disrupt potentially favorable jury proceedings, it is a dangerous gamble given the uncertainties and vagaries of juror deliberations.

17.24[2] Counsel Should Request a Hearing Regarding Juror Misconduct. Counsel should always request a hearing if there has allegedly been juror misconduct. However, the trial court has discretion as to whether to hold a hearing. A hearing is required "only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case" [*People v. Ray* (1996) 13 C4th 313, 343, 52 CR2d 296, 914 P2d 846] .



Judge's Perspective:

Generally, questions of juror misconduct arise unexpectedly, and since they must be raised in a timely manner there is little opportunity for a written motion. The motion must be raised out of the presence of other jurors, and counsel and the court should fashion a method for having one juror called into chambers without drawing too much attention to the rest of the jury. One method is to have the jury excused from the courtroom, but have the bailiff discreetly request a juror to accompany him or her out of the jury waiting room or hallway. The time at which the motion is raised will significantly affect the method used. Other options are to have the matter handled after a recess or at the end of the day when a juror

may be discreetly asked to remain behind while the other jurors are excused.



Strategic Point:

The better practice is always to have some writing to place before the judge, even if it is one page with bullet points. However, the issue of juror misconduct is so important that it may be that an oral motion, made outside the presence of the jury, is essential. Depending on the severity of the infraction, counsel can make an oral motion and request an opportunity (generally the next day) to present the court with a short memorandum or brief on the issue raised.

17.24[3] Counsel Should Put Information Regarding Misconduct on Record. Counsel should make certain that the hearing regarding juror misconduct is placed on the record. On appeal, the record must clearly show that the trial court was put on notice of potential juror misconduct [see, e.g., *People v. Williams* (1997) 16 C4th 153, 213, 66 CR2d 123, 940 P2d 710 ; *People v. Davis* (1995) 10 C4th 463, 547-548, 41 CR2d 826, 896 P2d 119] .



Warning:

It is possible the court will not grant counsel's request to hold a hearing regarding possible juror misconduct. Nevertheless, counsel should still place the information regarding possible misconduct on the record so that the court's decision regarding whether or not to hold a hearing can be reviewed on appeal.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureAppealsReviewabilityPreservation for Review



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Chapter 17 Dealing With the Jury

IV. DISCOVERING AND DEALING WITH JURY MISCONDUCT DURING TRIAL

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.25

17.25 Court Has Discretion in Responding to Juror Misconduct.

17.25[1] Court Engages in Fact Finding to Determine If Misconduct Occurred. When misconduct is suspected, the court may call one or more jurors into chambers individually for questioning as to the alleged misconduct, with counsel for all parties present [see, e.g., *People v. Mincey* (1992) 2 C4th 408, 467, 6 CR2d 822, 827 P2d 388 ; *Boeken v. Philip Morris, Inc.* (2005) 127 CA4th 1640, 1686-1687, 26 CR3d 638] .

17.25[2] Court Can Admonish Juror or Jurors. On learning of juror misconduct, the court may choose to admonish one or more jurors [*People v. Mincey* (1992) 2 C4th 408, 467, 6 CR2d 822, 827 P2d 388] .

Example:

In one case, the court admonished the entire jury for considering Bible verses read by one juror during jury deliberations [*People v. Mincey* (1992) 2 C4th 408, 467, 6 CR2d 822, 827 P2d 388] .



Strategic Point:

Counsel should not allow the court to say anything to the jury, or an individual juror, outside the presence of counsel unless there is some compelling reason for doing so (which is rare). Failure to do so would lead to the impression the judge was having direct communications with the jury which could influence the jury's determination.

— Judge's Perspective:

The admonition to the juror(s) should always be in the presence of counsel and on the record. Whether a juror is admonished in open court or in chambers depends on the nature of the alleged or actual misconduct. For example, a claim of jury misconduct for several jurors talking to spectators during recesses should be addressed to the entire jury in open court, and the jury should be reminded that the appearance of impropriety can cause allegations of misconduct and unnecessary delay. On the other hand, where one juror has been subject to in chambers questioning, it may be better to admonish the juror in chambers on the record since the misconduct is limited to just the one juror, such as when one juror is habitually late.

17.25[3] Court Can Replace Juror. A judge has discretion to replace a juror who has engaged in misconduct [CCP § 233; *Garden Grove School Dist. v. Hendler* (1965) 63 C2d 141, 144, 45 CR 313, 403 P2d 721] .

 Cross Reference:

Forms for use in replacing juror, see 17.41 -17.43.

17.25[4] Court Can Issue Contempt Citation. The court can issue a contempt order to a juror for improperly conversing with a party to an action, or with any other person in relation the merits of the action, or for receiving a communication from a party or other person in respect to it, without immediately disclosing it to the court [CCP § 1209(a)(10)].

Consider:

Although a juror can be held in contempt, it is unusual for this to happen. It is more common for the court simply to remove the juror, use the opportunity to instruct the remaining jurors on the severity of the infraction, and move on.

 Cross Reference:

Discussion of contempt, see Ch. 23, Contempt.

17.25[5] Court Can Order Mistrial. The court can order a mistrial in "those rare cases where the trial court in its discretion concludes the misconduct of the juror has already caused such irreparable harm that only a new trial can secure for the complaining party a fair trial"[*Rufo v. Simpson* (2001) 86 CA4th 573, 613, 103 CR2d 492 (mistrial was not granted in this case)].

 Cross Reference:

Discussion of mistrial, see Ch. 22, Mistrial.

17.25[6] Court Can Order New Trial. The court may grant a party's motion for a new trial on the grounds of juror misconduct [CCP § 657(1), (2); *Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co.* (1991) 234 CA3d 1724, 1745, 286 CR 435] .

 Cross Reference:

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

17.25[7] Parties Can Address Misconduct on Appeal. The parties may raise the issue of juror misconduct as a basis for appeal [see, e.g., *Province v. Center for Women's Health & Family Birth* (1994) 20 CA4th 1673, 1680, 25 CR2d 667 (appeal of court's denial of motion for new trial on grounds of juror misconduct)].

 Cross Reference:

Discussion of appeals, see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview, et seq. (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview



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V. INSTRUCTING JURY

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.26

17.26 CHECKLIST: Instructing Jury.

☐ Court will give pretrial instructions after jury is sworn in.

☐ General topics:

☐ Admonitions.

☐ Overview of trial procedures.

☐ Note taking.

☐ Witnesses.

☐ Evidence.

☐ Jurors' questions.

☐ Alternates.

☐ Specialized topics:

☐ Multiple parties.

☐ Non-person parties.

- ☐ Insurance.
- ☐ Interpreters.
- ☐ Removal of claims or parties.
- ☐ Service providers for disabled jurors.

Authority:

Judicial Council of California Civil Jury Instructions, CACI Nos. 100 -112 (LexisNexis Matthew Bender)

Discussion:

See 17.28

- ☐ Court may give some substantive and procedural instructions during the presentation of evidence.

Authority:

See, e.g., Los Angeles Super Ct Rules, Rule 8.51

Discussion:

See 17.29

- ☐ Court may give substantive instructions either before or after closing arguments.

Authority:

See, e.g., Los Angeles Super Ct Rules, Rule 8.51

Discussion:

See 17.30

- ☐ Court should give concluding instructions following closing arguments.
 - ☐ Concluding instructions may be similar or identical to pre-trial instructions (e.g., insurance, evidence, witnesses, etc.).
 - ☐ Pre-deliberation instructions.
 - ☐ Instructions regarding reading back of trial testimony.
 - ☐ Deadlocked jury admonition.
 - ☐ Substitution of alternate juror.

Authority:

Los Angeles Super Ct Rules, Rule 8.51; *Judicial Council of California Civil Jury Instructions*, *CACI* Nos. 5000 -5015 (LexisNexis Matthew Bender)

Discussion:

See 17.30

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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17.27 Options and Strategies for Instructing Jury.

It is counsel's duty to deliver proposed instructions to the judge before trial begins. Counsel may also deliver, at any time before closing argument, additional proposed instructions to the court. Before closing arguments begin, the court will decide which instructions to give and notify counsel [CCP § 607a]. Counsel are strongly encouraged to use the Judicial Council CACI jury instructions [*Cal Rules Ct, Rule 2.1050(e)*].

Jury Instructions:

Introductory Instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 100 -112* (LexisNexis Matthew Bender).

Concluding Instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 5000 -5015* (LexisNexis Matthew Bender).



Cross Reference:

Detailed discussion of jury instructions, see Ch. 16, Jury Instructions.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions



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17.28 Court Gives Pretrial Instructions at Beginning of Trial.

After the court swears the jury in, the judge will give the jurors pretrial instructions. These instructions consist generally of preliminary admonitions regarding appropriate conduct during trial, an overview of the manner in which the trial will proceed, instructions regarding note taking, instructions regarding witnesses and evidence, instructions regarding questions from jurors, and an instruction to alternates. When relevant, the judge may also instruct the jury on topics such as multiple parties, non-person parties, insurance, interpreters, removal of claims or parties, and service providers for disabled jurors [see Los Angeles Super Ct Rules, Rule 8.37].

Jury Instructions:

General pretrial instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 100 -102, 106, 107, 111, 112* (LexisNexis Matthew Bender).

Specialized instructions, *Judicial Council of California Civil Jury Instructions, CACI Nos. 103 -105, 108 -110* (LexisNexis Matthew Bender).



Cross References:

Discussion of pretrial admonitions, see *17.05*.

Discussion of jury instructions, see Ch. 16, Jury Instructions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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17.29 Court May Give Procedural and Substantive Instructions During Trial.

Although the court generally instructs the jury following closing arguments, the court has discretion to instruct the jury at other times for special reasons [*CCP* § 607]. In addition, instructions relating to terminology, burden of proof, evaluation of evidence, depositions, interrogatories, admissions, stipulations, and expert testimony can be read either at the beginning of trial, before the introduction of evidence, or during the presentation of evidence [*see, e.g.*, Los Angeles Super Ct Rules, Rule 8.51].



Cross Reference:

Discussion of jury instructions, see Ch. 16, Jury Instructions.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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17.30 Court May Give Substantive Instructions Either Before or After Closing Arguments.

The substantive instructions may be read to the jury either after the conclusion of final arguments or before final arguments [Los Angeles Super Ct Rules, Rule 8.51]. However, the concluding instructions must be given after closing arguments [Los Angeles Super Ct Rules, Rule 8.51].

Jury Instructions:

Concluding Instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 5000-5015* (LexisNexis Matthew Bender).



Cross Reference:

Detailed discussion of jury instructions, see Ch. 16, Jury Instructions.

Legal Topics:

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

Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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17.31 CHECKLIST: Addressing Issues Arising During Deliberations and Replacing Juror After Deliberations Have Started.

☐ Be prepared for jurors to ask questions during deliberations.

☐ Jury foreperson will put question in writing.

Authority:

CCP § 614; Los Angeles Super Ct Rules, Rule 8.55

Discussion:

See 17.33[1]

☐ Counsel will confer with the judge regarding the question.

Authority:

Los Angeles Super Ct Rules, Rule 8.55

Discussion:

See 17.33[2]

☐ Be prepared for jury to ask for court reporter to reread testimony.

☐ Jury foreperson will put question in writing.

Authority:

Judicial Council of California Civil Jury Instructions, CACI No. 5011

Discussion:

See 17.34[1]

☐ Counsel and parties will receive notice of the request but need not be present when testimony is reread.

Authority:

CCP § 614

Discussion:

See 17.34[2]

☐ Judge need not be present when testimony is reread.

Authority:

CCP § 614.5

Discussion:

See 17.34[2]

☐ Jury will have written copy of instructions on request.

Authority:

CCP § 612.5

Discussion:

See 17.35[1]

☐ Be prepared for jury to request rereading of original instructions.

☐ Court has discretion whether to comply with jury's request.

Authority:

People v. McCleod (1997) 55 CA4th 1205, 1219-1220, 64 CR2d 545

Discussion:

See 17.35[2]

☐ Be prepared for jury to request additional instructions or further explanation of original instructions.

☐ Court has discretion whether to comply with jury's request.

Authority:

Kumelauskas v. Cozzi (1961) 191 CA2d 572, 574-575, 12 CR 843

Discussion:

See 17.35[3]

- ☐ Be prepared for jurors to ask to visit or revisit a location involved in the action.

Authority:

People v. Garcia (2005) 36 C4th 777, 792, 31 CR3d 541, 115 P3d 1191

Discussion:

See 17.36

- ☐ Be prepared for jurors to bring exhibits into the jury room if the court deems it proper.

Authority:

CCP § 612

Discussion:

See 17.37[1]

- ☐ Be aware that jurors may not take deposition transcripts into jury room.

Authority:

CCP § 612

Discussion:

See 17.37[2]

- ☐ Court may need to replace juror during deliberations due to illness or misconduct.

- ☐ If alternate is available:

- ☐ Court will appoint alternate.

Authority:

CCP § 233

Discussion:

See 17.38[1]

- ☐ Jurors must begin deliberations again.

Authority:

People v. Collins (1976) 17 C3d 687, 693, 131 CR 782, 552 P2d 742

Discussion:

See 17.38[2]

- ☐ If no alternate is available:

- ☐ Parties may stipulate to deliberate with remaining jurors.

Authority:

CCP § 233

Discussion:

See 17.38[3][a]

Form:

See 17.46

- ☐ Parties may stipulate to begin trial anew with new juror.

Authority:

CCP § 233

Discussion:

See 17.38[3][b]

Form:

See 17.45

- ☐ If parties do not agree on a stipulation, jury will be discharged and case will end in mistrial.

Authority:

CCP § 233

Discussion:

See 17.38[4]

- ☐ Be aware of court procedures when jury states it is deadlocked:

- ☐ Court may admonish jurors regarding the importance of reaching a verdict.

Authority:

Los Angeles Super Ct Rules, Rule 8.53

Discussion:

See 17.39[1]

- ☐ Court may not try to coerce jurors into reaching a verdict.

Authority:

Inouye v. Pacific Southwest Airlines (1981) 126 CA3d 648, 179 CR 13

Discussion:

See 17.39[2]

- ☐ Be aware of what constitutes misconduct during deliberations.

- ☐ Jurors may not engage in activities that are prohibited during trial.

Exception:

Jurors may discuss the case during deliberations, but only in the jury room.

- ☐ Jurors may not reach a "chance" verdict.

Authority:

CCP § 657(2)

Discussion:

See 17.40[2][a]

- ☐ Jurors may not refuse to deliberate.

Authority:

Erikson v. Weiner (1996) 48 CA4th 1663, 1670, 56 CR2d 362

Discussion:

See 17.40[2][b]

- ☐ Jurors may not ignore instructions.

Authority:

CCP § 232

Discussion:

See 17.40[2][c]

- ☐ Jurors may not bring outside items into jury room.

Authority:

People v. Fauber (1992) 2 C4th 792, 837, 9 CR2d 24, 831 P2d 249

Discussion:

See 17.40[2][d]

Legal Topics:

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

Civil Procedure Trials Jury Trials Jury Deliberations



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17.32 Options and Strategies for Addressing Issues Arising During Deliberations and Replacing Juror After Deliberations Have Started.

Counsel will continue to be involved in the proceedings during deliberations. The judge will confer with counsel regarding any questions the jury might have, as well as requests for rereading of testimony. The issue of jury misconduct may also arise during deliberations, requiring a request for a hearing and possible removal of a juror. In addition, if counsel first learns of misconduct following the verdict, counsel should move for a new trial.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJurorsRemovalsCivil
ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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17.33 Jurors May Ask Questions During Deliberations.

17.33[1] Jury Foreperson Should Put Question in Writing. If a juror has question regarding the law that applies to the case or the case in general, the foreperson should put the question in writing and give it to the court clerk or bailiff [see *CCP* § 614; Los Angeles Super Ct Rules, Rule 8.55].

Jury Instructions:

Predeliberations Instructions, see *Judicial Council of California Civil Jury Instructions, CACI No. 5009* (LexisNexis Matthew Bender).

17.33[2] Judge and Counsel Confer Regarding Jury's Question. The trial judge should review the jury's question with counsel outside the jury's presence and on the record, and they should discuss an appropriate answer to give to the jury. The answer should be given in open court and be made part of the record in the absence of a stipulation to the contrary [Los Angeles Super Ct Rules, Rule 8.55].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury Deliberations



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DELIBERATIONS HAVE STARTED

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.34

17.34 Jurors May Want to Have Testimony Reread During Deliberations.

17.34[1] Jurors Should Put Request in Writing. The jurors may request in writing that trial testimony be read to them when they are in the jury room.

Jury Instructions:

Reading Back of Trial Testimony in Jury Room, see *Judicial Council of California Civil Jury Instructions, CACI No. 5011* (LexisNexis Matthew Bender).

17.34[2] Court Reporter Reads Testimony in Presence of or After Notice to Counsel. The testimony requested by the jury will be read in the jury room by the court reporter in the presence of or after notice to the parties or counsel [CCP § 614]. The judge need not be present while testimony is being read [CCP § 614.5].

Exception:

The attorneys may stipulate that the reading take place other than in the jury room.

Jury Instructions:

Reading Back of Trial Testimony in Jury Room, see *Judicial Council of California Civil Jury Instructions, CACI No. 5011* (LexisNexis Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Jury Trials Jury Deliberations



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17.35 Jurors May Request Rereading of Original Instructions or New Instructions.

17.35[1] Judge Must Give Jury Written Copy of Instructions on Request. When the jury retires to deliberate, the court must advise them that written copies of the jury instructions are available. The court may, at its discretion, provide the jury with a copy of the written instructions given. However, if the jury requests a copy of the written instructions, the court must give the jury a copy [*CCP* § 612.5; *see Los Angeles Super Ct Rules*, Rule 8.52].

17.35[2] Court Can Deny Request for Rereading. The court has discretion whether to reread instructions to the jury on request [*see People v. McCleod* (1997) 55 CA4th 1205, 1219-1220, 64 CR2d 545] .

17.35[3] Court Can Deny Request to Expand on Original Instructions. If so requested by the jury, the court has discretion to refuse to interpret the instructions given further [*see Kumelauskas v. Cozzi* (1961) 191 CA2d 572, 574-575, 12 CR 843] .

Example:

In one case, on a request from the jury for a definition of "right of way," the court properly reread certain relevant BAJI instructions without additional definitions [*Kumelauskas v. Cozzi* (1961) 191 CA2d 572, 574-575, 12 CR 843 (before adoption of CACI)].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury DeliberationsCivil
ProcedureTrialsJury TrialsJury InstructionsGeneral Overview



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17.36 Jurors May Ask to Visit or Revisit Scene of Incident.

The jury may want to visit or revisit a location involved in the case. Counsel should be present at such a visit [see *People v. Garcia* (2005) 36 C4th 777, 792, 31 CR3d 541, 115 P3d 1191]. The jury should put this request in writing and follow the procedures for requesting a rereading of testimony.

Jury Instructions:

Reading Back of Trial Testimony in Jury Room, see *Judicial Council of California Civil Jury Instructions, CACI No. 5011* (LexisNexis Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Jury Trials Jury Deliberations



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1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.37

17.37 Jurors May Request Exhibits.

17.37[1] Jurors May Take Exhibits Deemed Proper by Court. The jury may take into deliberations any papers or exhibits the court deems proper, as well as their own notes, but not the notes of other people [*CCP* § 612].

17.37[2] Jurors May Not Take Depositions Into Jury Room. The jury may not take deposition transcripts into the jury room [*CCP* § 612].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DeliberationsEvidenceDocumentary EvidenceGeneral
OverviewEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts



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1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.38

17.38 Court May Need to Replace Juror During Deliberations With Alternate Juror.

17.38[1] Replacement Required Due to Illness or Inability to Perform. The court may order a juror to be discharged if, before the jury has returned its verdict, the juror becomes sick or is otherwise unable to perform his or her duty. The court must designate an alternate to take the discharged juror's place [*CCP* § 233].

► **Cross References:**

Discussion of juror misconduct during deliberations, see *17.40*.

Discussion of selection of alternate jurors, see *Ch. 6, Jury Selection, 6.08[4]*.

17.38[2] If Court Appoints Alternate Juror, Jury Must Begin Deliberations Again. If an alternate juror replaces an original juror during deliberations, the jury must begin deliberations again from the beginning [*People v. Collins* (1976) 17 C3d 687, 693, 131 CR 782, 552 P2d 742 ; see *CCP* § 234]. In exceptional circumstances, the unintentional and unrealized presence of an alternate juror throughout trial, who did not contribute to the jury proceedings in a prejudicial way, may not be grounds for mistrial [*Brassfield v. Moreland School Dist.* (2006) 141 CA4th 67, 71, 45 CR3d 662].

Jury Instructions:

Substitution of Alternate Juror, see *Judicial Council of California Civil Jury Instructions, CACI No. 5014* (LexisNexis Matthew Bender).

17.38[3] If There Are No Alternate Jurors Available, Parties May Enter Into Stipulation.

17.38[3][a] Parties May Stipulate to Deliberations With Remaining Jurors. If there are no alternate jurors remaining, the parties may stipulate to continue deliberations with the remaining jurors [*CCP* § 233].

► **Cross Reference:**

Form, see *17.46*.

**Strategic Point:**

Counsel being asked to stipulate to have the deliberation proceed without the requisite number of jurors should consider whether those who remain are more or less inclined to return a verdict in favor of the party being asked to stipulate. If an attorney believes he or she "lost" someone on the jury who was leaning in favor of the interests of the party represented by that attorney who now will not be replaced, that attorney should consider not stipulating to proceed. The result of refusing to do so will be a mistrial with the consequent expense the party will incur. This may, or may not, be a significant factor as this new expense may lead to settlement opportunities that did not previously exist.

17.38[3][b] Parties May Stipulate That Trial Begin Anew With New Juror. If there are no alternate jurors remaining and the parties will not stipulate to deliberate with the remaining jurors, they may stipulate to swear in a new juror and begin the trial anew [*CCP* § 233].

**Cross Reference:**

Form, see 17.45.

17.38[4] If Parties Do Not Agree on Stipulation, Jury Will Be Discharged. If there are no alternate jurors remaining and the parties cannot agree to a stipulation regarding deliberating with fewer than 12 jurors, the jury must be discharged and the case may be retried [*CCP* § 233].

Exception:

Note that the parties may stipulate to using fewer than 12 jurors in a civil case [*see CCP* § 220].

**Cross References:**

Discussion of mistrial, see Ch. 22, Mistrial.

Discussion of permissible number of jurors, see *Ch. 6, Jury Selection*, 6.08[2].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsRemovalsCivil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsMotions for Mistrial



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17.39 Responding to Jury's Claim of Being Deadlocked Because Sufficient Jurors Cannot Agree on Verdict.

17.39[1] Court May Admonish Jurors Regarding Importance of Reaching Verdict. After a jury reports that it has reached an impasse in its deliberations, the court may, in counsel's presence, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The court should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict [*Cal Rules Ct, Rule 2.1036(a)*]. The court may tell jurors that they should not surrender their beliefs merely to reach a verdict [*Inouye v. Pacific Southwest Airlines* (1981) 126 CA3d 648, 652, 179 CR 13].

If the court determines that further action might assist the jury in reaching a verdict, the judge may [*Cal Rules Ct, Rule 2.1036(b)*]:

- Give additional instructions;
- Clarify previous instructions;
- Permit attorneys to make additional closing arguments; or
- Employ any combination of these measures.

Consider:

If there are 12 jurors, at least nine of them (three fourths of the jury) must agree to reach a verdict [*CCP § 618*]. However, the parties may stipulate to a number of jurors fewer than 12, but three fourths must still agree on the verdict [*CCP § 220*].

Jury Instructions:

Deadlocked Jury Admonition, see *Judicial Council of California Civil Jury Instructions, CACI No. 5013* (LexisNexis Matthew Bender).

17.39[2] Court's Instructions May Not Coerce Jury Into Reaching Verdict. The court may not coerce the jurors

into "surrendering their conscientious convictions in order to reach agreement." Each juror must decide the case individually and not merely go along with other jurors' conclusions [*Inouye v. Pacific Southwest Airlines (1981)* 126 CA3d 648, 652, 179 CR 13] .

Jury Instructions:

Deadlocked Jury Admonition, see *Judicial Council of California Civil Jury Instructions, CACI No. 5013* (LexisNexis Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental Instructions



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Chapter 17 Dealing With the Jury
VI. ADDRESSING ISSUES ARISING DURING DELIBERATIONS AND REPLACING JUROR AFTER
DELIBERATIONS HAVE STARTED

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.40

17.40 Jurors May Alert Court to Jury Misconduct During Deliberations.

17.40[1] Jurors May Not Engage in Activities During Deliberations That Constitute Misconduct During Trial. Conduct that is prohibited during trial, such as consuming alcohol, sleeping, or taking into account outside information, is also prohibited during deliberations [see, e.g., CCP § 611].

► Cross References:

Discussion of misconduct before deliberations stage of trial and review of acts constituting misconduct, see 17.19 -17.24.

Finding case law of juror misconduct, see 17.19.

Discussion of remedies for juror misconduct, see 17.25.

17.40[2] Jurors May Inform Court That Jurors Engaged in Prohibited Conduct.

17.40[2][a] Jurors May Not Reach "Chance" Verdict. Jurors may not resort to the determination of chance to reach a verdict. Such misconduct is ground for a new trial [CCP § 657(2)].

Example:

Drawing lots, rolling dice, tossing a coin, and other forms of gambling are all prohibited as chance verdicts. A "quotient" verdict, in which the jury arrives at a number by averaging their views, is also prohibited as a form of chance verdict [*Chronakis v. Windsor* (1993) 14 CA4th 1058, 1064, 18 CR2d 106] .

17.40[2][b] Jurors May Not Refuse to Deliberate. Jurors cannot avert a verdict with which they disagree by declining to participate in deliberations [*Erikson v. Weiner* (1996) 48 CA4th 1663, 1670, 56 CR2d 362] .

17.40[2][c] Jurors May Not Ignore Instructions. In reaching a verdict, the jurors can consider only the evidence and instructions given to them, and must consider all the questions and instructions presented [CCP § 232].

17.40[2][d] Jurors May Not Bring Outside Items Into Jury Room. Jurors may not bring outside items into the jury room [see *People v. Fauber* (1992) 2 C4th 792, 837, 9 CR2d 24, 831 P2d 249] .

Examples:

Improper items that have been brought into the jury room during deliberations include the following:

- Cell phone [*People v. Fauber* (1992) 2 C4th 792, 837, 9 CR2d 24, 831 P2d 249 (presence of cell phone in jury room creates "obvious potential for mischief")], laptop computers, PDAs, and other electronic communications devices.
- Bible [*People v. Mincey* (1992) 2 C4th 408, 467, 6 CR2d 822, 827 P2d 388] .
- Dictionary [*People v. Barton* (1995) 37 CA4th 709, 715, 43 CR2d 671] .

Consider:

With more sophisticated devices being able to record events in court, such as voice and image recording cell phones, PDAs, mini-laptops, etc., it may well be appropriate to include admonitions prohibiting such usage or disallowing such devices in court as a standard instruction at the start of trial.

 Cross References:

Discussion of misconduct before deliberations stage of trial, see 17.20 -17.24.

Discussion of remedies for juror misconduct, see 17.25.

17.40[3] Counsel or Party May Learn of Misconduct Following Verdict. If counsel or a party first learns of misconduct following the verdict, counsel should file a motion for new trial [CCP § 657(1), (2)].

 Cross Reference:

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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Chapter 17 Dealing With the Jury
VII. FORMS

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.41

17.41 Notice of Motion and Motion to Remove Juror.

Notice of Motion and Motion to Remove Juror.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name(s)],

Plaintiff(s),

vs.

_____, [name(s)],

Defendant(s).

)

)

)

)

)

)

)

)

NO. _____

NOTICE OF MOTION TO
REMOVE JUROR

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 counsel can be heard, at the courtroom of [_____] (Department or Division) _____ of] this court, located at _____ [address], _____ [city], _____ [moving party, e.g., Defendant Mary Jones] will move the court for an order removing _____ [juror, e.g., George Brown] from the jury of the above-entitled action.

This motion will be made on the ground that _____ [state type of misconduct alleged, e.g., the juror discussed the case with one of the attorneys or the juror was sleeping during the trial or the juror visited the accident scene independently].

The motion will be made and based on this notice, the pleadings, records, and papers on file herein, and the declaration of _____ [counsel, e.g., Defense Attorney Jane Lee].

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [name]

NOTES.

Authority:

CCP §§ 233, 1005

Grounds for Motion:

See 17.24, 17.25



Timing:

See 17.24

Related Form of Memorandum:

See California Points and Authorities, § 155.82 (Matthew Bender)

Related Form of Declaration:

See 17.42

Related Form of Order:

See 17.43

Additional Memoranda:

See California Points and Authorities, § 155.70 et seq. (Matthew Bender)



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VII. FORMS

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.42

17.42 Declaration in Support of Motion to Remove Juror.

Declaration in Support of Motion to Remove Juror.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name(s)],

Plaintiff(s),

vs.

_____, [name(s)],

Defendant(s).

)

)

)

)

)

)

)

NO. _____

DECLARATION OF _____ [name]

IN

SUPPORT OF MOTION

TO REMOVE JUROR

1. I, _____ [name], declare:

2. 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 Motion to Remove Juror].

3. This declaration is in support of _____'s [name of party] motion for an order removing _____ [juror, e.g., George Brown] as a juror in the above-entitled action.

4. _____ [Juror, e.g., George Brown] has engaged in misconduct in that _____ [state type of misconduct alleged, e.g., the juror discussed the case with one of the attorneys or the juror was sleeping during the trial or the juror visited the accident scene independently].

5. I learned of this misconduct when _____ [*state means by which counsel learned of misconduct, e.g., a fellow juror informed me that he overheard George Brown discussing the case with Plaintiff's attorney*].

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 §§ 233, 1005

Grounds for Motion:

See 17.24, 17.25

Related Form of Motion:

See 17.41

Related Form of Order:

See 17.43



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Chapter 17 Dealing With the Jury
VII. FORMS

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.43

17.43 Order Removing Juror.

Order Removing Juror.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name(s)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	ORDER REMOVING
_____ [name(s)],	)	JUROR
Defendant(s).	)	
	)	
	)	

The motion of _____ [party, e.g., Defendant Mary Jones] for an order removing
_____ [juror, e.g., George Brown] as a juror in the trial of the above-entitled action, came on for
hearing before me this _____ day of _____ [date], _____ [name]
appearing as attorney for _____ [party, e.g., Defendant Mary Jones], and _____
[name] appearing as attorney for _____ [party, e.g., Plaintiff John Smith], and the court being fully
advised in the premises, and good cause appearing therefor;

It is hereby ordered that the motion be and the same is hereby granted; that _____ [juror, e.g., George
Brown] is hereby removed from the jury.

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

CCP §§ 233, 1005

Grounds for Motion:

See 17.24, 17.25

Related Form of Motion:

See 17.41

Related Form of Declaration:

See 17.42



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Chapter 17 Dealing With the Jury
VII. FORMS

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.44

17.44 Stipulation to Continue Trial With Remaining Jurors.

Stipulation to Continue Trial With Remaining Jurors.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name(s)],

Plaintiff(s),

vs.

_____, [name(s)],

Defendant(s).

)

)

)

)

)

)

)

NO. _____

STIPULATION TO

CONTINUE TRIAL WITH

REMAINING JURORS

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that as a result of _____'s [juror, e.g., George Brown] removal from the jury as a result of _____ [misconduct or illness] and the fact that there are no alternatives available, the trial will continue and proceed to deliberations with the _____ [number of jurors remaining, e.g., 11] remaining jurors.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Plaintiff _____ [name]

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

NOTES.

Authority:

CCP § 233

Discussion:

See 17.11[4][a]

Related Form of Stipulation:

See 17.45, 17.46



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Chapter 17 Dealing With the Jury
VII. FORMS

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.45

17.45 Stipulation to Begin Trial Anew With New Juror.

Stipulation to Begin Trial Anew With New Juror.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name(s)],)

Plaintiff(s),)

vs.)

_____, [name(s)],)

Defendant(s).)

)

)

NO. _____

STIPULATION TO BEGIN TRIAL ANEW WITH
NEW JUROR

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that as a result of _____'s (*juror, e.g., John Alpha*) removal from the jury as a result of _____ [*misconduct or illness*] and the fact that there are no alternatives available, the parties will swear in another juror and begin trial anew.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

NOTES.

Authority:

CCP § 233

Discussion:

See 17.11[4][b], 17.38[3][b]

Related Forms of Stipulation:

See 17.44, 17.46



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Chapter 17 Dealing With the Jury
VII. FORMS

1-17 MB Practice Guide: Trial & Post-Trial Civil Proc 17.46

17.46 Stipulation to Deliberate With Remaining Jurors.

Stipulation to Begin Trial Anew With New Juror.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name(s)],

Plaintiff(s),

vs.

_____, [name(s)],

Defendant(s).

)
)
)
)
)
)
)

NO. _____

STIPULATION TO

DELIBERATE WITH

REMAINING JURORS

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that as a result of _____'s [juror, e.g., John Alpha] removal from the jury as a result of _____ [misconduct or illness] and the fact that there are no alternatives available, deliberations will continue with the _____ [number of jurors remaining, e.g., 11] remaining jurors.
Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Plaintiff _____ [name]

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

NOTES.

Authority:

CCP § 233

Discussion:

See 17.38[3][a]

Related Forms of Stipulation:

See 17.44, 17.46



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Chapter 18 Jury Verdicts

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.syn

§ 18.syn Synopsis to Chapter 18: Jury Verdicts

18.01 Scope.

18.02 Objective and Strategy.

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18.04 Options and Strategies for Party Requesting General Verdict.

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18.10[5] Local Rules May Control Timing and Submission of Special Interrogatories.

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18.12 Options and Strategies for Party Requesting Special Verdict.

18.12[1] Special Verdict Is Required in Some Cases, Optional in Most Cases.

18.12[2] Special Verdict May Draw Unwanted Attention to Certain Issues During Jury Deliberations.

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18.12[4] Special Verdict Has Advantage of Identifying Issues on Appeal.

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18.12[6] Failure to Request Special Verdict on Specific Issue Waives Right to Raise That Issue on Appeal.

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18.13 Questions and Answers Comprise Special Verdict.

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18.14[1] Jury Finds Facts, Leaving Judgment to Court.

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18.15[3] Proposition 51 Requires Special Verdict to Allocate Certain Noneconomic Damages.

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18.17 Present Issues in Writing to Court.

18.18 Request Special Verdict in Proper Form.

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18.18[2] Carefully Draft Special Verdict.

18.19 Make Request for Special Verdict Specific and Clear.

18.20 Make Request in Timely Manner.

18.20[1] Submit and Serve Special Verdict Form Before Argument.

18.20[2] Local Rules May Control Timing of Request for Special Verdict.

18.20[2][a] Alameda County Requires Submission and Service Before Trial.

18.20[2][b] Los Angeles County Requires Submission and Service Before Jury Instruction Conference.

18.20[2][c] Orange County Requires Submission and Service Before Party Rests.

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18.20[2][f] Other Counties May Have Court Rules Controlling Timing of Request for Special Verdict.

18.21 Serve Copies on All Other Parties.

18.22 Court May Allow Special Verdict When Not Required.

18.23 CHECKLISTS: Challenging General and Special Verdicts.

18.23[1] CHECKLIST: Challenging General Verdict.

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18.24 Options and Strategies for Challenging Verdict Form and Verdict.

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18.24[2] Counsel Should Object to Verdict Before Jury Is Discharged.

18.25 Challenging Proposed General Verdict Form.

18.26 General Verdict Upheld When One of Multiple Issues Is Sustained by Evidence.

18.27 General Verdict Improper After Erroneous Instructions Given on One of Multiple Theories.

18.28 Challenging General Verdict With Special Findings.

18.28[1] Special Finding Controls Over Inconsistent General Verdict.

18.28[2] Improper Inducement of Juror to Assent to Special Finding May Be Addressed by Motion for New Trial.

18.29 Challenging Proposed Special Verdict Form.

18.29[1] Party May Object to Special Verdict Form.

18.29[2] Party May Seek to Modify Special Verdict Form.

18.29[3] Objection to Special Verdict Form Must Be Timely.

18.29[4] Failure to Object to Form of Special Verdict Waives Issue on Appeal.

18.29[5] Party May Move for Inclusion of Additional Matters on Special Verdict Form.

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18.32 Methods for Challenging Special Verdict.

18.32[1] Correction or Further Deliberations Under CCP § 619.

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18.32[1][b] "Informal" Means Defective in Form or Contrary to Rule.

18.32[1][c] "Insufficient" Means Inadequate for Some Need or Purpose.

18.32[1][d] CCP § 619 Applies to Ambiguous Verdict.

18.32[1][e] CCP § 619 Applies to Inconsistent Verdict.

18.32[2] Trial Court May Construe Challenged Verdict in Accordance With Pleadings, Evidence, and Instructions.

18.32[3] Post-Trial Motions.

18.32[3][a] Party May Bring Post-Trial Motion When Appropriate.

18.32[3][b] Party May Bring Motion for Judgment Notwithstanding Verdict Based on Insufficient Evidence.

18.32[3][c] Party May Bring Motion for New Trial Based on Insufficient Evidence.

18.32[3][d] Party May Bring Motion for New Trial If Verdict Is Against the Law.

18.33 Address Improper Inducement of Juror to Assent to Special Verdict by Motion for New Trial.

18.34 Trial Court May Not Tell Jury About Effect of Special Verdict on Ultimate Rights and Liabilities.

18.35 Address Jury Misconduct by Motion for New Trial.

18.36 Evidence Regarding Validity of Verdict.

18.36[1] Show Improper Influence on Verdict by Admissible Evidence.

18.36[2] Evidence Concerning Juror's Mental Processes Is Inadmissible.

18.37 Attack Judgment Inconsistent With Special Verdict by Motion to Vacate.

18.38 Options and Strategies.

18.39 Court Remains Open During Jury Deliberations.

18.40 Court May Direct Sealed Verdict.

18.41 Requirements for Verdicts for Recovery of Money and of Specific Personal Property.

18.41[1] Jury Verdict for Recovery of Money Must Include Amount of Recovery.

18.41[2] Jury Verdict in Action for Recovery of Specific Personal Property Must Include Value and May Assess Damages.

18.42 Entry of Verdict.

18.42[1] Jury Must Submit Verdict to Clerk, Who Reads It.

18.42[2] Entry of Verdict Must Set Out Verdict and Include Other Information.

18.42[3] Special Finding Must Be Filed With Clerk and Entered on Minutes.

18.42[4] Special Verdict Must Be Filed With Clerk and Entered on Minutes.

18.42[5] Same Jurors Need Not Agree on All Elements of Special Verdict.

18.42[6] Entry of Special Verdict Must Specify Either Judgment on Verdict or Order Reserving Judgment.

18.43 Receiving Verdict and Polling Jury.

18.43[1] Local Rules May Affect Polling of Jury.

18.43[2] Los Angeles County Rules.

18.43[2][a] Verdicts Read Unless Incorrect or Incomplete.

18.43[2][b] Party May Request Polling of Jury on General or Special Verdict or Special Findings.

18.43[2][c] Trial Judge Directs Polling.

18.43[2][d] Each Juror Asked If General Verdict Is His or Her Verdict.

18.43[2][e] Each Juror Asked If Response to Special Verdict or Special Findings in General Verdict Is His or Her Personal Response.

18.43[3] Either Party May Request Polling of Jury.

18.43[4] Verdict Is Complete After Polling Unless More Than One Fourth Disagree.

18.44 General Verdict Form--Single Plaintiff--Single Defendant--Single Cause of Action.

18.45 General Verdict Form--Single Plaintiff--Single Defendant--Multiple Causes of Action.

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Chapter 18 Jury Verdicts
I. STRATEGY

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.01

18.01 Scope.

This chapter covers:

- Objectives and strategies for obtaining a general verdict [*see 18.03 -18.08*].
- Procedures for obtaining a general verdict [*see 18.09 -18.10*; Forms: *see 18.44, 18.45*].
- Procedures for obtaining special findings with a general verdict [*see 18.10*; Form: *see 18.46*].
- Objectives and strategies for obtaining a special verdict [*see 18.11 -18.17*].
- Procedures for obtaining a special verdict [*see 18.18 -18.22*; Form: *see 18.47*].
- Mandatory use of a special verdict [*see 18.15*].
- Challenges to a general verdict [*see 18.23 -18.27*].
- Challenges to special findings with a general verdict [*see 18.28*].
- Challenges to a special verdict [*see 18.29 -18.37*].
- Effect of a jury verdict and entry of judgment [*see 18.38 -18.43*].

Core Statutes:

CCP §§ 624, 625

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral
VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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Chapter 18 Jury Verdicts
I. STRATEGY

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.02

18.02 Objective and Strategy.

In most uncomplicated cases a general verdict will suit counsel's needs. Counsel should analyze the case at the outset to determine whether it is complex, whether a special verdict is required, or whether Judicial Council of California Civil Jury Instructions (CACI) special verdicts are available for the circumstances of the case. Plaintiffs generally favor a general verdict because it requires jurors to make fewer decisions than with a special verdict. Conversely, defendants generally prefer a special verdict form, which requires decision making, particularly when the verdict form gives jurors the latitude of making a decision that obviates the need to continue going through the verdict form. If a special verdict appears necessary or favorable to the client, counsel should consider at an early stage of the proceeding drafting a general verdict with special interrogatories or a special verdict.

In addition, if the case involves a series of required findings before a jury can reach a verdict, and one particular finding is dispositive, it may be useful to require a jury to use a special verdict form to reach findings in a particular order. In such a case, a negative finding on element number three, for example, might mean "skip the rest of these questions, go to the end of the form, and sign the form." The basis for the verdict is made much clearer, and the potential issue on appeal is framed more effectively. Alternatively, the jury will have to deal with a strong element and may find reaching an ultimate verdict is easier because a dispositive element with strong supportive evidence clarifies its deliberations.

Strategic Points:



- In a general verdict, a jury decides all issues generally in favor of the plaintiff or defendant. In a special verdict, the jury find the ultimate facts only, leaving the judgment of law to the court [see CCP § 624; *McCoy v. Gustafson* (2010) 180 CA4th 56, 92-93, 103 CR3d 37] .
- In certain cases, a special verdict will be required. In that instance, counsel must prepare a general verdict form with special interrogatories or a special verdict form.



Cross References:

Discussion of general verdict, see 18.05.

Discussion of special verdict, see *18.14*.

Discussion of when special verdict is required, see *18.15*.

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 ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral
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Chapter 18 Jury Verdicts
II. OBTAINING GENERAL VERDICT

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.03

18.03 CHECKLIST: Obtaining General Verdict.



Determine timing.



Determine whether local rules or trial court preferences require submission at specific time.

Authority:

See, e.g., Inyo Super Ct Rules, Rule 6.15(b)(6)

Discussion:

See 18.09[3]



Determine whether to provide special interrogatories for special findings.



If punitive damages are sought, a general verdict must include special findings separating compensatory damages from punitive damages.

Authority:

CCP § 625

Discussion:

See 18.15[1]

Form:

See 18.46



In a medical malpractice case under the Medical Injury Compensation Reform Act, a general verdict must include

special findings designating the part of the verdict that compensates for future damages.

Authority:

CCP § 667.7

Discussion:

See 18.15[2]

- ☐ A general verdict must allocate certain noneconomic damages pursuant to Proposition 51.

Authority:

CCP § 1431.2

Discussion:

See 18.15[3]

- ☐ If special findings are not required, determine whether special interrogatories would be advantageous.

- ☐ Consult CACI for special verdicts.

Discussion:

See 18.16

- ☐ Obtain or draft general verdict form.

- ☐ Determine whether court will provide verdict form.

- ☐ If court drafts form, review form for sufficiency.

Discussion:

See 18.09[1]

- ☐ Draft verdict form if necessary.

- ☐ Obtain forms from LexisNexis Automated Judicial Council of California Civil Jury Instructions (CACI).

Authority:

Cal Rules Ct, Rule 2.1050; Judicial Council of California Civil Jury Instructions, CACI Nos. VF-5000, VF-5001 (LexisNexis Matthew Bender)

Discussion:

See 18.09[1]

Forms:

See 18.44, 18.45

- ☐ Draft any special interrogatories.

Authority:

CCP § 625

Discussion:

See 18.10

Form:

See 18.46

- ☐ CACI forms of special verdicts may be used as models for special interrogatories.

Discussion:

See 18.10, 18.16

- ☐ Serve verdict form on all parties.



Consult local rules and trial court procedure to determine timing.

Authority:

See, e.g., Inyo Super Ct Rules, Rule 6.15(b)(6)

Discussion:

See 18.09[3]

- ☐ Serve special interrogatories on all parties before argument, unless otherwise ordered.

Authority:

Cal Rules Ct, Rule 3.1580

Discussion:

See 18.10[4]



Consult local rules and trial court practice to determine additional timing requirements.

Authority:

See, e.g., Los Angeles Super Ct Rules, Rule 8.95; Orange Super Ct Rules, Rule 362

Discussion:

See 18.10[5]

- ☐ File verdict form with clerk.



Consult local rules and trial court practice to determine timing.

Authority:

See, e.g., Inyo Super Ct Rules, Rule 6.15(b)(6)

Discussion:

See 18.09[3]



File special interrogatories with clerk.



Consult local rules and trial court practice to determine timing.

Authority:

See, e.g., Los Angeles Super Ct Rules, Rule 8.95; Orange Super Ct Rules, Rule 362

Discussion:

See 18.10[4], [5]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial
VerdictsGovernmentsCourtsRule Application & InterpretationTortsDamagesPunitive DamagesGeneral
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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.04

18.04 Options and Strategies for Party Requesting General Verdict.

18.04[1] If Special Verdict Is Not Required, Party May Use General Verdict Form. A jury's verdict is either general or special [CCP § 624]. In some circumstances, such as separating compensatory damages from punitive damages, the jury must determine issues on special findings or a special verdict [see, e.g., CCP § 625]. In other cases, the request for a special verdict or special findings is a strategic option, and a party may instead use a general verdict form.



Strategic Point:

Counsel will want to request a general verdict form when the jury is asked to determine a limited number of issues, or when the evidence is overwhelming on a dispositive issue. For example, for a plaintiff, it can be advantageous to use a general verdict in a personal injury case in which the injuries are particularly egregious, but the evidence of negligence is a closer question. For a defendant, it can be more advantageous in a case where the defendant did something either negligently or lacking in full compliance with the duty or contractual provision involved but overall the evidence tilts strongly in favor of the defendant. A general verdict is also preferable in certain multiple "cause of action" cases when there is strong evidence of liability on one cause of action and close questions on the others, or when a particular defense with virtually uncontradicted supporting evidence, applicable to most of the causes of action, is balanced with a cause of action that is a closer question. A general verdict is particularly useful when the proponent wants to have the jury deliberate the case as a whole and deflect particularly close scrutiny of one or more specific elements.



Cross References:

Discussion of when special verdict is required, see *18.15*.

Discussion of court's role in determining type of verdict, see *California Trial Guide*, § 91.21[4] (Matthew Bender).

Example:

Use of a special verdict form is recommended when there are different measures of damages for different causes of action.

Jury Instructions:

Directions for Use, see *Judicial Council of California Civil Jury Instructions, CACI No. VF-5001* (LexisNexis Matthew Bender).

18.04[2] Advantages Include Upholding Verdict When One of Multiple Counts Is Supported by Substantial Evidence. Under the general verdict rule, when several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts [*Tavaglione v. Billings* (1993) 4 C4th 1150, 1157, 17 CR2d 608, 847 P2d 574] .

A general verdict implies finding in favor of the prevailing party on all material issues and avoids drafting problems inherent in special verdicts [*Tavaglione v. Billings* (1993) 4 C4th 1150, 1156-1157, 17 CR2d 608, 847 P2d 574] . A general verdict implies a finding in favor of the prevailing party of every fact essential to support that verdict [*Baxter v. Peterson* (2007) 150 CA4th 673, 678, 58 CR3d 686] .

 Cross Reference:

Discussion of advantages of general verdict, see *California Trial Guide*, § 91.21[1] (Matthew Bender).

Example:

In a product liability action against a car maker based on injuries caused by an airbag and resulting in a judgment for the plaintiff, the defendant appealed on the grounds that there was insufficient evidence to support issues on the theories of design defect or risk benefit. The court held that because the liability theory of defect by failure to warn was supported by substantial evidence, the sufficiency of evidence on other theories was immaterial [*Bresnahan v. Chrysler Corp.* (1998) 65 CA4th 1149, 1154, 76 CR2d 804] .

Exception:

The general verdict rule does not apply to preclude thorough review of a case when *special findings* are inconsistent with the general verdict [see *Tavaglione v. Billings* (1993) 4 C4th 1150, 1159, 17 CR2d 608, 847 P2d 574] .

Example:

In a case arising from a bank's removing a director, the jury returned a general verdict for plaintiff that included \$2.25 million as the total amount of compensatory damages, with special findings itemizing damages for defamation in the amount of \$605,000 and higher amounts for other causes of action, and \$2.4 million in punitive damages. The appellate court upheld the total damages award in the general verdict, but reviewed the defamation issues among others raised by the defendant. To sustain the judgment, the appellate court was required to review and uphold a sufficient number of separate damage findings that, when combined, equaled or exceeded the amount of the judgment [*Tavaglione v. Billings* (1993) 4 C4th 1150, 1159, 17 CR2d 608, 847 P2d 574] .

 Cross Reference:

Discussion of special findings, see 18.10.

In addition, a general verdict form may be preferable to a special verdict form if there are specific issues that would be emphasized in a special verdict form, from which the party, frequently the plaintiff, wants to deflect attention [see *McCloud v. Roy Riegels Chems.* (1971) 20 CA3d 928, 936, 97 CR 910] . The reverse can also be true: the defendant may want a special verdict that walks the jury through the elements and forces the jury to consider each one. Similarly,

if there is an affirmative defense, a defendant may want a specific finding on that issue.

18.04[3] Disadvantages Include Not Identifying Specific Issues on Appeal. A general verdict does not determine specific issues that an appellate court may require for a resolution of the issues raised on appeal. Consequently, a judgment based on a general verdict in favor of one's client may be reversed for lack of detail on which to affirm the judgment [see *Tavaglione v. Billings* (1993) 4 C4th 1150, 1157, 17 CR2d 608, 847 P2d 574] .

Example:

In a case for the wrongful trimming of a tree by the owner of an adjacent billboard, the plaintiff stated causes of action for spoliation of evidence and related torts. The jury received a general verdict form with special findings, returning a general verdict awarding compensatory damages to the plaintiffs. The verdict form did not indicate the causes of action that formed the basis of the damage award. The jury also returned a second verdict form finding that the defendant acted with fraud, oppression, or malice in spoliating evidence, awarding punitive damages. The jury had no verdict form that allowed to award punitive damages on any other cause of action. Based on a Supreme Court decision applied retroactively, the appellate court reversed on the ground that the plaintiff could not state a cause of action for spoliation. The case was problematic because the jury's compensatory damage award was based on a general verdict, i.e., the jury was not asked to specify on which cause of action the award was based [see *Hassoldt v. Patrick Media group* (2000) 84 CA4th 153, 159-163, 100 CR2d 662 (reversing and ordering new trial except for spoliation claims)].



Warning:

Failure to request a special verdict or a general verdict with special findings may make opposing an appeal difficult when specific causes of action necessary to support the general verdict are supported weakly or not at all by the evidence.



Cross Reference:

Discussion of advantages of special verdict, see *California Forms of Pleading and Practice*, § 326A.12[3] (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsGeneral Overview



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18.05 Jury Pronounces Verdict Generally on All or Any Issues.

A general verdict is a verdict by which the jury pronounces generally on all or any of the issues, either in favor of the plaintiff or defendant [*CCP* § 624; *Trujillo v. North County Transit Dist.* (1998) 63 CA4th 280, 285, 73 CR2d 596] .



Strategic Point--Sufficiency to Sustain on All Issues Unnecessary:

When several issues in an action are tried and submitted to a jury for determination, a general verdict may not be disturbed for uncertainty if one issue is sustained by the evidence and is unaffected by error. Whether the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues is irrelevant [*Boeken v. Philip Morris, Inc.* (2005) 127 CA4th 1640, 1668, 26 CR3d 638] .



Cross References:

Discussion of advantages of general verdict, see 18.04[2].

Discussion of general verdicts, see *California Forms of Pleading and Practice*, § 326A.11 (Matthew Bender).

Comparison of general and special verdicts, see *California Trial Guide*, § 91.21[1] (Matthew Bender).

Distinguish:

Under a general verdict, a jury pronounces generally, in simple terms without elaboration, on all or any of the issues. A special verdict is a verdict by which the jury find the facts only, leaving the judgment of law to the court [*see CCP* § 624; *Textron Fin. Corp. v. National Union Fire Ins. Co.* (2004) 118 CA4th 1061, 1073, 13 CR3d 586] .



Cross Reference:

Discussion of special verdict, see 18.14.

Legal Topics:

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

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18.06 Form of Verdict, Not its Designation, Determines Whether Verdict Is General or Special.

A verdict is a general verdict if it pronounces generally on all or any of the issues, and awards damages, when appropriate, to the plaintiff. A verdict that does so is a general verdict, even if it contains findings of fact and is denominated a "special verdict" [*Chavez v. Keat* (1995) 34 CA4th 1406, 1409 n1, 41 CR2d 72] . Similarly, a verdict containing no findings of fact is a general verdict despite its denomination as a "special verdict" [*Boeken v. Philip Morris, Inc.* (2005) 127 CA4th 1640, 1668, 26 CR3d 638] .

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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18.07 Three Fourths of Jury Must Agree That Each Element of Cause of Action Is Proved.

In a civil case, three fourths of the jury may render a verdict [*Cal Const, art I, § 16*]. In a civil case involving a general verdict, jurors must decide at a minimum whether a particular cause of action was proved by a preponderance of the evidence and, in so doing, must decide whether each element of that cause of action was proved [*Stoner v. Williams* (1996) 46 CA4th 986, 996, 1000-1002, 54 CR2d 243 ; see CCP §§ 613, 618].

Jury Instructions:

Obligation to Prove--More Likely True Than Not True, see *Judicial Council of California Civil Jury Instructions, CACI No. 200* (LexisNexis Matthew Bender).

Jurors need not agree from among a number of alternative acts which specific act is proved, as long as they agree that each element of the cause of action is proved [*Stoner v. Williams* (1996) 46 CA4th 986, 1002, 54 CR2d 243] .

► **Cross References:**

Discussion of jury's reception of verdict, see *California Forms of Pleading and Practice, § 326A.14* (Matthew Bender).

Discussion of jury's agreement, see *California Trial Guide, § 91.31[5]* (Matthew Bender).

Legal Topics:

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

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18.08 Jury May Decide in Court or Retire for Deliberation.

When the case is submitted to the jury, the jury may decide in court or retire for deliberation [*CCP* § 613; *Mendoza v. Club Car, Inc. (2000)* 81 CA4th 287, 309-310, 96 CR2d 605] . Thus, a jury may decide a case immediately following the court's instructions [*Mendoza v. Club Car, Inc. (2000)* 81 CA4th 287, 309-310, 96 CR2d 605] .

Short deliberations do not necessarily show a jury's failure to consider a case fully [*Mendoza v. Club Car, Inc. (2000)* 81 CA4th 287, 310, 96 CR2d 605] .

Legal Topics:

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

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18.09 Requesting General Verdict.

18.09[1] If Court Does Not Provide General Verdict Form, Party Must Draft Form. If the court does not provide a general verdict form, a party must draft its own form.



Strategic Point:

Regardless of who prepares it, counsel should always review the form and substance of a general verdict form. When counsel prepares the form, he or she generally submits it with the jury instructions.



Judge's Perspective:

In most cases, the court requires counsel for the parties to prepare the verdict form.



Cross Reference:

Discussion of preparing verdict form, see *California Trial Guide*, § 91.21[3] (Matthew Bender).

18.09[2] Use CACI Forms if Applicable. The Judicial Council of California Civil Jury Instructions (CACI) are the official jury instructions for use in California [*Cal Rules Ct, Rule 2.1050(a)*]. The California Rules of Court strongly encourage use of CACI jury instructions and verdict forms [*see Cal Rules Ct, Rule 2.1050(e)*; CACI Nos. VF-5000, VF-5001]. These verdict forms are available from LexisNexis Automated Judicial Council of California Civil Jury Instructions.



Cross References:

Forms of CACI verdicts, see 18.44, 18.45.

18.09[3] Consult Local Rules and Trial Court Procedure to Determine Timing and Submission of General Verdict Form.

18.09[3][a] Trial Court May Set Procedure for Submission of General Verdict Form. Counsel should consult local rules and the procedure of the particular trial court for guidance regarding the timing and method of submitting a

general verdict form.



Strategic Point:

In general, counsel should submit the proposed general verdict form with the jury instructions. The submission of the verdict form can thus be used as a tool to help the court understand the reasons for the proposed instructions. A party is always entitled to instructions on issues in the case that are dispositive, and if the issue is highlighted by a verdict form, whether broadly as a general verdict, or with respect to special findings or a special verdict form, argument in favor of the instructions may be more successful.



Cross Reference:

Discussion of submitting verdict, see *California Trial Guide*, § 91.21[3] (Matthew Bender).

18.09[3][b] Local Rules May Govern Timing and Submission of General Verdict Form. Local rules may govern the timing and submission of a general verdict form.

Example:

Inyo County requires service and filing of form before the pretrial conference [see Inyo Super Ct Rules, Rule 6.15(b)(6)].



Cross Reference:

Discussion of submitting verdict, see *California Trial Guide*, § 91.21[3] (Matthew Bender).

Legal Topics:

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

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18.10 Special Findings.

18.10[1] Special Findings or Special Verdict Are Required in Some Circumstances, Discretionary in Others.

In some circumstances, such as when separating compensatory damages from punitive damages, the jury must determine issues on special findings or a special verdict [*see, e.g., CCP § 625*]. In other cases, the request for special findings is a strategic option.



Strategic Point:

Special findings are always appropriate in a situation where one or more elements is either particularly lacking in support or particularly dispositive. The use of special interrogatories with a general verdict helps to ensure that the jury considers a particular issue (for example, evidence of performance or occurrence of a particular condition precedent in a contract, such as requiring a determination that an insurer owes its insured a duty to defend or a duty to indemnify before there can be a finding of liability for bad faith) [*see, e.g., Waller v. Truck Ins. Exchange, Inc. (1995) 11 C4th 1, 36, 44 CR2d 370, 900 P2d 619*]. The special interrogatories do not find for or against a party, but rather only find the existence or non-existence of specific facts.



Cross Reference:

Discussion of when to use special verdict, *see 18.15, 18.16*.

18.10[2] Party May Request Special Findings With General Verdict. In all cases the court may instruct the jury, if it renders a general verdict, to find on particular questions of fact stated in writing, and may direct a written finding [*CCP § 625*].

18.10[3] Party May Submit Special Interrogatories With General Verdict to Test Validity of Verdict. Special findings in response to special interrogatories submitted with a general verdict are useful to test the validity of the general verdict by determining whether all facts essential to the verdict were established to the satisfaction of the jury [*Hurlbut v. Sonora Cmty. Hosp. (1989) 207 CA3d 388, 403, 254 CR 840*].

Example:

In a defamation case, the special interrogatories showed that the jury had determined that the plaintiff's damages were significantly different under several causes of action, including defamation and breach of implied covenant [*Tavaglione v. Billings* (1993) 4 C4th 1150, 1156-1158, 17 CR2d 608, 847 P2d 574]

18.10[4] Party Must Submit and Serve Special Interrogatories Before Argument Unless Otherwise Ordered.

Whenever a party wants a jury to make special findings, the party must, before argument unless otherwise ordered, present to the judge in writing the issues or questions of fact on which the findings are requested, in proper form for submission to the jury, and serve copies on all other parties [*Cal Rules Ct, Rule 3.1580*].

18.10[5] Local Rules May Control Timing and Submission of Special Interrogatories.

18.10[5][a] Los Angeles County Requires Submission and Service Before Jury Instruction Conference. If a party requests a special verdict or special findings, the proposed form thereof should be prepared and submitted to the trial judge and served on adversaries, pursuant to *Cal Rules Ct, Rule 3.1580*, before the jury instruction conference. When the jury retires to deliberate, the verdict forms the trial judge has determined to be appropriate should be sent to the jury room for use by the jurors [Los Angeles Super Ct Rules, Rule 8.95].

 Cross Reference:

Discussion of submitting special interrogatories, see 18.10[4].

18.10[5][b] Orange County Requires Submission and Service of Form Before Party Rests. When a party wants a special verdict or special interrogatories from a jury, the party must, at or before the time the party rests, prepare and submit to the trial judge and serve on opposing counsel the proposed form of verdict or interrogatories pursuant to *Cal Rules Ct, Rule 3.1580* [Orange Super Ct Rules, Rule 362].

 Cross Reference:

Discussion of submitting special interrogatories, see 18.10[4].

18.10[5][c] Other Counties May Have Local Rules for Special Interrogatories. Other counties may have local rules regarding the timing and submission of special interrogatories.

Example:

Lake County requires submission of form at pretrial conference [Lake Super Ct Rules, Rule 10.3].

18.10[6] Court Has Discretion to Allow Special Findings. The trial court has discretion to determine whether to request the jury to return special findings in addition to a general verdict. Its decision will not be reversed except on a showing of abuse of discretion [*Gherman v. Colburn* (1977) 72 CA3d 544, 590, 140 CR 330] .

A party does not have the *right* to submit special interrogatories [*Hurlbut v. Sonora Cmty. Hosp.* (1989) 207 CA3d 388, 403, 254 CR 840] .

Exception:

In some cases, a special verdict is required regarding a certain issue. In such a case, it may be possible to submit a general verdict with special interrogatories instead of a special verdict, in which case a general verdict with special findings is discretionary [see, e.g., CCP § 625; *Slaney v. Ranger Ins. Co.* (2004) 115 CA4th 306, 313, 8 CR3d 915 (special verdict separating compensatory damages from punitive damages)].

 Cross Reference:

Discussion of when special verdict is required, see *18.15*.

Legal Topics:

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

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18.11 CHECKLIST: Obtaining Special Verdict.

☐ Determine whether special verdict is required.

☐ A special verdict is required in the following circumstances:

☐ Punitive damages are requested to separate compensatory damages award from punitive damages award.

Authority:
CCP § 625

Discussion:
See 18.15[1]

☐ There are different measures of damages for different causes of action.

Authority:
Judicial Council of California Civil Jury Instructions, CACI No. VF-5001, "Directions for Use"
(LexisNexis Matthew Bender)

Discussion:
See 18.04[1]

☐ Periodic payments are requested for future damages in a medical malpractice case under the Medical Injury Compensation Reform Act.

Authority:
CCP § 667.7; Salgado v. County of Los Angeles (1998) 19 C4th 629, 639, 80 CR2d 46, 967 P2d 585

Discussion:

See 18.15[2]

- ☐ Defendant seeks a Proposition 51 offset for noneconomic damages attributable to another person's fault.

Authority:

Kitzig v. Nordquist (2000) 81 CA4th 1384, 1398, 97 CR2d 762

Discussion:

See 18.15[3]

- ☐ If special verdict is not required, determine whether special verdict is useful, such as in the following circumstances:

- ☐ The case is complex.

Discussion:

See 18.12[1]

- ☐ There are issues that the party wishes to preserve for appeal.

Authority:

See, e.g., *Heiner v. KMart Corp. (2000) 84 CA4th 335, 346, 100 CR2d 854*

Discussion:

See 18.12[4]

- ☐ There are CACI forms of special verdicts available, such as the following:

- ☐ Contract cases.

Authority:

Judicial Council of California Civil Jury Instructions, CACI Nos. VF-300 -VF-303
(LexisNexis Matthew Bender)

Discussion:

18.16

Form:

See 18.47

- ☐ Negligence cases.

Authority:

Judicial Council of California Civil Jury Instructions, CACI Nos. VF-400 -VF-409
(LexisNexis Matthew Bender)

Discussion:

See 18.16

☐ Tort damages.**Authority:**

Judicial Council of California Civil Jury Instructions, CACI Nos. VF-3900 -VF-3907
(LexisNexis Matthew Bender)

Discussion:

See 18.16



Determine timing.

☐ Party must submit and serve special verdict form before argument.**Authority:***Cal Rules Ct, Rule 3.1580***Discussion:**

See 18.20[1]

☐ Local court rules or trial court may require submission of verdict form at earlier time.**Authority:***Cal Rules Ct, Rule 3.1580; see, e.g., Alameda Super Ct Rules, Rule 4.4(H)(10)***Discussion:**

See 18.20[2]

☐ Draft special verdict form.☐ Obtain any forms available from LexisNexis Automated Judicial Council of California Civil Jury Instructions (CACI).**Authority:***Cal Rules Ct, Rule 2.1050***Discussion:**

See 18.09[2], 18.16

☐ If no forms are available from LexisNexis Automated Judicial Council of California Civil Jury Instructions (CACI) for relevant issues, carefully draft special verdict form.

☐ Include all issues appropriate to case, considering entire case and all relevant theories, causes of action and/or defenses.

Authority:

Cal Rules Ct, Rule 2.1050

Discussion:

See 18.18

- ☐ Special verdict form must be written.

Authority:

Cal Rules Ct, Rule 3.1580

Discussion:

See 18.17



Consult local court rules and trial court for format requirements.

Authority:

See, e.g., Shasta Super Ct Rules, Rule 4.05(G)(2)

Discussion:

See 18.18[1]

- ☐ Serve verdict form on all parties.



Consult local rules and trial court procedure to determine timing.

Authority:

See, e.g., Alameda Super Ct Rules, Rule 4.4(H)(10)

Discussion:

See 18.20[2]

- ☐ Serve special verdict on all parties before argument, unless otherwise ordered.

Authority:

Cal Rules Ct, Rule 3.1580

Discussion:

See 18.20[1]



Consult local rules and trial court practice to determine additional timing requirements.

Authority:

See, e.g., Los Angeles Super Ct Rules, Rule 8.95

Discussion:

See 18.20[2]

 File special verdict form with court.

 Consult local rules and trial court practice to determine timing.

Authority:

See, e.g., Santa Clara Super Ct Rules, Rule 6(D)(5)

Discussion:

See 18.20[2]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsGovernmentsCourtsRule Application & InterpretationTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers



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III. OBTAINING SPECIAL VERDICT

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18.12 Options and Strategies for Party Requesting Special Verdict.

18.12[1] Special Verdict Is Required in Some Cases, Optional in Most Cases. In some cases, a special verdict on a particular issue is specifically required. For example, by statute, in all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages [CCP § 625].

 Cross Reference:

Discussion of when special verdict is required, see *18.15*.



Strategic Point--Plaintiff:

Even though a statute may require a special verdict in a particular circumstance [see CCP § 625], the use of a special finding in a general verdict may suffice for this purpose.

 Cross Reference:

Form, see *18.47*.

In most cases, neither a special verdict nor special findings are required. The decision to use a special verdict is usually a strategic decision.

Examples:

Use of a special verdict form is recommended when there are different measures of damages for the different causes of action [see Judicial Council of California Civil Jury Instructions, "Directions for Use" in CACI No. VF-5001 (LexisNexis Matthew Bender)]. Special verdicts are also useful in a complex case. Although it is often helpful for the defendant to have the jury walk through all of the elements of each cause of action, it may be disadvantageous to the plaintiff. The jury's consideration of each element of a cause of action will also be helpful in resolving future appeals.

 Judge's Perspective:

When recovery depends on the jury's favorable decision on multiple questions, the defense will want to use a special verdict form to assure the jury makes each required determination.



Strategic Point:

A party may consult the many special verdict forms in Judicial Council of California Civil Jury Instructions (CACI), published by LexisNexis Matthew Bender, as a guideline to determine whether use of a special verdict form is advisable in a given case. These forms provide some assurance to the party in the event of an appeal based on the form used or responses provided by the jury.



Cross Reference:

Discussion of CACI special verdict forms, see 18.16.

18.12[2] Special Verdict May Draw Unwanted Attention to Certain Issues During Jury Deliberations. If a special verdict is not required, a party may benefit from the use of a general verdict to avoid drawing unwanted attention to a particular issue [see *McCloud v. Roy Riegels Chems. (1971) 20 CA3d 928, 936, 97 CR 910*].



Strategic Point:

The plaintiff will generally prefer a general verdict to avoid the possibility of the jury becoming bogged down on a particular step required to reach a decision in favor of the plaintiff.

Example:

In an intentional tort case in which there is little or no evidence that the conduct of the defendant was egregious enough to be malicious, fraudulent, or oppressive, and the facts do not readily lend themselves to an argument based on little more than the level of the injuries inflicted (i.e., minimal compensatory damages but a request for the maximum in punitive damages), the plaintiff may want a general verdict with compensatory and punitive damages, whereas the defendant may want to draw attention to the conduct of the defendant that counters the argument for punitive damages, in an attempt to mitigate loss.

18.12[3] Special Verdict Creates Possibility of Defective or Incomplete Verdict. A special verdict presents to the jury each ultimate fact in the case, so that nothing remains for the court but to draw from the facts conclusions of law [CCP § 624]. This procedure presents certain problems: The requirement that the jury resolve every controverted issue is one of the recognized pitfalls of special verdicts. The possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings [see *Saxena v. Goffney (2008) 159 CA4th 316, 325, 71 CR3d 469*].

18.12[4] Special Verdict Has Advantage of Identifying Issues on Appeal. A special verdict may serve to identify and clarify specific issues on appeal [see, e.g., *Arreola v. County of Monterey (2002) 99 CA4th 722, 761, 122 CR2d 38* (appellate court ascertained that one party was not derivatively liable because jury instruction and special verdict did not involve vicarious liability theory)].



Cross Reference:

Discussion of court's duty as to special verdict, see *California Trial Guide*, § 91.21[4] (Matthew Bender).

18.12[5] Special Verdict Does Not Imply Findings. With a special verdict, the court does not imply findings on all issues in favor of the prevailing party as with a general verdict [*Trujillo v. North County Transit Dist. (1998) 63 CA4th 280, 285, 73 CR2d 596*]. Rather, a special verdict's correctness is analyzed as a matter of law because a special

verdict is far more susceptible to defect than a general verdict, which can be tested with special findings [*Mendoza v. Club Car, Inc.* (2000) 81 CA4th 287, 303, 96 CR2d 605] .



Cross Reference:

Discussion of special findings, see 18.10.

18.12[6] Failure to Request Special Verdict on Specific Issue Waives Right to Raise That Issue on Appeal.

The failure to request a special verdict on a particular issue waives a claim of error with respect to that issue on appeal [Greer v. Buzgheia (2006) 141 CA4th 1150, 1158-1159, 46 CR3d 780].

Example:

In a personal injury action, the defendant's contention on appeal that the trial court erroneously admitted an expert's testimony concerning the plaintiff's future profits was rejected in part because the defendant did not request a special verdict segregating the elements of damage. The appellate court could not determine what part, if any, of the total damages award was awarded as compensation for future profits. Accordingly, a claim of error on this point was deemed waived [see *Heiner v. KMart Corp.* (2000) 84 CA4th 335, 346, 100 CR2d 854] .

18.12[7] If There Is No Right to Jury Trial, Advisory Jury May Render Special Verdict. When there is no right to a jury trial, such as in an equitable action, an advisory jury is nevertheless available and the trial court has the discretion to submit issues to an advisory jury and adopt the jury's findings on factual matters [see, e.g., *Caira v. Offner* (2005) 126 CA4th 12, 22 n4, 24 CR3d 233] .

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsReviewabilityPreservation for ReviewTortsDamagesPunitive DamagesGeneral Overview



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18.13 Questions and Answers Comprise Special Verdict.

A special verdict consists of both the questions posed in the verdict form and the jury's answers [*see, e.g., Bly-Magee v. Budget Rent-A-Car Corp. (1994) 24 CA4th 318, 325-326, 326, 29 CR2d 330*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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18.14 Jury Finds Only Facts in Special Verdict.

18.14[1] Jury Finds Facts, Leaving Judgment to Court. In a special verdict, the jury finds only the ultimate facts, leaving the court to apply those facts to the law and render a judgment [*see CCP § 624*].

Example:

In the underlying trial for trademark infringement in an insurance action, the jury properly found in special verdict forms that the defendants' use of the trademark was "likely to cause confusion," "infringing," and "a false representation or a false designation of origin." The jury also found that their "conduct was willful" [*see Palmer v. Truck Ins. Exch. (1999) 21 C4th 1109, 1113, 90 CR2d 647, 988 P2d 568*].

In all cases, the court may direct the jury to find a special verdict in writing on all or any of the issues [*CCP § 625*].

18.14[2] Special Verdict Presents Conclusions of Fact. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them. Those conclusions of fact must be presented so that nothing remains for the court but to draw from them conclusions of law [*CCP § 624*].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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18.15 Special Verdict Is Required in Some Circumstances.

18.15[1] Special Verdict Required When Jury Must Separate Punitive From Compensatory Damages. In cases in which the issue of punitive damages is presented to the jury, the court must direct the jury to find a special verdict in writing, separating punitive damages from compensatory damages [*CCP* § 625; *see, e.g., Slaney v. Ranger Ins. Co. (2004) 115 CA4th 306, 313, 8 CR3d 915*].

Consider:

Counsel may also, in the court's discretion, do this by way of general verdict with special findings.



Cross Reference:

Form, *see* 18.46.

18.15[2] Special Verdict Required When Jury Must Designate Part of Verdict That Compensates for Future Damages in Medical Malpractice Case. In suits against health care providers, *CCP* § 667.7 requires the court to order that the plaintiff's future damages be paid by periodic payments rather than in one lump-sum payment if the award equals or exceeds \$50,000, and if one of the parties requests periodic payments [*CCP* § 667.7; *Deocampo v. Ahn (2002) 101 CA4th 758, 771, 125 CR2d 79*].

If requested by a party in a Medical Injury Compensation Reform Act of 1975 case, periodic payments for \$50,000 or more in future damages are mandatory [*see CCP* § 667.7]. The trial court has a mandatory duty to enter a periodic-payment judgment in cases falling within the statute. To preserve the right to a jury trial, *CCP* § 667.7 requires the jury to designate the part of its verdict that is intended to compensate for future damages [*Salgado v. County of Los Angeles (1998) 19 C4th 629, 639, 80 CR2d 46, 967 P2d 585*]. The jury must designate the part of the verdict that is attributable to the plaintiff's future damages [*Deocampo v. Ahn (2002) 101 CA4th 758, 771, 125 CR2d 79*].

When a party properly invokes *CCP* § 667.7, the trial court must fashion the periodic payments based on the gross amount of future damages, because if a present value award is periodized, a plaintiff might not be fully compensated for the future losses. The judgment, in effect, would be discounted twice; first by reducing the gross amount to present value, and second by deferring payment. The proper approach is for the jury to determine the gross amount of future

damages, and then for the court to structure a periodic payment schedule based on that amount [*Salgado v. County of Los Angeles* (1998) 19 C4th 629, 639, 80 CR2d 46, 967 P2d 585] .

 Cross Reference:

Discussion of procedure under CCP § 667.7, see *California Forms of Pleading and Practice*, § 326A.12[3] (Matthew Bender).

18.15[3] Proposition 51 Requires Special Verdict to Allocate Certain Noneconomic Damages. A defendant seeking a Proposition 51 offset for noneconomic damages attributable to another person's fault must propose a special verdict requesting this allocation [*Kitzig v. Nordquist* (2000) 81 CA4th 1384, 1398, 97 CR2d 762 ; see CCP § 1431.2].

Strategic Point--Defendant:



A defendant seeking a Proposition 51 offset must draft a special verdict form requesting allocation of noneconomic damages *in addition to* proposing a jury instruction informing the jury of the law on that issue. A jury instruction alone, without the special verdict form, does not satisfy this requirement [*Kitzig v. Nordquist* (2000) 81 CA4th 1384, 1398, 97 CR2d 762] .

 Cross Reference:

Discussion of jury instructions, see Ch. 16, Jury Instructions.

In an action for personal injury, property damages, or wrongful death based on comparative fault, the liability of each defendant for noneconomic damages is several only, not joint. Each defendant is liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment is rendered against that defendant for that amount [CCP § 1431.2(a)].

The 1986 statutes enacted under Proposition 51 addressed inequities perceived in the "deep pocket rule" and limited certain noneconomic damages awards against multiple tortfeasors [see CCP §§ 1431-1431.5].

 Cross References:

Discussion of impact of Proposition 51, see *California Forms of Pleading and Practice*, § 177.44 (Matthew Bender).

Discussion of use of special verdicts, see *California Trial Guide*, § 91.21[1] (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsTortsDamagesPunitive DamagesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsProcedureMultiple DefendantsJoint & Several Liability



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18.16 Special Verdict Forms Are Available for Many Causes of Action and Claims for Damages.

The Judicial Council of California Civil Jury Instructions (CACI) are the official instructions for use in California [*Cal Rules Ct., Rule 2.1050(a)*]. The California Rules of Court strongly encourage use of CACI jury instructions and verdict forms [*see Cal Rules Ct, Rule 2.1050(e)*]. These forms are available from LexisNexis Automated Judicial Council of California Civil Jury Instructions.

Special verdict forms are available for the following types of cases, among others:

- Contract cases [*see, e.g., Leamon v. Krajcikewcz (2003) 107 CA4th 424, 429-430, 132 CR2d 362*] .



Cross Reference:

Form, *see* 18.47.

Jury Instructions:

Contracts, *see Judicial Council of California Civil Jury Instructions, CACI Nos. VF-300 -VF-303* (LexisNexis Matthew Bender).

- Negligence cases [*see, e.g., Laico v. Chevron U.S.A., Inc. (2004) 123 CA4th 649, 657-658, 20 CR3d 307*] .

Jury Instructions:

Negligence, *see Judicial Council of California Civil Jury Instructions, CACI Nos. VF-400 -VF-409* (LexisNexis Matthew Bender).

- Eminent domain cases [*see, e.g., City of San Diego v. D.R. Horton San Diego Holding Co., Inc. (2005) 126 CA4th 668, 682-684, 24 CR3d 338*] .

Jury Instructions:

Eminent Domain, *see Judicial Council of California Civil Jury Instructions, CACI Nos. VF-3500 -VF-3502* (LexisNexis Matthew Bender).

- Product liability cases [see, e.g., *Mendoza v. Club Car, Inc.* (2000) 81 CA4th 287, 303, 96 CR2d 605 ; but see *Bresnahan v. Chrysler Corp.* (1998) 65 CA4th 1149, 76 CR2d 804 (general verdict)].

Jury Instructions:

Products Liability, see *Judicial Council of California Civil Jury Instructions*, CACI Nos. VF-1200 -VF-1208 (LexisNexis Matthew Bender).

- Privacy cases [see, e.g., *Sanders v. American Broad. Cos., Inc.* (1999) 20 C4th 907, 913 85 CR2d 909, 978 P2d 67 (jury was asked whether conversation on which defendants allegedly intruded was conducted "in circumstances in which the parties to the communication may reasonably have expected that the communications may have been overheard")].

Jury Instructions:

Right to Privacy, see *Judicial Council of California Civil Jury Instructions*, CACI Nos. VF-1800 -VF-1807 (LexisNexis Matthew Bender).

- Fraud and deceit cases [see, e.g., *Fragale v. Faulkner* (2003) 110 CA4th 229, 235, 1 CR3d 616 (intentional and negligent misrepresentation)].

Example:

In one fraud case, the jury found on a special verdict that the individual defendant made no affirmative misrepresentations, but concealed or suppressed material facts, causing damages to the plaintiff of \$218,000. It further found that the corporate defendant did not conceal or suppress any material fact [see *Persson v. Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1149, 1162-1163, 23 CR3d 335 (upholding jury verdict awarding damages for fraudulent concealment)].

Jury Instructions:

Fraud or Deceit, see *Judicial Council of California Civil Jury Instructions*, CACI Nos. VF-1900 -VF-1903 (LexisNexis Matthew Bender).

- Wrongful termination cases [see *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 C4th 93, 107, 69 CR2d 900, 948 P2d 412] .



Strategic Point:

In a wrongful termination case based on breach of contract, when the discharged employee denied committing the acts that led to the decision to terminate employment, the proper inquiry for the jury was whether the factual basis on which the employer concluded a dischargeable act had been committed was reached honestly, after an appropriate investigation and for reasons that were not arbitrary or pretextual. Under this standard, the jury's role is to assess the objective reasonableness of the employer's factual determination of misconduct. By contrast, an *improper* question for the jury would be whether the employee in fact committed the act that led to dismissal, which would improperly cause the jury to decide the ultimate truth of the employee's alleged misconduct [*Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 C4th 93, 107, 69 CR2d 900, 948 P2d 412] .

Jury Instructions:

Wrongful Termination, see *Judicial Council of California Civil Jury Instructions*, CACI

Nos. VF-2400 -VF-2408 (LexisNexis Matthew Bender).

- Fair Employment and Housing Act cases [see *Aguilar v. Avis Rent A Car Sys., Inc.* (1999) 21 C4th 121, 127, 87 CR2d 132, 980 P2d 846 ; Gov Code § 12900 et seq.].

Example:

In an employment discrimination case under the FEHA, the jury found by special verdict that the defendants unlawfully discriminated against the plaintiff based on his religious beliefs and practices in violation of that statute, and that they terminated his employment in violation of public policy. The jury found no breach of contract and no breach of good faith [*Silo v. CHW Med. Found.* (2002) 27 C4th 1097, 1103, 119 CR2d 698, 45 P3d 1162] .

Jury Instructions:

Fair Employment and Housing Act, see *Judicial Council of California Civil Jury Instructions*, CACI Nos. VF-2500 -VF-2512 (LexisNexis Matthew Bender).

- Statutory causes of action under Unfair Practices Act [B&P Code § 17200 et seq.].

Jury Instructions:

Unfair Practices Act, see *Judicial Council of California Civil Jury Instructions*, CACI Nos. VF-3300 -VF-3307 (LexisNexis Matthew Bender).

- Torts actions.

Jury Instructions:

Damages, see *Judicial Council of California Civil Jury Instructions*, CACI Nos. VF-3900 -VF-3907 (LexisNexis Matthew Bender).

Legal Topics:

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

Civil Procedure Trials Jury Trials Jury Instructions Standard Instructions Civil Procedure Trials Jury Trials Verdicts Special Verdicts



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18.17 Present Issues in Writing to Court.

Whenever a party wants special findings from a jury, the party must, before argument, unless otherwise ordered, present to the judge in writing the issues or questions of fact on which the findings are requested, in proper form for submission to the jury, and serve copies on all other parties [*Cal Rules Ct, Rule 3.1580*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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18.18 Request Special Verdict in Proper Form.

18.18[1] Local Rules May Control Form of Special Verdict. Counsel should consult local court rules for requirements regarding the form of a special verdict. For example, Colusa, Shasta, and Siskiyou counties require "Yes" or "No" answers if possible [*see, e.g.,* Shasta Super Ct Rules, Rule 4.05(G)(2)].

18.18[2] Carefully Draft Special Verdict. A party must draft a special verdict form carefully to ensure inclusion of all issues that must be addressed [*see, e.g.,* *Heppler v. J.M. Peters Co., Inc.* (1999) 73 CA4th 1265, 1287-1288, 87 CR2d 497 (plaintiff belatedly contended, on appeal, that special verdict forms did not address one defendant's negligence; issue should have been addressed at trial in timely manner, although appellate court found that special verdict did address that issue)].



Cross Reference:

Discussion of preparing special verdict, *see California Trial Guide*, § 91.21[3] (Matthew Bender).



Judge's Perspective:

Counsel drafting special verdict forms should carefully review the forms to ensure that all important issues are addressed and to ensure that the jury answers all questions needed to support the verdict. Even though special verdict forms are requested early in the proceedings, it is not unusual for the forms to be finalized at the end of the case after all legal issues have been resolved. Last minute changes are sometimes made without careful scrutiny by both counsel and the court. Defects in the verdict forms may go unnoticed, and it is not unusual for the jury to point out these flaws to the court during their deliberations.



Strategic Point--Party Requesting Special Verdict:

The party requesting a special verdict should consider all related jury instructions and carefully draft any related instructions he or she proposes to complement the special verdict [*see* *Kitzig v. Nordquist* (2000) 81 CA4th 1384, 1398, 97 CR2d 762].

 Cross Reference:

Discussion of jury instructions, see Ch. 16, Jury Instructions.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial
VerdictsGovernmentsCourtsRule Application & Interpretation



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18.19 Make Request for Special Verdict Specific and Clear.

Counsel must request a special verdict in a clear and specific manner. Mentioning a special verdict in a casual manner or briefly during court proceedings is insufficient to lodge a request for special verdict, or to preserve the objection for the court's failure to allow that special verdict to be submitted to the jury [*Kitzig v. Nordquist (2000) 81 CA4th 1384, 1398, 97 CR2d 762*] .



Strategic Point:

Counsel is advised to submit a special verdict form, carefully drafted to complement all related instructions, when the instructions are submitted to ensure that counsel has preserved objections to the failure to use an adequate special verdict. At such time as the court resolves differences in the proposed instructions submitted by all parties, counsel will have the opportunity to refine the special verdict form in light of the issues and evidence actually tried, and the proposed form will be in the record for appellate or other use.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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18.20 Make Request in Timely Manner.

18.20[1] Submit and Serve Special Verdict Form Before Argument. Whenever a party want special findings from a jury, the party must, before argument, unless otherwise ordered, present to the judge in writing the issues or questions of fact on which the findings are requested, in proper form for submission to the jury, and serve copies on all other parties [*Cal Rules Ct, Rule 3.1580*].

 Cross Reference:

Discussion of preparing special verdict, see *California Trial Guide*, § 91.21[3] (Matthew Bender).

 Warning:

Failure to request a special verdict in a timely manner waives any objection on an issue [*see, e.g., Kitzig v. Nordquist (2000) 81 CA4th 1384, 1398, 97 CR2d 762*] . A party may not contend on appeal that a special verdict form did not address an issue if the party did not submit a special verdict form on that issue or object during trial to the omission [*see, e.g., Thompson Pacific Construction, Inc. v. City of Sunnyvale (2007) 155 CA4th 525, 550, 66 CR3d 175 ; Heppler v. J.M. Peters Co., Inc. (1999) 73 CA4th 1265, 1287-1288, 87 CR2d 497* (waiver of issue when not raised during trial in timely manner)].

18.20[2] Local Rules May Control Timing of Request for Special Verdict.

18.20[2][a] Alameda County Requires Submission and Service Before Trial. In Alameda County, if the use of a special verdict form is anticipated, each counsel, and any self-represented party, must prepare the form of special verdict, personally serve it on opposing counsel or any self-represented party three court days before trial, and submit it to the trial judge at the first appearance in the trial department [*Alameda Super Ct Rules, Rule 4.4(H)(10)*].

18.20[2][b] Los Angeles County Requires Submission and Service Before Jury Instruction Conference. In Los Angeles County, if a party requests a special verdict or special findings, the proposed form should be prepared and submitted to the trial judge and served on adversaries, pursuant to *Cal Rules Ct, Rule 3.1580*, before the jury instruction conference. When the jury retires to deliberate, the verdict forms the trial judge has determined to be appropriate should be sent to the jury room for use by the jurors [*Los Angeles Super Ct Rules, Rule 8.95*].

18.20[2][c] Orange County Requires Submission and Service Before Party Rests. In Orange County, a party who wants a special verdict or special interrogatories from a jury must at or before the time the party rests, prepare and submit to the trial judge and serve on opposing counsel the proposed form pursuant to *Cal Rules Ct, Rule 3.1580* [Orange Super Ct Rules, Rule 362].

18.20[2][d] San Diego County Requires Attachment of Form to Joint Trial Readiness Conference Report. In San Diego County, if a special verdict form will be proposed, counsel must attach it to the joint trial readiness conference report [San Diego Super Ct Rules, App B(G), Div II].

18.20[2][e] Santa Clara County Requires Submission and Service of Form by Noon on Friday Before Trial Date. In Santa Clara County, unless the case was settled at the mandatory settlement conference or dismissed in full beforehand or unless otherwise ordered by the court, proposed special verdicts (among other items) must be lodged in the department of the trial judge or, if none, with the court's calendar secretary, and served on all other parties by noon on the Friday before the date set for trial [Santa Clara Super Ct Rules, Rule 6(D)(5)].

18.20[2][f] Other Counties May Have Court Rules Controlling Timing of Request for Special Verdict. Other counties may have local rules regarding the timing of a request for a special verdict.

Example:

Riverside County requires submission and service of form before evidence offered [see Riverside Super Ct Rules, Rule 2.0070].

** Judge's Perspective:**

Even though local rules may require early submission, it is not unusual for the final form to be determined at the close of trial.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsReviewabilityPreservation for ReviewGovernmentsCourtsRule Application & Interpretation



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Chapter 18 Jury Verdicts
III. OBTAINING SPECIAL VERDICT

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.21

18.21 Serve Copies on All Other Parties.

Whenever a party wants special findings from a jury, the party must, before argument, unless otherwise ordered, present to the judge in writing the issues or questions of fact on which the findings are requested, in proper form for submission to the jury, and serve copies on all other parties [*Cal Rules Ct, Rule 3.1580*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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18.22 Court May Allow Special Verdict When Not Required.

In all cases, the court may direct the jury to find a special verdict in writing, on all, or any of the issues [CCP § 625]. The court therefore has discretion to allow a request for special verdict that is not otherwise required [see, e.g., *Los Angeles Metro. Transp. Auth. v. Continental Dev. Corp.* (1997) 16 C4th 694, 701, 66 CR2d 630, 941 P2d 809 (trial court denied plaintiff's request for a special verdict form that would have required jury to state separately amounts awarded for different elements of severance damages in condemnation action)].

If the court permits a special verdict form, the inclusion of questions in that form, either specific questions or "special interrogatories," lies within the sound discretion of the trial court [*Wolf v. Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1118, 776 CR3d 585]. Particularly when the special interrogatories in the special verdict form, even though repetitive, do not emphasize one side of the case so as to place the trial court's imprimatur on that theory of the case over the other, they may "fall far short of an abuse of the court's broad discretion" [*Wolf v. Walt Disney Pictures & Television* (2008) 162 CA4th 1107, 1119, 776 CR3d 585].

A request for special verdict is properly refused if the premise of the question is based on an erroneous interpretation of the law [see, e.g., *Filet Menu, Inc. v. C.C.L. & G., Inc.* (2000) 79 CA4th 852, 859-865, 94 CR2d 438].

Example:

In a breach of contract case between a restaurant and paper supplier, the trial court properly refused to submit a special verdict to the jury to determine whether the contract was divisible, and if so, which parts of the contract were induced by fraud. Because a divisible contract is still a single contract, the customary rules regarding contract formation are applicable. A contract induced by fraud renders the entire agreement voidable, permitting the aggrieved party to defend a suit on the contract by objecting to its enforcement because it was procured or induced by fraud. Because the jury found that the contract was induced by misrepresentations made with the intent to defraud cross-complainants, the contract, whether divisible or not, was voidable [*Filet Menu, Inc. v. C.C.L. & G. Inc.* (2000) 79 CA4th 852, 859-865, 94 CR2d 438].

— Judge's Perspective:

Even when a special verdict form is not required, courts will generally allow submission of special verdict forms to the jury.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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IV. CHALLENGING GENERAL AND SPECIAL VERDICTS

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.23

18.23 CHECKLISTS: Challenging General and Special Verdicts.

18.23[1] CHECKLIST: Challenging General Verdict.

☐ Consider objecting to general verdict form.



Determine timing.



Object to form of general verdict before its submission to jury.

Authority:

See *Tavaglione v. Billings* (1993) 4 C4th 1150, 1157, 17 CR2d 608, 847 P2d 574

Discussion:

See 18.06



Determine whether local rules or trial court procedure require attorneys to meet and confer regarding verdict forms, or otherwise require verdict forms to be approved at specific stage of trial.

Authority:

See, e.g., El Dorado Super Ct Rules, Rule 7.12.11(C)

Discussion:

See 18.09[3]



Analyze general verdict form for accuracy and completeness.



If special findings are included, analyze whether the questions thoroughly and accurately address the issues.

Discussion:

See 18.25, 18.29

- ☐ Make appropriate objections in timely manner.

Discussion:

See 18.24[1]

- ☐ After general verdict is rendered, analyze verdict for correctness and completeness.



Determine timing.

- ☐ Object to verdict before jury is discharged.

Authority:

See *CCP* § 619

Discussion:

See 18.24[2]

- ☐ Determine whether local rules or trial court procedure requires attorney to object in particular manner or at specific time.

Discussion:

See 18.24[2]

- ☐ If special findings are included in general verdict, analyze answers for internal consistency, consistency with general verdict, and overall completeness.

Authority:

CCP § 625; see *Tavaglione v. Billings* (1993) 4 C4th 1150, 1156, 17 CR2d 608, 847 P2d 574

Discussion:

See 18.28

- ☐ When special finding is inconsistent with general verdict, special finding prevails.

Authority:

CCP § 625

Discussion:

See 18.28[1]

- ☐ Make appropriate objections in timely manner.

Authority:

See *CCP* § 619

Discussion:

See 18.24[2]

☐ Consider bringing post-trial motion if appropriate.

☐ Motion for new trial if juror was induced to assent to special finding.

Authority:

CCP § 657(2)

Discussion:

See 18.28[2]

18.23[2] CHECKLIST: Challenging Special Verdict.

☐ Consider objecting to special verdict form.



Determine timing.



Object before the court discharges the jury.

Authority:

See *Jensen v. BMW of N. Am., Inc.* (1995) 35 CA4th 112, 131, 41 CR2d 295

Discussion:

See 18.29[3]

☐ Consult local rules and trial court procedures to determine timing of objection.

Discussion:

See 18.29[3]

☐ Request modification of special verdict form if necessary.

Authority:

See, e.g., *John Y. v. Chaparral Treatment Ctr., Inc.* (2002) 101 CA4th 565, 579-580, 124 CR2d 330

Discussion:

See 18.29[2]

☐ After special verdict rendered, consider objecting to special verdict.



Determine timing.

- ☐ Object in timely manner at time of trial.

Authority:

See *Padilla v. Greater El Monte Cmty. Hosp.* (2005) 129 CA4th 667, 670, 28 CR3d 636

Discussion:

See 18.30

- ☐ Object before jury is discharged.

Authority:

See CCP § 619; *Mizel v. City of Santa Monica* (2001) 93 CA4th 1059, 1072, 113 CR2d 649

Discussion:

See 18.24[2]

- ☐ Consult local rules and trial court procedures to determine timing of objection.

Discussion:

See 18.24[2]

- ☐ Determine whether answers are internally consistent.

Authority:

See CCP § 619

Discussion:

See 18.31[2]

- ☐ Determine whether verdict is ambiguous.

Authority:

See *Mizel v. City of Santa Monica* (2001) 93 CA4th 1059, 1071, 113 CR2d 649

Discussion:

See 18.31[3]

- ☐ If special verdict is informal or insufficient, request correction of verdict.

Authority:

CCP § 619

Discussion:

See 18.32[1]

- ☐ Request further jury deliberations if appropriate.

Authority:

CCP § 619

Discussion:

See 18.32[1]

- ☐ Consider bringing post-trial motions if appropriate.

- ☐ Motion for judgment notwithstanding the verdict if verdict not supported by evidence.

Authority:

CCP § 629; see Trujillo v. North County Transit Dist. (1998) 63 CA4th 280, 284, 73 CR2d 596

Discussion:

See 18.32[3][b]

- ☐ Motion for new trial, if verdict based on insufficient evidence.

Authority:

CCP § 657(6)

Discussion:

See 18.32[3][c]

- ☐ Motion for new trial, if verdict is against the law.

Authority:

CCP § 657(6)

Discussion:

See 18.32[3][d]

- ☐ Motion for new trial, if juror induced to assent to special verdict.

Authority:

CCP § 657(2)

Discussion:

See 18.33

- ☐ Motion for new trial based on jury misconduct.

Authority:

CCP § 657(2)

Discussion:

See 18.35

- ☐ Motion to vacate, if judgment inconsistent with special verdict.

Authority:

CCP § 663(2)

Discussion:

See 18.37

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil
ProcedureJudgmentsRelief From JudgmentMotions for New TrialsGovernmentsCourtsRule Application &
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Chapter 18 Jury Verdicts
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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.24

18.24 Options and Strategies for Challenging Verdict Form and Verdict.

18.24[1] Timing of Objection to Verdict Form Is Crucial. A party must object in a timely manner to a verdict form proposed by the opposing party. Local court rules or trial court procedure may govern the timing of the submission and approval of verdict forms. Counsel should therefore consult these rules and procedures at the pretrial stage to avoid missing an opportunity to correct, modify, or strike a challenged form. Counsel should raise the objection before the court adopts the verdict form and preferably before argument and instructions are given, but in no event before the form is provided to the jury. It may be sufficient to indicate the objection on the record and request, if the court is in a hurry and will not allow argument before instructing the jury, that the verdict form be submitted to the jury only subject to counsel putting more complete objections on the record after the jury retires.

18.24[2] Counsel Should Object to Verdict Before Jury Is Discharged. Counsel should carefully analyze a returned verdict so that any irregularities may be addressed before discharge of the jury [*see, e.g., CCP § 619* (correction of verdict)]. It is prudent, economical, and judicious to give the jury an opportunity to correct inconsistencies in the verdict before it is discharged [*Mizel v. City of Santa Monica* (2001) 93 CA4th 1059, 1072, 113 CR2d 649] .

► **Cross Reference:**

Discussion of procedures and remedies if error in verdict, see *California Trial Guide*, § 91.31[1] (Matthew Bender).

Failure to do so may constitute a waiver to a later challenge. Even if the issues are not waived, the alternative procedures, such as a motion for new trial, will be more expensive and time-consuming.

Counsel should also consult local rules and court preferences to determine further requirements of timing.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityPreservation for ReviewGovernmentsCourtsRule Application &

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18.25 Challenging Proposed General Verdict Form.

A party may object to a form of a general verdict before its submission to the jury [see *Tavaglione v. Billings* (1993) 4 C4th 1150, 1157, 17 CR2d 608, 847 P2d 574] .



Warning:

Failure to object to the form of a verdict in a timely manner may constitute a waiver of that issue on appeal [see *Tavaglione v. Billings* (1993) 4 C4th 1150, 1157, 17 CR2d 608, 847 P2d 574] . However, in appropriate circumstances, it may be a strategic decision to leave an inconsistency in the verdict.

Review of special interrogatories submitted with a general verdict form is particularly crucial.

Consider:

Keep in mind that attacking the jury verdict itself is not the same thing as attacking the form of verdict.



Cross Reference:

Challenging proposed special verdict form, see 18.29.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureAppealsReviewabilityPreservation for Review



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18.26 General Verdict Upheld When One of Multiple Issues Is Sustained by Evidence.

When several issues in a cause are tried and submitted to a jury for its determination, a general verdict may not be disturbed for uncertainty if one issue is sustained by the evidence and is unaffected by error. When a situation of this character is presented it does not matter that the evidence may have been insufficient to sustain a verdict in favor of the successful party on the other issues or that reversible errors were committed with regard to such issues [*Boeken v. Philip Morris, Inc.* (2005) 127 CA4th 1640, 1668, 26 CR3d 638] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral Verdicts



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18.27 General Verdict Improper After Erroneous Instructions Given on One of Multiple Theories.

When two theories are presented to a jury, of which only one is supported by substantial evidence and a general verdict is returned in favor of the plaintiff, it is presumed that the verdict was based on the theory that is supported by the evidence. But when the jury is permitted to choose between two factual theories, is misinstructed as to the legal requirements for one of them, and there is no way to eliminate the likelihood that the jury chose the theory affected by the instructional error, it is likely that the jury, following the instructions, reached an improper verdict. Reversal in that case is required [*Lundy v. Ford Motor Co. (2001) 87 CA4th 472, 480, 104 CR2d 545*] .



Strategic Point--Defendant:

If appropriate, the defendant may raise the issue of improper jury instructions in conjunction with a challenge to a verdict for the plaintiff [see, e.g., *Los Angeles County Metro. Transp. Auth. v. Continental Dev. Corp. (1997) 16 C4th 694, 702, 66 CR2d 630, 941 P2d 809*] .



Cross Reference:

Discussion/forms relating to improper general verdict, see California Forms of Pleading and Practice, Ch. 326, Jury Instructions (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureAppealsStandards of ReviewReversible Errors



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.28

18.28 Challenging General Verdict With Special Findings.

18.28[1] Special Finding Controls Over Inconsistent General Verdict. When a special finding of facts is inconsistent with the general verdict, the special finding controls over the general verdict, and the court must give judgment accordingly [CCP § 625; *Tavaglione v. Billings* (1993) 4 C4th 1150, 1156, 17 CR2d 608, 847 P2d 574] . This rule applies to special findings regarding damages [*Tavaglione v. Billings* (1993) 4 C4th 1150, 1157, 17 CR2d 608, 847 P2d 574] .

► **Cross Reference:**

Discussion of special findings, see *California Trial Guide*, § 91.31[2] (Matthew Bender).

Distinguish:

No presumption arises when there are inconsistencies between two questions within a *special verdict*. Rather, a special verdict's correctness must be analyzed as a matter of law, because a special verdict is far more susceptible to defect than a general verdict, which can be tested with special findings [*Mendoza v. Club Car, Inc.* (2000) 81 CA4th 287, 303, 96 CR2d 605] .

► **Cross Reference:**

Discussion of no implied findings in special verdict, see 18.12[5].

The "general verdict rule" is based on the assumption that the jury found on the cause of action or theory which was supported by substantial evidence and as to which there was no error, an assumption that may be proven incorrect by the special verdict or response to special interrogatories [*Tavaglione v. Billings* (1993) 4 C4th 1150, 1157, 17 CR2d 608, 847 P2d 574] .

► **Cross Reference:**

Discussion of general verdict rule, see 18.26.

18.28[2] Improper Inducement of Juror to Assent to Special Finding May Be Addressed by Motion for New Trial. The verdict may be vacated, and any other decision may be modified or vacated, in whole or in part, and a new or

further trial granted on all of part of the issues, on the application of any party aggrieved, on the ground that any one or more of the jurors were induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court [*CCP* § 657(2)].

Cross References:

Discussion of new trial, see Ch. 21, Motion for New Trial.

Detailed discussion/forms for motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.29

18.29 Challenging Proposed Special Verdict Form.

18.29[1] Party May Object to Special Verdict Form. A party may object to a special verdict form, for example, if it does not cover a crucial issue in the case [*see, e.g., Heppler v. J.M. Peters Co., Inc. (1999) 73 CA4th 1265, 1287, 87 CR2d 497* (failure to object to special verdict forms for failing to address defendant's negligence waived that issue on appeal)].

18.29[2] Party May Seek to Modify Special Verdict Form. A party may request modification of a special verdict form proposed by another party [*see, e.g., John Y. v. Chaparral Treatment Ctr., Inc. (2002) 101 CA4th 565, 579-580, 124 CR2d 330* (failure to request modification of special verdict form resulted in waiver of any claim that it was insufficient to enable desired findings)].

A special verdict form should be modified before its submission to the jury if the court disposes of an issue, cause of action, or theory contained in the form before jury deliberations begin [*see, e.g., Saks v. Charity Mission Baptist Church (2001) 90 CA4th 1116, 1142, 110 CR2d 45* (dictum noting procedural error justifying reversal: special verdict questions requesting findings on RICO claims should not have been submitted to jury after motion for nonsuit on RICO claims had been granted)].

18.29[3] Objection to Special Verdict Form Must Be Timely. A party should object to a special verdict form before the court discharges the jury [*see Jensen v. BMW of N. Am., Inc. (1995) 35 CA4th 112, 131, 41 CR2d 295*].

The most effective time for counsel to object to a defective special verdict form is immediately after learning of the defect [*see Jensen v. BMW of N. Am., Inc. (1995) 35 CA4th 112, 131, 41 CR2d 295*]. Such an objection should be raised only after considering the overall trial strategy, and whether other favorable wording in the special verdict form might be revised. Counsel should also consult local court rules and trial court preferences for additional timing requirements.

18.29[4] Failure to Object to Form of Special Verdict Waives Issue on Appeal. Failure to object to the form of a special verdict waives that issue on appeal [*see, e.g., Heppler v. J.M. Peters Co., Inc. (1999) 73 CA4th 1265, 1287, 87 CR2d 497*]. However, if one party chooses to submit a verdict form tendering less than their full case to the jury, the other party is not required to object [*Saxena v. Goffney (2008) 159 CA4th 316, 328, 71 CR3d 469*].

18.29[5] Party May Move for Inclusion of Additional Matters on Special Verdict Form. If appropriate, a party may move to include additional matters on a special verdict form prepared by the opposing party [*see, e.g., Wilson v. Ritto* (2003) 105 CA4th 361, 366-367, 129 CR2d 336 (motion to add nonparty to special verdict form as additional tortfeasor against whom jury could assess percentage of fault for noneconomic damages; motion denied)].



Strategic Point:

The court may request that each party submit a proposed special verdict form. One party's form may be more acceptable to the court than the other, but the other party should not pass up the opportunity to request that the court modify the chosen form to include wording proposed by the party whose form was not chosen.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsReviewabilityPreservation for Review



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18.30 Challenge to Special Verdict Must Be Timely.

A party challenging a special verdict must object in a timely manner at the time of trial [*see, e.g., Padilla v. Greater El Monte Cmty. Hosp. (2005) 129 CA4th 667, 670, 28 CR3d 636* (motion to recompute jury's "present value calculation" of client's malpractice award almost two years after final judgment was entered)].



Warning:

Failure to make a timely objection to a purported error when it occurs in the trial court ordinarily waives the objection on appeal [*Padilla v. Greater El Monte Cmty. Hosp. (2005) 129 CA4th 667, 670, 28 CR3d 636*] .

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsReviewabilityPreservation for Review



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.31

18.31 Grounds for Challenging Special Verdict.

18.31[1] Verdict Is Informal or Insufficient. A special verdict may be challenged on the ground that it is informal or insufficient [see *CCP* § 619].

► **Cross Reference:**

Discussion of methods to challenge special verdict, see *18.32[1]*.

18.31[2] Verdict Is Internally Inconsistent. A special verdict may be challenged on the ground that the answers to the questions are internally inconsistent [see, e.g., *Oxford v. Foster Wheeler LLC* (2009) 177 CA4th 700, 716-722, 99 CR3d 418] .

► **Cross Reference:**

Discussion of challenging inconsistent verdict, see *18.32[1][e]*.

18.31[3] Verdict Is Ambiguous. A party may challenge a special verdict on the ground that it is ambiguous [see, e.g., *McCoy v. Gustafson* (2010) 180 CA4th 56, 90-94, 103 CR3d 37] .

► **Cross Reference:**

Discussion of challenging ambiguous verdict, see *18.32[1][d]*.

18.31[4] Verdict Is Not Supported by Sufficient Evidence. A special verdict may be challenged on the ground that the verdict is unsupported by the evidence [see, e.g., *Trujillo v. North County Transit Dist.* (1998) 63 CA4th 280, 284, 73 CR2d 596] .

► **Cross Reference:**

Discussion of challenging unsupported verdict, see *18.32[3][c]*.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.32

18.32 Methods for Challenging Special Verdict.

18.32[1] Correction or Further Deliberations Under CCP § 619.

18.32[1][a] Party May Obtain Correction of Informal or Insufficient Verdict. When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be sent out again to deliberate further [CCP § 619].

Examples:

Reinstruction and further deliberation are proper in the following circumstances [see *Mizel v. City of Santa Monica* (2001) 93 CA4th 1059, 1071, 113 CR2d 649] :

- One verdict states there was a defect causing harm to plaintiff, but another verdict states that plaintiff's injuries were not reasonably foreseeable, and the jury apportions fault.
- The verdict does not comport with jury instructions.
- The verdicts are insufficient, contradictory, and incomprehensible.
- The verdict is confusing.

Distinguish:

Trial courts may not reinstruct in all circumstances. For example, reinstruction is not warranted if a verdict is "erroneous" [*Mizel v. City of Santa Monica* (2001) 93 CA4th 1059, 1071, 113 CR2d 649] .

➡ Cross Reference:

Discussion of procedures for erroneous verdict, see *California Trial Guide*, § 91.31 (Matthew Bender).

In so doing, the court may not direct the jury's deliberations. Trial courts may not "throw their weight of influence into the deliberations of the jury" as to matters exclusively within its province, but must rather provide neutral direction [

Mizel v. City of Santa Monica (2001) 93 CA4th 1059, 1070-1073, 113 CR2d 649 .



Strategic Point:

CCP § 618 must be construed with CCP § 619 [*Crowe v. Sacks (1955) 44 C2d 590, 596, 283 P2d 689*] .

CCP §§ 618 and 619 provide the limitations on the jurisdiction of the trial court after the matter has been submitted to the jury. CCP § 618 provides that when at least three fourths of the jury have agreed on a verdict, they must be conducted into court "and the verdict rendered by their foreperson." The verdict must be read to the jury by the clerk or by the court and the inquiry made whether it is their verdict. Either party may require the jury to be polled. If on inquiry or polling more than one fourth of the jurors disagree, the jury must be sent out again. However, if no disagreement is expressed, the verdict is complete and the jury is discharged from the case [*Crowe v. Sacks (1955) 44 C2d 590, 595-596, 283 P2d 689*] .

A juror's silence at polling, due to the trial court's failure to poll that juror on one of several special verdict questions, does not constitute an expressed disagreement with the verdict under CCP § 618, and does not prevent the trial court from accepting the verdict as complete and discharging the jury [*Keener v. Jeld-Wen, Inc. (2009) 46 C4th 247, 257-261, 92 CR3d 862, 206 P3d 403*] .



Cross Reference:

Discussion of entering and receiving verdict and polling jury, see 18.42, 18.43.

18.32[1][b] "Informal" Means Defective in Form or Contrary to Rule. In the context of CCP § 619, "informal" means defective in form; not in the usual form or manner; or contrary to custom or prescribed rule [*Crowe v. Sacks (1955) 44 C2d 590, 596, 283 P2d 689* ; *Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 302, 96 CR2d 605*] .

18.32[1][c] "Insufficient" Means Inadequate for Some Need or Purpose. In the context of CCP § 619, "insufficient" means inadequate for some need, purpose, or use [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 302, 96 CR2d 605*] .

18.32[1][d] CCP § 619 Applies to Ambiguous Verdict. CCP § 619 applies to an ambiguous verdict [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 302, 305-306, 96 CR2d 605*] . The trial court may therefore direct the jury to deliberate further to correct any ambiguity [*Mizel v. City of Santa Monica (2001) 93 CA4th 1059, 1070-1071, 113 CR2d 649*] .

Courts have wide latitude in deciding whether a verdict is ambiguous so as to come within the purview of CCP § 619 [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 302, 96 CR2d 605*] .

If the verdict is ambiguous, the party adversely affected should request a more formal and certain verdict. Then, if the trial judge has doubts on the subject, he or she may send the jury out, under proper instructions, to correct the informal or insufficient verdict [*Woodcock v. Fontana Scaffolding & Equip. Co. (1968) 69 C2d 452, 456, 72 CR 217, 445 P2d 881* ; *Zagami, Inc. v. James A. Crone, Inc. (2008) 160 CA4th 1083, 1091-1092, 74 CR3d 235*] .

18.32[1][e] CCP § 619 Applies to Inconsistent Verdict. CCP § 619 applies to an inconsistent verdict [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 302, 96 CR2d 605*] .

Courts have wide latitude to decide whether a verdict is inconsistent so as to come within the purview of CCP § 619 [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 302, 96 CR2d 605*] . A court may therefore instruct the jury that a verdict is inconsistent and they must deliberate further [see *Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 302, 96*

CR2d 605 (instruction reviewed for abuse of discretion)].

Example:

In a personal injury case arising from the plaintiff's falling off a curb outside a restaurant, the jury returned a special verdict, which contained some responses indicating that the curb was a dangerous condition that caused the plaintiff's damages of \$4 million, and one response that the dangerous curb had not created a reasonably foreseeable risk of the kind of injury suffered by the plaintiff. Given this confusion, the trial court properly provided additional instruction and requested the jury to deliberate further [*Mizel v. City of Santa Monica (2001) 93 CA4th 1059, 1070-1071, 113 CR2d 649*].



Strategic Point:

Invoking CCP § 619 to request that the jury deliberate further has advantages over alternatives such as a motion for new trial based on inconsistent verdicts. If the jury renders an inconsistent or ambiguous verdict, it is prudent, economical, and judicious to give the jury an opportunity to correct the inconsistencies before it is discharged [*Mizel v. City of Santa Monica (2001) 93 CA4th 1059, 1072, 113 CR2d 649*].



Cross Reference:

Discussion of motion for new trial, see 18.32[3][d].

Distinguish:

When a general verdict is inconsistent with special findings, the special findings prevail and that verdict is upheld. However, if there are inconsistent questions within a *special verdict*, this rule is inapplicable. A special verdict's correctness must be analyzed as a matter of law, because a special verdict is far more susceptible to defect than a general verdict, which can be tested with special findings. When the discrepancy is identified before the jury is discharged, the court has control of the jury and may, pursuant to CCP § 619, use its power to correct the verdict before it becomes final. It is the court's duty in that case to try to remedy the situation [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 302-303, 96 CR2d 605*].



Cross Reference:

Upholding special finding inconsistent with general verdict, see 18.26.

18.32[2] Trial Court May Construe Challenged Verdict in Accordance With Pleadings, Evidence, and Instructions. The trial court may construe a seemingly insufficient verdict, such as one that contains arguably inconsistent findings, in accordance with the pleadings, evidence, and instructions. This procedure may serve to uphold a judgment based on such a verdict in the appropriate case [see, e.g., *Shade Foods v. Innovative Prod. Sales & Mktg., Inc., (2000) 78 CA4th 847, 894, 93 CR2d 364* (analyzing findings regarding economic damages in relation to various theories of liability, and upholding judgment after construing verdict vis-a-vis adjacent answers and in trial context)].

18.32[3] Post-Trial Motions.

18.32[3][a] Party May Bring Post-Trial Motion When Appropriate. In an appropriate case, a party may bring a post-trial motion to challenge a special verdict [see, e.g., *Trujillo v. North County Transit Dist. (1998) 63 CA4th 280, 284, 73 CR2d 596*].

18.32[3][b] Party May Bring Motion for Judgment Notwithstanding Verdict Based on Insufficient Evidence. A party may bring a motion for judgment notwithstanding the verdict if the verdict is not supported by sufficient evidence [see CCP § 629; see, e.g., *Trujillo v. North County Transit Dist. (1998) 63 CA4th 280, 284, 73 CR2d 596*].

Grounds for this motion may include inconsistent findings on a special verdict [*see, e.g., Trujillo v. North County Transit Dist.* (1998) 63 CA4th 280, 283-284, 73 CR2d 596] .

 Cross Reference:

Discussion of motion jnov, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

18.32[3][c] Party May Bring Motion for New Trial Based on Insufficient Evidence. A party may bring a motion for new trial based on insufficient evidence to support the verdict [CCP § 657(6)].

 Cross References:

Discussion of new trial, see Ch. 21, Motion for New Trial.

Detailed discussion/forms for motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

18.32[3][d] Party May Bring Motion for New Trial If Verdict Is Against the Law. A party may bring a motion for new trial if the verdict is against the law [CCP § 657(6)]. An inconsistent verdict is against the law and is grounds for a new trial [*see CCP § 657(6); see, e.g., Shaw v. Hughes Aircraft Co.* (2000) 83 CA4th 1336, 1344, 100 CR2d 446 (finding in cause of action for breach of implied covenant inconsistent with finding of no breach of contract; new trial granted)].

An inconsistent verdict may arise from an inconsistency among answers within a special verdict. When there is an inconsistency among answers within a special verdict, both or all the questions are equally against the law [*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 CA4th 668, 682, 24 CR3d 338] .



Warning:

Failure to challenge inconsistent verdicts may constitute a waiver of this issue on appeal [*see Tavaglione v. Billings* (1993) 4 C4th 1150, 1158, 17 CR2d 608, 847 P2d 574] .



Strategic Point:

If the discrepancy is identified before the jury is discharged, the court retains control of the jury and may, pursuant to CCP § 619, use its power to correct the verdict before it becomes final. It is the court's duty to try to remedy the situation [*Mendoza v. Club Car, Inc.* (2000) 81 CA4th 287, 303, 96 CR2d 605] . Invoking CCP § 619 to request that the jury deliberate further has advantages over alternatives such as a motion for new trial based on inconsistent verdicts. If the jury renders an inconsistent or ambiguous verdict, it is prudent, economical, and judicious to give the jury an opportunity to correct the inconsistencies before it is discharged [*Mizel v. City of Santa Monica* (2001) 93 CA4th 1059, 1072, 113 CR2d 649] .

 Cross Reference:

Discussion of procedure under CCP § 619, see 18.32[1].

Example:

In an eminent domain action, the jury rendered irreconcilable special verdict findings based on different per-acre values for the same parcel of property: by its answer to special verdict question No. 1, it found the larger parcel before the freeway project to be worth \$445,000 per acre, and by its answer to special verdict question No. 2(a), it found the same property at the same point in time to be worth \$850,000 per

acre. These inconsistent and irreconcilable implied findings rendered the special verdict against the law, warranting a new trial [*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 CA4th 668, 682-684, 24 CR3d 338] .

Cross References:

Discussion of new trial, see Ch. 21, Motion for New Trial.

Detailed discussion/forms for motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Discussion of challenging verdict based on inconsistencies, see *California Trial Guide*, § 91.31[2] (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts



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IV. CHALLENGING GENERAL AND SPECIAL VERDICTS

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.33

18.33 Address Improper Inducement of Juror to Assent to Special Verdict by Motion for New Trial.

The verdict may be vacated, and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues on the application of any party aggrieved, on the ground that one or more jurors were induced to assent to a general or special verdict, or to a finding on any question submitted to them by the court [CCP § 657(2)].

► Cross References:

Discussion of new trial, see Ch. 21, Motion for New Trial.

Detailed discussion/forms for motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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18.34 Trial Court May Not Tell Jury About Effect of Special Verdict on Ultimate Rights and Liabilities.

The trial court may not tell the jury about the effect of their special verdict on the ultimate rights or liabilities of the parties. If such an instruction is given, it is generally held to be reversible error [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 307, 96 CR2d 605*] .

Exceptions:

This rule is subject to major exceptions. The most predominant is that the error is harmless if the instruction is on matters the jury became acquainted with during trial [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 306-307, 96 CR2d 605*] . It is also inapplicable when the instruction is necessary to correct a special verdict under CCP § 619 [*Mendoza v. Club Car, Inc. (2000) 81 CA4th 287, 308, 96 CR2d 605*] .

► Cross References:

Discussion of instructing jury, see Ch. 16, Jury Instructions.

Discussion of correction of verdict, see 18.32[1].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsGeneral Overview



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.35

18.35 Address Jury Misconduct by Motion for New Trial.

A party may move for new trial based on jury misconduct [see *CCP* § 657(2)].

 Cross References:

Discussion of new trial, see Ch. 21, Motion for New Trial.

Discussion/forms for motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Discussion of jury misconduct, see *California Trial Guide*, §§ 91.10 -91.13 (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.36

18.36 Evidence Regarding Validity of Verdict.

18.36[1] Show Improper Influence on Verdict by Admissible Evidence. On an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of a character that is likely to have influenced the verdict improperly [*Evid Code § 1150(a)*].

18.36[2] Evidence Concerning Juror's Mental Processes Is Inadmissible. No evidence is admissible to show the effect of such a statement, conduct, condition, or event on a juror either in influencing the juror to assent to or dissent from the verdict, or concerning the mental processes by which it was determined [*Evid Code § 1150(a)*; see *Evid Code § 1150(b)* (statute does not affect law relating to competence of juror to give evidence to impeach or support verdict)].

► **Cross References:**

See California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Detailed discussion of *Evid Code § 1150*, see Cotchett, *California Courtroom Evidence*, 20.15 (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury

TrialsJurorsMisconductEvidenceCompetencyJurorsDeliberationsEvidenceCompetencyJurorsExternal

InfluencesEvidenceCompetencyJurorsVerdict Accuracy



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18.37 Attack Judgment Inconsistent With Special Verdict by Motion to Vacate.

A judgment or decree, when based on the special verdict of a jury, may, on motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered if inconsistent with or not supported by the special verdict, when it materially affects the substantial rights of the party and entitles the party to a different judgment [see CCP § 663(2)].



Cross Reference:

Discussion of motion to vacate, see *Ch. 27, Motion to Vacate Judgment and Enter Different Judgment*, 27.03 et seq.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsInconsistent VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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18.38 Options and Strategies.

Even though special verdict forms are requested early in the proceedings, it is not unusual for the forms to be finalized at the end of the case after all legal issues have been resolved. Last minute changes are sometimes made without careful scrutiny by both counsel and the court. Defects in the verdict forms may go unnoticed, and it is not unusual for the jury to point out these flaws to the court during their deliberations.

Immediately after the verdict is announced in open court and before the jury is discharged, the losing party should ask for the jury to be polled to determine if two thirds voted in favor of the general verdict or in favor of each part of the special verdict requiring two-thirds support. The opportunity to poll the jury is lost once the jury is discharged.

Legal Topics:

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

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18.39 Court Remains Open During Jury Deliberations.

While the jury is absent, the court may adjourn from time to time, to conduct other business. However, court is open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged [CCP § 617].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury Deliberations



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18.40 Court May Direct Sealed Verdict.

The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day [*CCP* § 617].

Example:

The court may seal the verdict in a case where settlement discussions are ongoing or in highly publicized cases where members of the press have requested to be present when the verdict is read.



Cross Reference:

Discussion of sealed verdict, see *California Trial Guide*, § 91.30 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Jury Trials Verdicts General Overview



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.41

18.41 Requirements for Verdicts for Recovery of Money and of Specific Personal Property.

18.41[1] Jury Verdict for Recovery of Money Must Include Amount of Recovery. When a verdict is found for the plaintiff in an action for the recovery of money, or for the cross-complainant when a cross-complaint for the recovery of money is established, the jury must find the amount of the recovery [*CCP* § 626].

18.41[2] Jury Verdict in Action for Recovery of Specific Personal Property Must Include Value and May Assess Damages. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by the answer, claims a return of the property, the jury, if their verdict is in favor of the plaintiff, or, if in favor of defendant, they also find that he or she is entitled to the return of the property, must find the value of the property. If instructed, the jury must also find the value of specific parts of the property, and may at the same time assess the damages, if any are claimed in the complaint or answer, that the prevailing party sustained from the taking or detention of the property [*CCP* § 627].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial
VerdictsTortsDamagesCompensatory DamagesGeneral OverviewTortsIntentional TortsConversionGeneral Overview



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.42

18.42 Entry of Verdict.

18.42[1] Jury Must Submit Verdict to Clerk, Who Reads It. When three fourths or more of the jury have agreed on a verdict, the jury must be conducted into court and the verdict rendered by the foreperson. The verdict must be in writing, signed by the foreman, and must be read to the jury by the clerk, or by the court, if there is no clerk, and the inquiry made whether it is their verdict [*CCP* § 618].

 Cross Reference:

Discussion of entry of verdict, see *California Trial Guide*, § 91.30[3] (Matthew Bender).

18.42[2] Entry of Verdict Must Set Out Verdict and Include Other Information. In superior courts on receipt of a verdict, an entry must be made in the minutes of the court, specifying the time of trial and the names of the jurors and witnesses, and setting out the verdict at length [*CCP* § 628].

18.42[3] Special Finding Must Be Filed With Clerk and Entered on Minutes. Special finding, if any, must be filed with the clerk and entered on the minutes [*CCP* § 625].



Strategic Point:

When a special finding of facts is inconsistent with the general verdict, the special finding controls; and the court must give judgment accordingly [*CCP* § 625].

 Cross Reference:

Discussion of special findings, see 18.28[1].

18.42[4] Special Verdict Must Be Filed With Clerk and Entered on Minutes. The special verdict must be filed with the clerk and entered on the minutes [*CCP* § 625].

 Cross Reference:

Discussion of filing special verdict, see *California Trial Guide*, § 91.30[3] (Matthew Bender).

18.42[5] Same Jurors Need Not Agree on All Elements of Special Verdict. As long as at least three fourths of the jury agree on each element of the ultimate verdict, constitutional and statutory voting requirements are satisfied [*Cal Const, art I, § 16; CCP § 618*]. The same jurors need not agree on each element [*Resch v. Volkswagen of Am., Inc. (1984) 36 C3d 676, 678, 205 CR 827, 685 P2d 1178*] .

Example:

In a product liability case, jurors who did not vote for a special verdict finding a defect could vote on the special verdict as to whether the defect was a substantial factor in bringing about plaintiff's injuries [*Resch v. Volkswagen of Am., Inc. (1984) 36 C3d 676, 682-683, 205 CR 827, 685 P2d 1178*] .

18.42[6] Entry of Special Verdict Must Specify Either Judgment on Verdict or Order Reserving Judgment. When a special verdict is found on receipt of a verdict, an entry must be made in the minutes of the court, specifying either the judgment rendered, or if the case be reserved for argument or further consideration, the order reserving it [*CCP § 628*].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewGovernmentsCourtsClerks of Court



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.43

18.43 Receiving Verdict and Polling Jury.

18.43[1] Local Rules May Affect Polling of Jury. Local rules may affect polling of the jury. Counsel should consult local court rules and trial court preferences.

 Cross Reference:

Los Angeles County local rules on polling jury, see *18.43[2]*.

18.43[2] Los Angeles County Rules.

18.43[2][a] Verdicts Read Unless Incorrect or Incomplete. On advice from the jury foreperson that a verdict has been reached, the trial judge should direct the foreperson to hand all verdict forms (signed and unsigned) to the bailiff or court attendant for delivery to the judge, who should then examine them. If the verdicts appear correct and complete to the trial judge, they should be handed to the clerk to be read into the record. If the verdicts are incorrect or incomplete, the trial judge should call counsel to the side bench to review the forms and discuss any inquiries to be directed to the foreperson and the possible return of the verdict forms with instructions concerning clarification, completion, or revision. If the forms are returned to the foreperson, the jury ordinarily should be sent back to the jury room to complete, clarify, or revise them [Los Angeles Super Ct Rules, Rule 8.56].

18.43[2][b] Party May Request Polling of Jury on General or Special Verdict or Special Findings. On the return of a general or special verdict or special findings, on the request of any party, the jury should be polled on them [Los Angeles Super Ct Rules, Rule 8.56].

18.43[2][c] Trial Judge Directs Polling. Polling should be conducted at the direction of the trial judge by the clerk or by the trial judge [Los Angeles Super Ct Rules, Rule 8.56].

18.43[2][d] Each Juror Asked If General Verdict Is His or Her Verdict. In the event of a general verdict without special findings each juror separately should be asked, "Is the verdict as read your personal verdict?" [Los Angeles Super Ct Rules, Rule 8.56].

18.43[2][e] Each Juror Asked If Response to Special Verdict or Special Findings in General Verdict Is His

or Her Personal Response. In the event of a general verdict with special findings, or in the event of a special verdict, each juror separately should be asked as to each response, "Is the response to that question (or issue) your personal response?" [Los Angeles Super Ct Rules, Rule 8.56].

18.43[3] Either Party May Request Polling of Jury. After the verdict is submitted to the clerk in writing and read, either party may require the jury to be polled. If the jury is polled, then the court or the clerk asks each juror if it is his or her verdict [CCP § 618].



Strategic Point:

The losing party should ask for the jury to be polled. The winning party should not.

18.43[4] Verdict Is Complete After Polling Unless More Than One Fourth Disagree. If on that inquiry or polling, more than one fourth of the jurors disagree, the jury must be sent out again. However, if no disagreement is expressed, then the verdict is complete and the jury discharged from the case [CCP § 618].



Cross Reference:

Discussion of polling jury, see *California Trial Guide*, § 91.30[3] (Matthew Bender).



Strategic Point:

CCP § 618 must be construed with CCP § 619 [*Crowe v. Sacks* (1955) 44 C2d 590, 596, 283 P2d 689] .

CCP §§ 618 and 619 provide the limitations on the jurisdiction of the trial court after the matter has been submitted to the jury. CCP § 618 provides that when at least three fourths of the jury have agreed on a verdict, they must be conducted into court "and the verdict rendered by their foreman." The verdict must be read to the jury by the clerk or by the court and the inquiry made whether it is their verdict. Either party may require the jury to be polled. If on inquiry or polling more than one fourth of the jurors disagree, the jury must be sent out again, but if no disagreement is expressed, the verdict is complete and the jury discharged from the case [*Crowe v. Sacks* (1955) 44 C2d 590, 595-596, 283 P2d 689] .

A juror's silence at polling, due to the trial court's failure to poll that juror on one of several special verdict questions, does not constitute an expressed disagreement with the verdict under CCP § 618, and does not prevent the trial court from accepting the verdict as complete and discharging the jury [*Keener v. Jeld-Wen, Inc.* (2009) 46 C4th 247, 257-261, 92 CR3d 862, 206 P3d 403] .



Cross Reference:

Discussion of further deliberations, see 18.32[1].

Legal Topics:

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

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VI. FORMS

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.44

18.44 General Verdict Form--Single Plaintiff--Single Defendant--Single Cause of Action.

General Verdict Form--Single Plaintiff--Single Defendant--Single Cause of Action.

CACI No. VF-5000 General Verdict Form--Single Plaintiff--Single Defendant--Single Cause of Action

Select one of the following two options:

_____ We find in favor of _____ [*name of plaintiff*] and against
_____ [*name of defendant*] and award damages to _____ [*name of plaintiff*] in the
amount of \$_____.

_____ We find in favor of _____ [*name of defendant*] and against
_____ [*name of plaintiff*].

Signed: _____

Presiding Juror

Dated: _____

_____ [After it has been signed *or* After all verdict forms have been signed], deliver this verdict form
to the _____ [clerk *or* bailiff *or* judge].

NOTES.

Authority:

CCP §§ 624, 626; Cal Rules Ct, Rule 2.1050

Grounds:

See 18.09



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1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.45

18.45 General Verdict Form--Single Plaintiff--Single Defendant--Multiple Causes of Action.

General Verdict Form--Single Plaintiff--Single Defendant--Multiple Causes of Action.

CACI No. VF-5001 General Verdict Form--Single Plaintiff--Single Defendant--Multiple Causes of Action

For each claim, select one of the two options listed.

On _____ [name of plaintiff]'s claim for _____ [insert first cause of action]

_____ we find in favor of _____ [name of plaintiff] and against
_____ [name of defendant].

_____ we find in favor of _____ [name of defendant] and against
_____ [name of plaintiff].

On _____ [name of plaintiff]'s claim for _____ [insert second cause of action]

_____ we find in favor of _____ [name of plaintiff] and against
_____ [name of defendant].

_____ we find in favor of _____ [name of defendant] and against
_____ [name of plaintiff].

Complete the section below only if you find in favor of _____ [name of plaintiff] on at least one of
_____ [his/her/its] claims.

We award _____ [name of plaintiff] the following damages: \$_____.

Signed:_____

Presiding Juror

Dated: _____

_____ [After it has been signed/After all verdict forms have been signed], deliver this verdict form to the _____ [clerk/bailiff/judge].

NOTES.

Authority:

CCP §§ 624, 626; Cal Rules Ct, Rule 2.1050

Grounds:

See 18.09



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Chapter 18 Jury Verdicts
VI. FORMS

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.46

18.46 Verdict With Special Findings Regarding Punitive Damages.

Verdict With Special Findings Regarding Punitive Damages.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____

VERDICT WITH SPECIAL

FINDINGS REGARDING

PUNITIVE DAMAGES

We, the jury in the above-entitled action, find for the _____ [party, e.g., Plaintiff, John Smith] and against the _____ [party, e.g., Mary Jones] [add, if appropriate: in the sum of \$_____ as actual damages].

We further find in answer to the special interrogatories submitted to us as follows:

ISSUE NO. 1: If you found that Plaintiff, _____ [name], was entitled to recover actual damages from Defendant, _____ [name], was Defendant, _____ [name], guilty of oppression, fraud, or malice in doing the acts that caused Plaintiff's actual damages?

Answer "yes" or "no."

ANSWER: _____

ISSUE NO. 2: If you answered Issue No. 1 yes, what amount of punitive damages, if any, do you assess against Defendant _____ [name] for the sake of example and by way of punishment?

ANSWER: Amount of Punitive Damages: _____

Dated: _____

[signature of presiding juror]

NOTES.

Authority:

CCP § 625

Related Special Verdict Forms:

Judicial Council Forms of California *Civil Jury Instructions*, CACI No. VF-3900, Punitive Damages--Trial Not Bifurcated; CACI No. VF-3901, Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee--Trial Not Bifurcated; CACI No. VF-3902, Punitive Damages--Entity Defendant--Trial Not Bifurcated; CACI No. VF-3903, Punitive Damages--Entity Defendant--Ratification--Trial Not Bifurcated; CACI No. VF-3904, Punitive Damages--Entity Defendant--Authorization--Trial Not Bifurcated (LexisNexis Matthew Bender)

Related Jury Instructions:

Introduction to Special Verdict Form, *Judicial Council of California Civil Jury Instructions*, CACI No. 5012 (LexisNexis Matthew Bender)



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Chapter 18 Jury Verdicts
VI. FORMS

1-18 MB Practice Guide: Trial & Post-Trial Civil Proc 18.47

18.47 Special Verdict--Breach of Contract.

Verdict With Special Findings Regarding Punitive Damages.

CACI No. VF-300 Breach of Contract

We answer the questions submitted to us as follows:

1. Did _____ [*name of plaintiff*] and _____ [*name of defendant*] enter into a contract?
_____ Yes _____ No

If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did _____ [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required _____ [*him/her/it*] to do?
_____ Yes _____ No

If your answer to question 2 is yes, then skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was _____ [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required _____ [*him/her/it*] to do?
_____ Yes _____ No

If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did all the conditions occur that were required for _____ [*name of defendant*]'s performance?

_____ Yes _____ No

If your answer to question 4 is yes, then answer question 5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. Did _____ [*name of plaintiff*] fail to do something that the contract required _____ [him/her/it] to do?

_____ Yes _____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Was _____ [*name of plaintiff*] harmed by that failure?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. What are _____ [*name of plaintiff*]'s damages?

[a. Past _____ [*if verdict form combines* \$_____]
 other causes of action involving both economic and
 noneconomic damages, add: economic] loss

[including _____ *insert descriptions of claimed damages*]]:

[b. Future _____ [*if verdict form combines* \$_____]
 other causes of action involving both economic and
 noneconomic damages, add: economic] loss [including

_____ *insert*
 descriptions of claimed damages]]:

TOTAL

\$_____

Signed: _____

Presiding Juror

Dated: _____

_____ [After it has been signed/After all verdict forms have been signed], deliver this verdict form to the _____ [clerk/bailiff/judge].

NOTES.

Authority:

CCP § 625

Related Jury Instructions:

Breach of Contract--Essential Factual Elements, *Judicial Council of California Civil Jury Instructions*, *CACI No. 303*, (LexisNexis Matthew Bender)

Related Form for Points and Authorities:

See *California Points and Authorities*, §§ 50.10, 50.11 (Matthew Bender)



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Chapter 19 Introduction to Judgments

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.syn

§ 19.syn Synopsis to Chapter 19: Introduction to Judgments

19.01 Scope.

19.02 Objective and Strategy.

19.03 CHECKLIST: Judgment Fundamentals.

19.04 Options and Strategies.

19.05 Judgments Finally Determine Rights of Parties, Whereas Orders Do Not.

19.06 Single Judgment Rule.

19.06[1] Only One Final Determination of Rights and Obligations of Parties in Each Case.

19.06[2] Portion or Entirety of Judgment May Be Interlocutory.

19.07 Law of the Case Doctrine Requires Judgment to Conform to Prior Appellate Rulings in Interlocutory Appeals.

19.08 Alternative and Conditional Judgments.

19.08[1] Judgments May Be Rendered in the Alternative or Upon Happening of Specified Contingency.

19.08[2] Judgments May Be Conditioned on Party's Compliance With Condition.

19.09 CHECKLIST: Securing Limited Remedies in Judgments.

19.10 Prejudgment Interest Must Be Stated in Judgment.

19.11 Future Damages in Judgments on Actions for Injury or Damages Based on Professional Negligence of Health Care Provider.

19.12 Determining Method of Satisfaction of Verdict Against Public Entity in Personal Injury or Wrongful Death Actions.

19.12[1] Either Party May Request Mandatory Settlement Conference Upon Verdict Against Public Entity in Personal Injury or Wrongful Death Actions.

19.12[2] Uninsured Public Entity May Obtain Order Allowing Periodic Payment of Damages.

19.12[3] Public Entity May Obtain Reimbursement of Collateral Source Payments Paid to Plaintiff in Action for Personal Injury or Wrongful Death.

19.13 CHECKLIST: Submission, Filing, and Entry of Judgments.

19.14 Options and Strategies.

19.15 Determining Date of Submission of Case for Decision.

19.16 Timing of Court's Filing of Decision After Submission of Cause for Decision.

19.16[1] Judge's Compensation Is Withheld If Court Fails to File Judgment Within 90 Days of Date Cause Was Submitted for Decision.

19.16[2] Case Is Decided on Announcement of Tentative Decision or Termination of Cause.

19.16[3] Court May Vacate Submission for Good Cause and Resubmit Case for Decision.

19.16[4] Judge's Filing of False Affidavit of Cases Pending More Than 90 Days or Persistent Failure to File Within 90 Days Are Grounds for Disciplinary Sanctions.

19.17 Writ of Mandate May Be Available to Compel Court to File Judgment.

19.18 Entry of Judgment.

19.18[1] Court Must Enter Judgment, at Which Point It Becomes Effective.

19.18[2] Judgment Must Generally Be Entered Immediately on the Court's Filing of Judgment.

19.19 CHECKLIST: Effect of Entry of Judgment.

19.20 Options and Strategies.

19.21 Specific Findings of Fact Preclude Relitigation of Same Cause by Same Parties.

19.22 Entry of Judgment Restricts Trial Court's Jurisdiction to Change Judgment.

19.23 Satisfaction, Discharge, and Enforcement.

19.23[1] Entered Judgment May Be Satisfied and Discharged.

19.23[2] Judgment Becomes Enforceable on Entry.

19.24 Entered Judgments May Be Assigned.

19.25 CHECKLIST: Challenging Judgments and Finality of Judgments.

19.26 Options and Strategies.

19.27 Validity of Judgments.

19.27[1] Judgment Is Valid Only Against Parties.

19.27[2] Final Determination of Rights of Parties in Valid Judgment May Be Challenged Under Statutes or in Equity.

19.28 Challenging Correctness of Judgment.

19.29 Appeal of Judgments.

19.29[1] Appeal Generally Must Be Filed Within 60 Days of Service or Mailing of Notice of Entry.

19.29[2] Effect of Filing Post-Judgment Motions on Time for Appeal.

19.29[2][a] Motion for New Trial.

19.29[2][b] Motion to Vacate Judgment.

19.29[2][c] Motion for Judgment Notwithstanding the Verdict.

19.29[3] Appeal Generally Removes Trial Court Jurisdiction to Consider Posttrial Motions.

19.30 Finality of Judgments.

19.30[1] Judgment Is Final After Appeals Exhausted and Appeal Period Has Run.

19.30[2] Judgment Is Final Only Within Its Scope.

19.30[3] Reservation of Jurisdiction Limits Finality Until Exercised.

19.30[4] Final Judgment May Be Challenged Only on Equitable Grounds or If Void.

19.30[4][a] Equity Is Basis to Change Mode or Procedure of Executing Final Judgment.

19.30[4][b] Equitable Jurisdiction Is Basis for Setting Aside Final Judgment That Is Void.

19.30[5] Final Judgment May Be Enforced by Separate Action.

19.31 Request for Judgment Ordering That Future Damages Be Paid in Periodic Payments.

19.32 Judgment Ordering That Future Damages Be Paid in Periodic Payments.

19.33 Judicial Council Form JUD-100--Judgment.



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Chapter 19 Introduction to Judgments
I. STRATEGY

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.01

19.01 Scope.

This chapter covers:

- Objectives and strategy for judgments [*see 19.02*].
- Judgment fundamentals [*see 19.03 -19.08*].
- Securing limited remedies in judgment [*see 19.09 -19.12*; Forms: *see 19.31 -19.32*].
- Submission, filing, and entry of judgments [*see 19.13 -19.18*].
- Effect of entry of judgment [*see 19.19 -19.24*].
- Challenging judgments and finality of judgments [*see 19.25 -19.30*].



Cross References:

Coverage of default judgments (entered on the defendant's failure to answer the complaint), see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.44 -36.64.

Coverage of stipulated judgments (i.e., consent judgments entered pursuant to settlement), see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 28.09.

Coverage of judgments entered pursuant to formal compromise offers under *CCP* § 998, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 37.74.

Coverage of judgments generally, see Ch. 19, Introduction to Judgments.

Coverage of judgment notwithstanding the verdict, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

Coverage of motions to vacate, modify, or set aside judgments, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment; Ch. 28, Correcting and Modifying Judgment; and Ch. 29, Setting Aside Judgments and Orders.

Coverage of enforcement of judgments, see Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, Planning Enforcement of Judgment.

Legal Topics:

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

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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Chapter 19 Introduction to Judgments
I. STRATEGY

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.02

19.02 Objective and Strategy.

Judgments create vested rights in resolution of conflicts. For that reason, there can only be one judgment in a given action against a particular defendant. The vestment itself cannot occur, for example, until the conditions of a conditional judgment, or the contingencies of alternate judgments, are fulfilled. Effectuation of statutory remedies, such as periodic payment of future damages, requires that they be properly memorialized in the express terms of the judgment.

Once it is obtained, the entry of judgment is an essential aspect of the vesting of rights in a judgment. Only an entered judgment may be assigned, enforced, or used as evidence of judgment in another proceeding. Of course, the vesting of rights by entry of judgment does not stand in the face of a successful post-judgment challenge to a judgment on one of the limited statutory or equitable grounds.

The passing of the appeal period and resolution of any appeals is another milestone, conferring "finality" on the judgment as a final determination of the rights and obligations of the parties to the action. Here, too, the milestone is relative, because judgments that are void, or judgments obtained by extrinsic fraud or mistake (within statutory limitations after discovery of the fraud or mistake), may be overturned on a proper showing at any time. On the other hand, finality confers the right of a party to bring an action on the judgment.

Legal Topics:

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

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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Chapter 19 Introduction to Judgments
II. JUDGMENT FUNDAMENTALS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.03

19.03 CHECKLIST: Judgment Fundamentals.

☐ Check judgments and orders to make sure they are corrected labeled by court.

☐ Judgments finally determine rights of parties in the action, while orders do not.

Authority:
CCP § 577

Discussion:
See 19.05

☐ Check judgment or proposed judgment for whether it finally determines all or only some of the rights of the parties to the action.

☐ Each issue or right should be determined only once.

Authority:
In re Marriage of Fink (1976) 54 CA3d 357, 361, 126 CR 626

Discussion:
See 19.06[1]

☐ Issues or rights remaining undetermined are subject to additional proceedings.

Authority:
Olmstead v. West (1960) 177 CA2d 652, 655, 2 CR 443

Discussion:

See 19.06[2]

- ☐ Check judgment for conformity with prior decisions on interlocutory appeals.

Discussion:

See 19.07

- ☐ Check whether contingencies of alternate judgments or conditions of conditional judgments have been met.

Discussion:

See 19.08

Legal Topics:

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

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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Chapter 19 Introduction to Judgments
II. JUDGMENT FUNDAMENTALS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.04

19.04 Options and Strategies.

Parties to a judgment should always make sure that all aspects of the controversy have been decided, and to make sure to pursue any that remain explicitly or implicitly undecided.

In appropriate circumstances, counsel should seek to have a judgment provide for alternate outcomes based on contingent events, or to condition judgment on the fulfillment of a relevant future condition.



Strategic Point:

Counsel may decide that the client is likely to lose on an issue not decided by the court's judgment and, therefore, choose not to bring it to the court's attention.



Judge's Perspective:

In most cases, counsel for the prevailing party will be requested by the court to prepare the judgment. Opposing counsel will decide whether or not to dispute the form of the judgment. The judgment should accurately reflect the court's findings.

Legal Topics:

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



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Chapter 19 Introduction to Judgments
II. JUDGMENT FUNDAMENTALS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.05

19.05 Judgments Finally Determine Rights of Parties, Whereas Orders Do Not.

A judgment is the final determination of the rights of the parties in an action or proceeding [CCP § 577]. A similar definition applies to a "judgment" in a special proceeding [see CCP § 1064]. The finality of a judgment is determined by its substance or effect, rather than by its designation [*Estate of Lock* (1981) 122 CA3d 892, 896, 176 CR 358] .



Trap:

Although a judgment is described as a final determination of the rights of the parties, whether the judgment itself is final is a different question addressed to whether the judgment is subject to attack or challenge [see 19.30].

Distinguish:

A direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order [CCP § 1003]. That provision applies likewise to an "order" in a special proceeding [CCP § 1064].

Legal Topics:

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



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Chapter 19 Introduction to Judgments
II. JUDGMENT FUNDAMENTALS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.06

19.06 Single Judgment Rule.

19.06[1] Only One Final Determination of Rights and Obligations of Parties in Each Case. Given that a judgment is the final determination of the rights and obligations of the parties, there can be but one final judgment in an action. The judgment ends the suit in the court in which it was entered when it determines the rights of the parties in relation to the matter in controversy. The rule is interrelated with the right of appeal, because no order or judgment may be appealed from unless it finally disposes of the case in the trial court. A disposition that determines completely all issues between two opposing parties is final within the meaning of the basic rule; but a disposition that leaves undetermined essential issues is not final, even though it purports to dispose of some issues [*In re Marriage of Fink* (1976) 54 CA3d 357, 361, 126 CR 626] .

Exceptions:

The single judgment rule does not apply to actions in which separate and independent relief is sought against several defendants. When the plaintiff seeks separate and independent relief, a several judgment as to each defendant is proper [*Stafford v. Yerge* (1956) 139 CA2d 851, 854, 294 P2d 721] .

Moreover, courts have not inflexibly adhered to the single or final judgment rule. When an otherwise premature or partial judgment, in its own right, is appealable, and unnecessary delay and economic hardship can be avoided by hearing an appeal, an appellate court may assert jurisdiction and entertain the appeal instead of dismissing it [*McClure v. County of San Diego* (1987) 191 CA3d 807, 811, 236 CR 653] .

19.06[2] Portion or Entirety of Judgment May Be Interlocutory. As a general test, which must be adapted to particular circumstances of individual cases, when no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the decree, the decree is final; where anything further in the nature of a judicial action on the part of the court is essential to the final determination of the rights of the parties, the decree is deemed interlocutory [*Olmstead v. West* (1960) 177 CA2d 652, 655, 2 CR 443] .

Example:

Orders pertaining to pleadings or parties are considered interlocutory, and therefore are not final judgments [*Adoption of Lenn E.* (1986) 182 CA3d 210, 217, 227 CR 63] .

**Strategic Point:**

A decree may properly be final in its determination of all the issues of fact and law, and be interlocutory as to its mode of execution [*Wynn v. Treasure Co. (1956) 146 CA2d 69, 79, 303 P2d 1067*] .

**Cross Reference:**

Listing of actions in which a statutory provision for interlocutory judgment exists, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureAppealsAppellate JurisdictionState Court Review



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Chapter 19 Introduction to Judgments
II. JUDGMENT FUNDAMENTALS

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19.07 Law of the Case Doctrine Requires Judgment to Conform to Prior Appellate Rulings in Interlocutory Appeals.

The doctrine of law of the case provides that the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case [In re Marriage of Balcof (2006) 141 CA4th 1509, 1518, 47 CR3d 183; *see Joyce v. Simi Valley Unified Sch. Dist.* (2003) 110 CA4th 292, 304, 1 CR3d 712 (law of the case barred appellant from challenging jury instruction on second appeal)].

Distinguish:

The doctrine of law of the case generally applies only to issues that were both presented and determined in a prior appeal [*Bovard v. American Horse Enters., Inc.* (1988) 201 CA3d 832, 841, 247 CR 340] .

Exception:

A holding resulting from an alternative writ where the matter is fully briefed, there is opportunity for oral argument, and the cause is decided by written opinion establishes the law of the case on a later appeal from the final judgment because the matter is a determination of the cause [*see Kowis v. Howard* (1992) 3 C4th 888, 894, 12 CR2d 728, 838 P2d 250] .

➡ Cross Reference:

Discussion of law of the case doctrine, see California Forms of Pleading and Practice, Ch. 41, Appeal: Review Standards and Appellate Rules of Law (Matthew Bender).

Legal Topics:

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

Civil Procedure Judgments Preclusion & Effect of Judgments Law of the Case Civil Procedure Appeals Appellate Jurisdiction Interlocutory Orders



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Chapter 19 Introduction to Judgments
II. JUDGMENT FUNDAMENTALS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.08

19.08 Alternative and Conditional Judgments.

19.08[1] Judgments May Be Rendered in the Alternative or Upon Happening of Specified Contingency. In some cases, the court may properly render judgment in the alternative or upon the happening of a certain contingency. Such judgments may be proper in actions for the recovery of personal property or where casting the judgment upon the determination of an ultimate fact will afford the practical advantage of eliminating subsequent litigation [*CCP* § 667; *Chandler v. Hibberd* (1958) 165 CA2d 39, 50, 332 P2d 133] .

19.08[2] Judgments May Be Conditioned on Party's Compliance With Condition. In some cases, the court may properly render judgment in favor of one party upon that party's compliance with a specific condition set forth by the court.

Examples:

Conditional judgments have been properly rendered in a variety of proceedings, including:

- Rescission of contract [*CC* § 1692].
- Injunctive relief [*San Diego v. Southern Cal. Tel. Corp.* (1954) 42 C2d 110, 120, 266 P2d 14] .
- Actions to quiet title [*Stein v. Simpson* (1951) 37 C2d 79, 87, 230 P2d 816] .
- Specific performance [*Goldsworthy v. Dobbins* (1952) 110 CA2d 802, 809, 243 P2d 883] .

Distinguish:

Conditional judgments may not be rendered, if to do so would deny a substantial right of a party or work a forfeiture or inequitable requirement [*see Sketchley v. Lipkin* (1950) 99 CA2d 849, 854, 222 P2d 927]

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral
OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesSpecific
PerformanceReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions



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Chapter 19 Introduction to Judgments
III. SECURING LIMITED REMEDIES IN JUDGMENTS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.09

19.09 CHECKLIST: Securing Limited Remedies in Judgments.

☐ To obtain prejudgment interest, make sure that the proposed judgment specifies:

- ☐ The rate of prejudgment interest.
- ☐ The date on which prejudgment interest began accruing.

Authority:

Cal Rules Ct, Rule 3.1802

Discussion:

See 19.10

☐ To secure future damages in judgments on actions for injury or damage based on professional negligence of health care provider:

- ☐ Make sure the proposed judgment must states:
 - ☐ The recipient(s) of the payments.
 - ☐ The dollar amount of the payments.
 - ☐ The interval between payments.
 - ☐ The number of payments or the period of time over which the payments must be

made.

- ☐ Make sure the total amount of noneconomic damages does not exceed statutory limits:

Authority:

CC § 3333.2(b); CCP § 667.7(b)(1)

Discussion:

See 19.11

☐ To finalize the method of payment of damages that a verdict requires a public entity to pay in an action for personal injury or wrongful death, the defendant public entity may:

- ☐ File a written request for a mandatory settlement conference to discuss available methods by which the judgment is to be satisfied.
- ☐ Seek an order allowing it to pay by periodic payments.
- ☐ Move for post-trial hearing to reduce the judgment against the public entity by the amount of collateral source payments paid or obligated to be paid to plaintiff before commencement of trial.

Authority:

Gov Code §§ 962, 984, 985

Discussion:

See 19.12

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesJudgment
InterestPrejudgment InterestTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsPublic Entity
LiabilityLiabilityState Tort Claims ActsProcedural Requirements



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III. SECURING LIMITED REMEDIES IN JUDGMENTS

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19.10 Prejudgment Interest Must Be Stated in Judgment.

Prejudgment interest is not a cost, but rather an element of damages [*North Oakland Med. Clinic v. Rogers* (1998) 65 CA4th 824, 830, 76 CR2d 743] . The proposed judgment must specify the rate of interest and the date on which prejudgment interest began accruing [see *Cal Rules Ct, Rule 3.1802*].



Strategic Point:

Counsel for plaintiff should ensure that the proposed and entered judgment contain necessary provisions for securing any prejudgment interest to which the plaintiff may be entitled.



Cross Reference:

Further discussion of prejudgment interest, see *Ch. 26, Entry of Judgment, 26.18[5][d]*.

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesJudgment
InterestPrejudgment Interest



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Chapter 19 Introduction to Judgments
III. SECURING LIMITED REMEDIES IN JUDGMENTS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.11

19.11 Future Damages in Judgments on Actions for Injury or Damages Based on Professional Negligence of Health Care Provider.

A judgment ordering the payment of future damages [see CCP § 667.7(e)(1) (definition)] in an action for injury or damages based on the professional negligence [see CCP § 667.7(e)(4) (definition)] of a health care provider [see CCP § 667.7(e)(3) (definition)] by periodic payments [see CCP § 667.7(e)(2) (definition)] must specify [CCP § 667.7(b)(1)]:

- The recipient(s) of the payments.
- The dollar amount of the payments.
- The interval between payments.
- The number of payments or the period of time over which the payments must be made.

 Cross Reference:

Form of judgment ordering that future damages be paid in period payments, see 19.32.



Strategic Point:

The statutory provisions concerning future damages are intended to minimize litigation by requiring a judgment to incorporate all elements of a periodic payment program compensating a successful plaintiff for future damages and precluding any subsequent modification to the specifications of the original judgment [see CCP § 667.7(f)]. Counsel for plaintiff in such an action should make sure that the proposed and entered judgment contains aforementioned necessary provisions for securing any future damages to which the plaintiff may be entitled.



Trap:

Because the trial court lacks jurisdiction to grant a motion for periodic payment after a jury's lump-sum judgment has been entered [*Craven v. Crout* (1985) 163 CA3d 779, 784, 209 CR 649], counsel should be sure to request the remedy before the verdict in a case tried by jury. In such a case, the request should

also ask for a stay of the entry of the jury's verdict [*Craven v. Crout* (1985) 163 CA3d 779, 784, 209 CR 649] .

Example:

If the defendant has put the plaintiff on notice at the pleading stage of the intention to seek periodic payment of future damages and requested the trial court to instruct the jury to designate the portion of the damages that was attributable to future damages, a formal request for periodic payment of future damages made following delivery of the verdict is not untimely [see *Gorman v. Leftwich* (1990) 218 CA3d 141, 152-153, 266 CR 671] .

 Cross Reference:

Form of request for judgment ordering that future damages be paid in period payments, see 19.31.



Strategic Point:

Noneconomic damages in an action for injury or damages based on the professional negligence of a health care provider are capped at a specific dollar amount [see CC § 3333.2(b)]. Counsel for plaintiff in such an action should ensure that the proposed and entered judgment does not call for more noneconomic damages than the statutory limit.

Prerequisite:

An award of punitive damages in an action arising out of professional negligence of a health care provider may only be available if the plaintiff obtained required order of the court allowing a claim for punitive damages in the complaint as amended [see CCP § 425.13]

Distinguish:

The term "health care provider" in CC § 3333.2(c)(1) pertains to person, whether natural or corporate, the latter case specifically including a licensed clinic, health dispensary, or health facility [*Kotler v. Alma Lodge* (1998) 63 CA4th 1381, 1391, 74 CR2d 721] , but does not include an unincorporated association of natural persons [*Lathrop v. HealthCare Partners Med. Group* (2004) 114 CA4th 1412, 1420, 8 CR3d 668] .

Example--Multiple Causes of Action:

When a plaintiff knowingly chooses to proceed on the basis of one or more causes of action covered by CC § 3333.2, limiting damages for noneconomic losses in medical malpractice actions to \$250,000, as well as one or more causes of action not covered by Section 3333.2, and obtains a recovery that may be based on the theory not covered by Section 3333.2, the limitations of CC § 3333.2 do not apply [*Flores v. Natividad Med. Ctr.* (1987) 192 CA3d 1106, 1115, 238 CR 24] .

 Cross Reference:

Discussion of future damages, see California Forms of Pleading and Practice, Ch. 177, Damages; Ch. 209, Dentists; Ch. 295, Hospitals; and Ch. 414 Physicians and Other Medical Personnel (Matthew Bender).

Legal Topics:

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

Civil Procedure Judgments Entry of Judgments General Overview Torts Malpractice & Professional Liability Healthcare Providers



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19.12 Determining Method of Satisfaction of Verdict Against Public Entity in Personal Injury or Wrongful Death Actions.

19.12[1] Either Party May Request Mandatory Settlement Conference Upon Verdict Against Public Entity in Personal Injury or Wrongful Death Actions. On entry of verdict against a public entity in excess of the statutory threshold amount in an action for personal injury or wrongful death, the public entity may file a written request for a mandatory settlement conference to discuss available methods by which the judgment is to be satisfied [*Gov Code* § 962].



Timing:

A public entity's request for mandatory settlement conference must be made in accordance with the time limits applicable to motions for new trial under *CCP* § 659 [*Gov Code* § 962], namely, before entry of judgment, or by 15 days after the date of the clerk's mailing or a party's service of notice of entry of judgment on the public entity, but no later than 180 days after entry of judgment [*CCP* § 659].



Strategic Point:

Motions under *Gov Code* § 962 may be noticed with motions under *Gov Code* § 984 [see 19.12[2]], *Gov Code* § 984 [see 19.12[3]], and *CCP* § 659 (new trial) [*Gov Code* §§ 962, 985(b)].



Cross Reference:

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

19.12[2] Uninsured Public Entity May Obtain Order Allowing Periodic Payment of Damages. A judgment against an uninsured or underinsured [see *Gov Code* § 984(b)] public entity may be ordered paid by periodic payments only by order [*Gov Code* § 984(c)]:

- Under *CCP* § 667.7, providing for future damages in actions based on negligence of a health care provider [see 19.11];

- Under *Gov Code* § 970.6 after the governing body and the court have made the necessary findings of unreasonable hardship;
- Under *Gov Code* § 984(d) if the public entity has so elected; or
- If the parties agree on periodic payments.

**Timing:**

Motions under *Gov Code* § 984 may be noticed with motions under *Gov Code* § 962 [see 19.12[1]], *Gov Code* § 985 [see 19.12[3]], and *CCP* § 659 (new trial) [*Gov Code* §§ 962, 985(b)].

**Cross Reference:**

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

19.12[3] Public Entity May Obtain Reimbursement of Collateral Source Payments Paid to Plaintiff in Action for Personal Injury or Wrongful Death. After return of verdict in an action for personal injury or wrongful death against a public entity, the public entity may move for a post-trial hearing to reduce the judgment against the public entity by the amount of collateral source payments paid or obligated to be paid to plaintiff prior to commencement of trial [*Gov Code* § 985(b)].

**Timing:**

A public entity's motion for hearing on reduce the judgment against the public entity by the amount of collateral source payments paid or obligated to be paid to plaintiff prior to commencement of trial must be made in accordance with the time limits applicable to motions for new trial under *CCP* § 659 [*Gov Code* § 985(b)], namely, before entry of judgment, or by 15 days after the date of the clerk's mailing or a party's service of notice of entry of judgment on the public entity, but no later than 180 days after entry of judgment [*CCP* § 659].

**Strategic Point:**

Motions under *Gov Code* § 985 may be noticed with motions under *Gov Code* § 962 [see 19.12[1]], *Gov Code* § 984 [see 19.12[2]], and *CCP* § 659 (new trial) [*Gov Code* §§ 962, 985(b)].

**Cross Reference:**

Motion for new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

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

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19.13 CHECKLIST: Submission, Filing, and Entry of Judgments.

☐ Calendar date each case is submitted to the judge for decision and the date 90 days after the date of submission.

☐ Determine the date of submission of the case for decision.

☐ Except in limited circumstances, a cause is submitted for decision in trial court on either the date the court orders the matter submitted, or the later of:

☐ The date the final paper is required to be filed and

☐ The date the argument is heard.

Authority:

CCP § 75; Cal Rules Ct, Rule 2.900

Discussion:

See 19.15

☐ If the client's need for a decision is truly urgent, consider notifying the judge of the facts of the client's hardship on submission of the case for decision or as soon as possible thereafter.

☐ When there is no evident client hardship, as the number of days past the date that a case was submitted approaches 90, consider sending the judge a reminder that cases ordinarily must be decided with that time.

Authority:

Cal Const, art VI, § 19

Discussion:

See 19.16

- ☐ If a case has not yet been decided and the case was submitted for decision more than 90 days ago:
- ☐ Carefully consider filing a written statement with the Commission on Judicial Performance if research shows the judge in the case has either:
- ☐ Persistently failed to decide cases within 90 days of the date they were submitted for decision.
 - ☐ Filed false affidavits concerning whether the judge has pending cases not decided within 90 days of the date they were submitted for decision.

Authority:

Cal Rules Comm Jud Perf, Rule 109(a)

Discussion:

See 19.16

- ☐ Carefully consider filing an action for writ of mandate compelling the judge to file a decision in the case.

Authority:*Hassanally v. Firestone (1996) 51 CA4th 1241, 1245, 59 CR2d 625***Discussion:**

See 19.17

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.14 Options and Strategies.

A party wanting the judge to file a decision right away should consider the possible consequences to the case in the actual decision by the judge. First, attempting to rush the judge can create animosity, and may also result in a hurried, poorly reasoned judgment.

In terms of pressuring the judge to file a timely judgment, the California Constitution, statutes, and court rules allow for withholding a judge's salary for failure to file a decision within 90 days, as disclosed by the judge on regular affidavits. It is also possible to bring a disciplinary action for a judge's persistent failure to decide a case within that time or for a judge's false affidavits as to existence of cases pending on his or her docket for longer than 90 days after submission. However, these are extreme measures that are best avoided except in egregious circumstances [*see 19.16*].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral
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19.15 Determining Date of Submission of Case for Decision.

A cause is submitted for decision in trial court on either [*Cal Rules Court, Rule 2.900(a)*]:

- The date the court orders the matter submitted; or
- The later of:
 - ☐ The date the final paper is required to be filed; and
 - ☐ The date the argument is heard.

Exception:

A superior court may provide that when all judges are absent from a county, a noncontested matter in which no evidence is required or that may be submitted on affidavits is submitted on [*CCP § 75*]:

- The filing with the clerk of a statement of submission by the party or his or her attorney; or
- The date set for the hearing on the matter.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.16 Timing of Court's Filing of Decision After Submission of Cause for Decision.

19.16[1] Judge's Compensation Is Withheld If Court Fails to File Judgment Within 90 Days of Date Cause Was Submitted for Decision. A judge of a court of record may not receive his or her judge's salary while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision [*Cal Const, art VI, § 19*].

Distinguish:

The provision withholding a judge's salary for the judge's failure to decide cases within 90 days of the date they are submitted for decision does not affect the trial court's jurisdiction to decide case later than 90 days after submission [*Hassanally v. Firestone* (1996) 51 CA4th 1241, 1245-1246, 59 CR2d 625] .



Strategic Points:

- As the number of days from the date the case was submitted approaches 90, counsel should send the court a reminder that the date for a decision in the case is nearing. However, although the requirement that the judge must ordinarily decide the case within 90 days of the submission of the case for decision, it is unwise to point out that the judge could have his or her salary withheld if the judge fails to decide the case within that time.
- Counsel should, obviously, be very judicious in taking action that might lead to the withholding of a judge's salary. Such steps may lead to irreparable damage to a client's case and may subject an otherwise conscientious judge to unwarranted scrutiny. This action should be used as a last resort.

⚖️ Judge's Perspective:

Most courts have internal procedures to monitor cases under submission to ensure timely decisions. Therefore, the situation where a matter remains under submission for 90 days is very rare. In those unusual instances, counsel's best recourse is probably a gentle reminder to the court.

19.16[2] Case Is Decided on Announcement of Tentative Decision or Termination of Cause. A submitted cause is pending and undetermined until [*Cal Rules Court, Rule 2.900(c)*]:

- The court announces its tentative decision; or
- The cause is terminated.

Accordingly, the time required to finalize a tentative decision is not time during which the decision is pending and undetermined [*Cal Rules Court, Rule 2.900(c)*].

Consider:

In most cases, judges have no problem issuing tentative decisions within 90 days.

Distinguish:

For purposes of this rule, a motion to vacate, reconsider, or rehear a case is a separate and new cause submitted separate from the underlying action [*Cal Rules Court, Rule 2.900(c)*].

19.16[3] Court May Vacate Submission for Good Cause and Resubmit Case for Decision. The trial court may vacate the submission of a case for decision by issuing an order served on the parties that states good cause and provides for resubmission of the case for decision [*Cal Rules Court, Rule 2.900(b)*].



Timing:

Before the expiration of the 90-day period for filing the decision, the judge may, with cause, resubmit the case [*Mardikian v. Commission on Judicial Performance* (1985) 40 C3d 473, 484-485, 220 CR 833, 709 P2d 852 (judge censured for, among other things, resubmitting cases without cause)].

Example:

If an unreasonably burdensome workload or other good cause makes a prompt decision impossible even for an conscientious judge, a trial judge may be entitled to file a declaration of reasons for resubmission [see *Hassanally v. Firestone* (1996) 51 CA4th 1241, 1245, 59 CR2d 625 (resubmission of case without cause is improper)].

19.16[4] Judge's Filing of False Affidavit of Cases Pending More Than 90 Days or Persistent Failure to File Within 90 Days Are Grounds for Disciplinary Sanctions. Judges must report by affidavit any cases currently pending more than 90 days after submission for decision before receiving their salary [*Gov Code § 68210*]. A judge's failure to render a decision within 90 days [*Doan v. Commission on Judicial Performance* (1995) 11 C4th 294, 312, 45 CR2d 254, 902 P2d 272 , modified by 11 C4th 474a (1995) (judge removed from office under *Cal Const, art VI, § 18(c)* for, among other things, persistent failure to file decisions on time); *McCullough v. Commission on Judicial Performance* (1989) 49 C3d 186, 191, 260 CR 557, 776 P2d 259 (judge removed from office under *Cal Const, art VI, § 18(c)* for, among other things, persistent failure to file decisions on time)], even if unintentional [*Mardikian v. Commission on Judicial Performance* (1985) 40 C3d 473, 484-485, 220 CR 833, 709 P2d 852 (judge censured); *In re Jensen* (1978) 24 C3d 72, 73, 154 CR 503, 593 P2d 200 (judge censured where proper application to deciding cases could have prevented decisions more than 90 days after submission)], or a judge's filing of a false affidavit that he or she has no cases outstanding more than 90 days after submission [*In re McCullough* (1987) 43 C3d 534, 535, 236 CR 151, 734 P2d 987 (judge censured); *In re Jensen* (1978) 24 C3d 72, 73, 154 CR 503, 593 P2d 200] is grounds for disciplinary action against the judge [see *Cal Const, art VI, § 18(c)*].

Prerequisites:

The initiation of a disciplinary action against a judge requires the submission of a written statement alleging facts implicating the judge's conduct to the Commission on Judicial Performance [*Cal Rules Comm Jud Perf, Rule 109(a)*]. A statement alleging the failure to file case decisions within 90 days of the

date they are submitted for decision generally must cite persistent failure of the judge to perform the duties of office [see, e.g., *McCullough v. Commission on Judicial Performance* (1989) 49 C3d 186, 191, 260 CR 557, 776 P2d 259 (decided under prior court rules)], while a statement alleging the filing of false affidavits of cases outstanding more than 90 days [see *Cal Const*, art VI, § 18(c)].



Warning:

Counsel should consider the prejudice to the client's case that could result from taking action leading to withholding of a judge's salary or disciplinary action against a judge for the judge's failure to decide a case within 90 days of its submission. Although there are sanctions against biased decisionmaking on the part of a judge, the extra cost of seeking disqualification of a biased judge and the irreparable damage to the client's case from a judge's possible retaliatory adverse ruling outweigh the benefit from a speedier decision. It is rare for appellate courts to rule in favor of disqualification, and would require an egregious situation to justify.

Rather than seeking withholding of the judge's salary or disciplinary action, a better course of action is to take a writ and ask the appellate court to direct the trial judge to issue a decision *see* 19.17].



Judge's Perspective:

Most courts have internal procedures to monitor cases under submission to ensure timely decisions. Therefore, the situation where a matter remains under submission for 90 days is very rare. In those unusual instances, counsel's best recourse is probably a gentle reminder to the court.



Cross Reference:

Disqualification of judge for cause, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 22.15 *et seq.*



Strategic Point:

If the practitioner is seeking disqualification *after* judgment or during the period immediately preceding entry of judgment but after trial or resolution, it is probably too late. An appellate review may consider the effort to be that of a "sore loser" situation than a true "bias" situation.



Cross References:

Discussion of judges' compensation, see *California Forms of Pleading and Practice*, Ch. 317, Judges (Matthew Bender); or

California Points and Authorities, Ch. 130, Judges (Matthew Bender).

Legal Topics:

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

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19.17 Writ of Mandate May Be Available to Compel Court to File Judgment.

A trial court's failure to decide a case within 90 days of the date it is submitted for decision is probably the basis for an action for writ of mandate under *CCP § 1085* seeking to compel the rendering and filing of the decision [*see Hassanally v. Firestone* (1996) 51 CA4th 1241, 1245, 59 CR2d 625 (noting that there are no reported cases on point)].

Consider:

Counsel should consider any prejudice to the client's case that could result from taking action for writ of mandate against a judge to compel a decision in a case not decided within 90 days of its submission. However, this course of action is recommended rather than attempting to withhold the judge's salary or to take disciplinary action against the judge [*see 19.16*].

➡ Cross References:

Discussion of and forms for motions for writ of mandate generally, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender); or

California Points and Authorities, Ch. 150, Mandate and Prohibition (Matthew Bender).

Legal Topics:

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

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19.18 Entry of Judgment.

19.18[1] Court Must Enter Judgment, at Which Point It Becomes Effective. The court does not have discretion to refuse to give judgment declaring a right that is properly pleaded and well established by evidence. When there are grounds for the granting of legal or equitable relief, judgment is given to the party entitled thereto as a matter of right and not of grace [*Collins v. Collins* (1957) 48 C2d 325, 333-334, 309 P2d 420] . Until entered, the judgment is not effective for any purpose [CCP § 664].

➡ **Cross Reference:**

Procedures and standards for entering judgments and giving notice, see Ch. 26, Entry of Judgment.

19.18[2] Judgment Must Generally Be Entered Immediately on the Court's Filing of Judgment. The judgment must be entered by the court clerk, in conformity with the decision of the court, immediately on filing of the decision [CCP § 664].

Exception:

The court clerk ordinarily must prepare and enter judgment in conformity with a jury's verdict within 24 hours after the rendition of the verdict, whether or not a motion for judgment notwithstanding the verdict is pending [CCP § 664].

➡ **Cross Reference:**

Entry of judgment after jury trial, see Ch. 26, *Entry of Judgment*, 26.21 -26.24.

Exception:

On the filing of the defendant's verified statement authorizing the judgment and the accompanying certificate (or declaration) of the defendant's attorney, the court clerk will enter a judgment of the court for the amount confessed, with costs consisting of the plaintiff's filing fee [CCP § 1134(a), (b)].

➡ **Cross References:**

Obtaining entry of judgment by confession, see Ch. 26, *Entry of Judgment*, 26.03 -26.07.

Obtaining entry of judgment after bench trial, see *Ch. 26, Entry of Judgment*, 26.15 -26.20.

Obtaining entry of judgment after adverse party failed to appear at trial, see *Ch. 26, Entry of Judgment*, 26.08 -26.10.

Obtaining entry of judgment on submitted controversy, see *Ch. 26, Entry of Judgment*, 26.11 -26.14.

Legal Topics:

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

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19.19 CHECKLIST: Effect of Entry of Judgment.

- ☐ Check entered judgment for inclusion of all requested specific findings of fact.

Discussion:

See 19.21

- ☐ Determine appropriateness of filing available post-judgment motion.

Discussion:

See 19.22

- ☐ Seek any satisfaction from other party required by the judgment, and provide acknowledgment upon receipt of satisfaction.

Discussion:

See 19.23[1]

- ☐ Determine whether judgment should be:

☐ Enforced.

Discussion:

See 19.23[2]

☐ Assigned.

Discussion:

See 19.24

Legal Topics:

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

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19.20 Options and Strategies.

The prevailing party on an entered judgment gains the protection of res judicata on the same claim by the parties to the action, and should use it to best advantage in any subsequent litigation. The party's participation in drafting a proposed decision or submission of special interrogatories to a jury should be focused on maximizing that potential advantage from the judgment.

The losing party will have the potential adverse effect of collateral estoppel in actions by non-parties against them on the same factual contentions. The party not prevailing should participate in drafting the proposed decision to attempt to limit its effect in actions by third parties.

The entry of judgment also limits the available options for changing rulings of the court, not the least of which is the judgment itself. The entry of judgment also entitles the prevailing party to satisfaction and obligates that party to discharge the judgment on satisfaction. Accordingly, attached property in the hands of a levying officer may be transferred to the prevailing party at that time, while property delivered to the plaintiff under claim and delivery must be returned to a prevailing defendant, along with relevant damages.

Judgments may also be enforced or assigned on entry.

Legal Topics:

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

Civil Procedure Judgments Entry of Judgments General Overview Civil Procedure Judgments Preclusion & Effect of Judgments Estoppel Collateral Estoppel Civil Procedure Judgments Preclusion & Effect of Judgments Res Judicata Civil Procedure Remedies Provisional Remedies Attachments



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19.21 Specific Findings of Fact Preclude Relitigation of Same Cause by Same Parties.

Res judicata precludes parties or their privies from relitigating a cause of action or an issue that has been finally determined by a court of competent jurisdiction [see *Henn v. Henn* (1980) 26 C3d 323, 329, 161 CR 502, 605 P2d 10]. A general verdict in a jury trial implies a finding in favor of the prevailing party of every fact essential to support its claim or defense [*Southern Pac. Co. v. Unarco Indus., Inc.* (1974) 42 CA3d 142, 116 CR 847 ; *Travelers Ins. Co. v. Leshner* (1986) 187 CA3d 169, 194, 231 CR 791]. If an issue could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged [*Federici v. Gursev Schneider & Co., LLP* (2006) 143 CA4th 606, 620, 49 CR3d 405].

The doctrine of issue preclusion precludes relitigation of an issue previously adjudicated when the following requirements are satisfied [*Hernandez v. City of Pomona* (2009) 46 C4th 501, 511, 94 CR3d 1, 207 P3d 506] :

- The issue sought to be precluded is identical to that decided in a prior proceeding.
- The issue was actually litigated in the prior proceeding.
- The issue was necessarily decided in the prior proceeding.
- The decision in the former proceeding is final and on the merits.
- The party against whom issue preclusion is asserted is the same as or in privity with the party to the prior proceeding.

Consider:

Note the distinction between issue preclusion, collateral estoppel, and bar, all of which fall short of res judicata, and vary slightly.

An issue is "actually litigated" when it is properly raised by the pleadings or otherwise, is submitted for determination, and is actually determined [*Hernandez v. City of Pomona* (2009) 46 C4th 501, 511-512, 94 CR3d 1, 207 P3d 506] .

Distinguish:

To determine which issues were actually litigated in the underlying action, the court in the subsequent

action cannot rely exclusively on the findings in the underlying action, but must carefully scrutinize the pleadings and proof. This scrutiny includes looking behind the findings at the evidence presented to determine what was actually decided [*Schaefer/Karpf Prods. v. CNA Ins. Cos.* (1998) 64 CA4th 1306, 1314, 76 CR2d 42] . Distinguishing between "issues" and "legal theories" is not always easy and requires reference to the pleadings and proof in each case [see *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 CA4th 607, 617, 81 CR2d 708 ; *Wimsatt v. Beverly Hills Weight Etc. Int'l, Inc.* (1995) 32 CA4th 1511, 1517, 38 CR2d 612] .

Strategic Point:



Even though the range of issues precluded is not limited to those expressly decided in the written decision, a clearly written decision reduces the cost and risk in proving that a particular issue was in fact decided. Therefore, a party to a jury trial should request special interrogatories on particular issues, and a party writing a proposed decision [see *Ch. 26, Entry of Judgment*, 26.18[3]] should look to maximize its value for issue preclusion for future use by taking judicial notice of the decision in any subsequent action or enforcement by writing clear, complete, and unequivocal findings of fact in the proposed decision.



Cross References:

Discussion of requesting special interrogatories, see *Ch. 18, Jury Verdicts*, 18.10.

California Forms of Pleading and Practice, Ch. 326A, Jury Verdicts (Matthew Bender).

Discussion of res judicata, see 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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19.22 Entry of Judgment Restricts Trial Court's Jurisdiction to Change Judgment.

Once a judgment has been entered, the trial court loses its unrestricted power to change that judgment, even though time for appeal from the judgment has not yet passed. The court does retain power to correct clerical errors in a judgment that has been entered, or to entertain and grant a motion for a new trial under *CCP* § 655 *et seq.* or a motion for a judgment notwithstanding the verdict under *CCP* § 629. The court also retains jurisdiction to consider and grant a motion to vacate a judgment and enter a different judgment for either of two reasons: an incorrect or erroneous legal basis for the decision, not consistent with or supported by the facts, or a judgment not consistent with or not supported by the special verdict under *CCP* §§ 663, 663a. The court also retains jurisdiction to entertain and grant a motion for relief from a judgment taken against a party through mistake, inadvertence, surprise, or excusable neglect under *CCP* § 473 [*Rochin v. Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1237, 79CR2d 719 ; *Craven v. Crout* (1985) 163 CA3d 779, 782-783, 209 CR 649] . Motions under *CCP* § 473.1 and *M&V Code* § 402(d), as well as motions and actions under the court's inherent and equitable powers also may be brought within their respective limitations, after entry of judgment [see 19.25 *et seq.*].

Examples:

- After judgment, the trial court has no jurisdiction to hear a motion to reconsider [*Betz v. Pankow* (1993) 16 CA4th 931, 937-938, 20 CR2d 841] .
- The trial court may not amend an entered judgment to substantially modify it or materially alter the rights of the parties under its authority to correct clerical error [*Rochin v. Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1237, 79 CR2d 719] .



Cross References:

Discussion of challenging entered judgments, see 19.25 *et seq.*

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

Discussion of motion for judgment JNOV, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

Discussion of motion to vacate judgment, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

Legal Topics:

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

Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionLower Court Jurisdiction



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19.23 Satisfaction, Discharge, and Enforcement.

19.23[1] Entered Judgment May Be Satisfied and Discharged. A satisfaction of a money judgment is entered in the register of actions by the court clerk when a writ is returned satisfied for the full amount of a lump-sum judgment, when an acknowledgment of satisfaction is filed with the court, or when the court orders entry of satisfaction of judgment [CCP § 724.020]. When a money judgment is satisfied either by payment of the full amount required, or by acceptance by the judgment creditor of a lesser sum in full satisfaction, the judgment creditor must immediately file an acknowledgment of satisfaction with the court unless the judgment is satisfied in full pursuant to a writ [CCP §§ 724.010(a), 724.030].

► **Cross Reference:**

Discussion of satisfaction of money judgments, see Matthew Bender[(R)] Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 24, Discharge and Satisfaction of Judgments.

With respect to attached property, the levying officer must release attached property when the officer [CCP § 488.730(a)]:

- Receives a written direction to release the property from the plaintiff's attorney of record or, if the plaintiff does not have an attorney of record, from the plaintiff.
- Receives a certified copy of a court order for release.
- Is otherwise required to release the property.

► **Cross Reference:**

Discussion of release of attached property after judgment, see California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

Property that has been delivered to the plaintiff under claim and delivery must, in the event the plaintiff does not win possession of the property in the judgment, be returned to the defendant, along with necessary damages incurred by the

defendant, if any [CCP § 512.120].

 Cross Reference:

Discussion of return of property delivered to plaintiff after judgment for defendant, see California Forms of Pleading and Practice, Ch. 119, Claim and Delivery (Matthew Bender).

A surety who has obtained a writ of prevention in quia timet on property of the principal that can satisfy the principal's obligation [see *Escrow Agents' Fid. Corp. v. Superior Court* (1992) 4 CA4th 491, 493-494, 5 CR2d 698], or an order that the principal pay the obligation [see CC § 2846; CCP § 1050], is entitled to release from the obligation on the principal's performance of the obligation.

 Cross Reference:

Discussion of quia timet and orders under CC § 2846 or CCP § 1050, see California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

19.23[2] Judgment Becomes Enforceable on Entry. A judgment is enforceable under the enforcement statutes [see CCP § 680.010 *et seq.*] on its entry, unless otherwise provided by statute or in the judgment [CCP § 683.010].

 Timing:

Judgments are not enforceable, and judgment liens and enforcement actions become null, on the expiration of 10 years after the entry of the judgment unless otherwise provided by statute [CCP § 683.020].

Distinguish:

The 10-year period for enforcing judgments runs from the due date of each installment of a money judgment payable in installments [CCP § 683.030].

Exception:

Renewed judgments may generally be enforced up to 10 years after the timely filing of the renewal application [see CCP §§ 683.180, 683.190, 683.220].

 Cross Reference:

Discussion of enforcement of judgments, see Matthew Bender[(R)] Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, Planning Enforcement of Judgment.

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensRenewals



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19.24 Entered Judgments May Be Assigned.

An entered judgment that has not been satisfied may be transferred by assignment [CC §§ 953, 954]. The validity of an assignment is generally governed by the law of contracts [*Northern Counties Bank v. Earl Himovitz & Sons Livestock Co.* (1963) 216 CA2d 849, 855-856, 31 CR 551] .



Warning:

Actual notice of the assignment, although not required by law, is necessary for the protection of the judgment debtor from suit under the judgment by the assignor *Curtin v. Kowalsky* (1904) 145 C 431, 434-435, 78 P 962] , thus freeing the judgment debtor to reserve payment to the assignee, and preventing the debtor from erroneously paying the assignee. It is also necessary to obtain the right of substitute and notice in any ongoing litigation concerning the judgment, such as an appeal [see *Kaplan v. Hacker* (1952) 113 CA2d 571, 573, 248 P2d 464 (decided under prior similar statute)].

An assignee of a judgment is not entitled to enforce the judgment unless an acknowledgment of assignment of judgment to the assignee has been filed under CCP § 673 or the assignee has otherwise become an assignee of record [CCP § 681.020].



Cross Reference:

Discussion of assignment of judgments, see Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 14, Assigning a Judgment.

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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19.25 CHECKLIST: Challenging Judgments and Finality of Judgments.

☐ If a party has failed to fully present his or her case through his or her own or his or her attorney's excusable fault, or through the extrinsic fraud or mistake of another party, seek, as applicable:

- ☐ Relief from a judgment or dismissal taken through the party's mistake, inadvertence, surprise, or excusable neglect, or based on an attorney's affidavit of fault.
- ☐ Relief in equity from a judgment by motion or action based on extrinsic fraud or mistake.
- ☐ Relief from a judgment when a court has assumed jurisdiction over the law practice of the party's attorney.
- ☐ Relief from a judgment when a court has assumed jurisdiction over the law practice of the party's attorney.

Discussion:

See 19.27[2]

☐ If a judgment is void or the product of extrinsic fraud or mistake, seek, as applicable:

- ☐ Statutory or inherent relief from a void judgment or order by motion or action.
- ☐ Relief in equity from a judgment based on extrinsic fraud or mistake.

☐ Writ of error coram vobis and coram nobis.

☐ If a judgment contains a judicial or clerical error, file, as applicable:

☐ Motion for new trial or on a motion to vacate the judgment and enter a different one after judgment containing error of fact or law.

☐ Motion for judgment notwithstanding the verdict of the jury after judgment from trial by jury that contains error of fact or law.

☐ Motion under:

☐ Court's inherent power to vacate and correct its judgments that, because of clerical error, are improvidently or inadvertently made.

☐ Court's statutory power to correct clerical errors.

☐ Motion under court's inherent power to enter orders for judgments nunc pro tunc so that the judgment will be held effective prior to the date on which it was actually entered.

Discussion:

See 19.28

☐ If trial court rejects or is likely to reject motion for new trial, motion to vacate the judgment and enter a different one, and motion for judgment notwithstanding the verdict, file appeal of the judgment.



Trap:

File the appeal only after all other viable post-trial motions have been filed and decided by the trial court.

Authority:

Cal Rules Ct, Rules 8.104, 8.108

Discussion:

See 19.29

☐ If the time for appealing a judgment has passed, file, as applicable:

☐ Motion or action for determination that the judgment is void on the face of the record.

☐ Motion or action on basis of equitable jurisdiction to correct extrinsic fraud or mistake in rendering of judgment.

Discussion:

See 19.30[4]

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From
JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil
ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From
JudgmentMotions to Vacate



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19.26 Options and Strategies.

Judgments may be challenged by:

- Motion for judgment notwithstanding the verdict.

➤ **Cross References:**

Discussion and forms for motions for judgment notwithstanding the verdict, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

California Points and Authorities, Ch. 155, Motions After Trial (Matthew Bender).

- Motion for new trial.

➤ **Cross References:**

Discussion of and forms for motions for new trial, see Ch. 21, Motion for New Trial.

California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

California Points and Authorities, Ch. 155, Motions After Trial (Matthew Bender).

- Motion to vacate judgment and enter different judgment.

➤ **Cross References:**

Discussion of and forms for motions to vacate judgment and enter different judgment, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew

Bender).

California Points and Authorities, Ch. 155, Motions After Trial (Matthew Bender).

- Motion to correct or modify judgment.

➤ **Cross References:**

Discussion of and forms for motions to correct or modify judgment, see Ch. 28, Correcting and Modifying Judgment.

California Forms of Pleading and Practice, Ch. 371, Motions after Trial (Matthew Bender).

California Points and Authorities, Ch. 131, Judgments (Matthew Bender).

- Motions and actions to set aside judgments and orders.

➤ **Cross Reference:**

Discussion of and forms for motions to set aside judgments, see Ch. 29, Setting Aside Judgments and Orders.

- Review by writ of certiorari.

➤ **Cross Reference:**

Discussion of review by writ of certiorari, see California Forms of Pleading and Practice, Ch. 492, Review (Certiorari), Writ of (Matthew Bender).

- Appeal of the judgment or order to a higher court.

➤ **Cross Reference:**

Discussion of appeals, see California Forms of Pleading and Practice, Chs. 40- 54 (Matthew Bender).

- Action in quo warranto.

➤ **Cross Reference:**

Discussion of and forms for actions for quo warranto, see California Forms of Pleading and Practice, Ch. 483, Quo Warranto (Matthew Bender).

- Action for writ of mandate.

➤ **Cross Reference:**

Discussion of and forms for motions to correct or modify judgment, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender); or

California Points and Authorities, Ch. 150, Mandate and Prohibition (Matthew Bender).

**Strategic Points:**

■ Motions for relief from judgment under *CCP* § 473(d) and for new trial, and appeal, are cumulative remedies, and one does not bar another, if each is timely [*Miller v. Lee* (1942) 52 CA2d 10, 125 P2d 627]. This can also be said of motions to vacate and enter a different judgment, as well as motions seeking equitable relief from judgment. Counsel should file for as many forms of relief as the case warrants.

■ In view of the fact that the filing of appeal papers removes the trial court's jurisdiction to consider post-trial motions [see 19.29[3]], and that appeal periods are extended for specified periods after the denial of post-trial motions [see 19.29[2]], any appeal should follow resolution of all post-trial motions by the trial court to avoid divesting the trial court of jurisdiction to consider other attacks on the judgment. The exceptions are a motion or action for relief from a void judgment, which generally may be made at any time, and a motion or action for relief based on equity due to extrinsic fraud or mistake, which may be made or filed within the applicable limitation periods [see 19.30[4]].

■ Actions on domestic judgments [see 19.30[5]] may be brought, among other reasons, to:

- ☐ Invoke contempt powers of another court.
- ☐ Preserve the priority of a judgment lien.
- ☐ Foreclose a lien.
- ☐ Assert a statutory cause of action against a third person.

**Cross Reference:**

California Forms of Pleading and Practice, § 318.180 et seq. (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureRemediesWritsCommon Law WritsMandamus



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19.27 Validity of Judgments.

19.27[1] Judgment Is Valid Only Against Parties. Failure to join indispensable parties is not jurisdictional. However, in the absence of an indispensable party, the court cannot bind an absent party, even though it has the power to render a binding decision as to parties before it [*Kraus v. Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 364, 368, 140 CR 744] .

Example:

When a judgment is rendered against a party and the prevailing party wants to execute on the assets of a related party (such as the party's parent) the judgment may be ineffective absent a motion to amend the judgment to add a party on an alter ego theory or otherwise.

➡ Cross Reference:

Discussion of parties to judgment, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

19.27[2] Final Determination of Rights of Parties in Valid Judgment May Be Challenged Under Statutes or in Equity. A valid judgment may be challenged as not representing a full adjudication of the dispute between the parties by:

- Motions under *CCP* § 473(b) or in equity for relief from a judgment or dismissal, taken through the party's mistake, inadvertence, surprise, or excusable neglect, or based on an attorney's affidavit of fault [see *Ch. 29, Setting Aside Judgments and Orders*, 29.10 et seq.].
- Motions under *CCP* § 473(d) or in equity for relief from a void judgment or dismissal [see *Ch. 29, Setting Aside Judgments and Orders*, 29.24 et seq.].
- Motions or actions in equity for relief from a judgment based on fraud, duress, or extrinsic mistake [see *Ch. 29, Setting Aside Judgments and Orders*, 29.34 et seq.].

- Motions under *M&V Code* § 402(d) for relief from a judgment on basis of military service [see *Ch. 29, Setting Aside Judgments and Orders*, 29.45 et seq.].
- Motions under *CCP* § 473.1 for relief from a judgment when a court has assumed jurisdiction over the law practice of the party's attorney [see *Ch. 29, Setting Aside Judgments and Orders*, 29.53 et seq.].
- Request for findings on appellate review of case heard by the trial court judge under *CCP* § 909, on the basis of the record or new evidence presented to the appellate court.

 Cross Reference:

Discussion of requests for findings under *CCP* § 909, see California Forms of Pleading and Practice, Ch. 50, Appeal: Briefs (Matthew Bender).

- Application for writ of error coram vobis and coram nobis.

The writs of error coram vobis (on appeal) and coram nobis (before the trial court) may in rare cases be available when a party or appellant has discovered new evidence after judgment that would have supported a motion for reconsideration or new trial. A writ will issue under the very limited circumstances that meet the following criteria [*Betz v. Pankow* (1993) 16 CA4th 931, 941, 20 CR2d 841 (coram vobis); *Los Angeles Airways, Inc. v. Hughes Tool Co.* (1979) 95 CA3d 1, 9, 156 CR 805 (coram nobis)]:

- The error does not appear in the record.
- No other remedy is available.
- The issue involved has not been previously determined.

 Cross Reference:

Discussion of writs of error coram vobis and coram nobis, see California Forms of Pleading and Practice, Ch. 50, Appeal: Briefs (Matthew Bender).

Legal Topics:

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

Civil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraud



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19.28 Challenging Correctness of Judgment.

After judgment, a trial court may correct judicial error only on a motion for new trial under *CCP* § 656 *et seq.* [see Ch. 21, Motion for New Trial] or on a motion to vacate the order or judgment and enter a different one under *CCP* § 663 [see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment, 27.03 -27.08]. In the case of a trial by jury, a party may move even after the entry of judgment for judgment notwithstanding the verdict of the jury [see Ch. 20, Motion for Judgment Notwithstanding the Verdict, 20.03 *et seq.*].

In addition, a trial court has inherent power to vacate and correct its judgments that, because of clerical error, are improvidently or inadvertently made, as well as statutory power under *CCP* § 473(d) to correct clerical errors [see Ch. 28, Correcting and Modifying Judgment, 28.05 -28.09].

Courts have the inherent power to enter orders for judgments *nunc pro tunc* (a judgment relating back to the time when it should have been entered) so that the judgment will be held effective before the date on which it was actually entered [see Ch. 28, Correcting and Modifying Judgment, 28.09].

Although the trial court may correct its own inadvertence or clerical error, it can correct judicial error (errors in findings of fact or conclusions of law) after entry of judgment only on a motion for new trial or on a motion under *CCP* § 663 to vacate the order or judgment and enter a different one [*Greene v. Superior Court* (1961) 55 C2d 403, 405-406 10 CR 817, 359 P2d 249] .

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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19.29 Appeal of Judgments.

19.29[1] Appeal Generally Must Be Filed Within 60 Days of Service or Mailing of Notice of Entry. Except as extended under *Cal Rules Ct, Rule 8.108* [see 19.29[2]], the period for filing an appeal of a judgment is the earliest of [Cal Rules Ct, Rule 8.104(a)]:

- 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, either of which must show the date it was mailed.
- 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, either of which must be accompanied by proof of service.
- 180 days after entry of judgment.

Exception:

If the judgment is against a public entity that elects to pay the judgment in periodic payments under *Gov Code § 984*, the time period of 60 days described in the first two options above is lengthened to 90 days [Cal Rules Ct, Rule 8.104(c)].



Warning:

The reviewing court has no power to extend the appeal period except in an appellate emergency as defined in *Cal Rules Ct, Rule 8.66* [Cal Rules Ct, Rule 8.104(b)].

Cal Rules Ct, Rule 8.104(a)(1) requires a single document--either a "Notice of Entry" so entitled or a file-stamped copy of the judgment or appealable order--that is sufficient in itself to satisfy all of the rule's conditions, including the requirement that the document itself show the date on which it was mailed [*Alan v. American Honda Motor Co., Inc.* (2007) 40 C4th 894, 905, 55 CR3d 534, 152 P3d 1109] .

 Cross Reference:

Discussion of extension of appeal period for an appellate emergency, see California Forms of Pleading and Practice, Ch. 46, Appeal: Extending or Shortening Time (Matthew Bender).

Distinguish:

For purposes of determining the beginning of the appeal period, the entry date of a judgment is the date the judgment is either [*Cal Rules Ct, Rule 8.104(d)(1)*]:

- Entered in the judgment book.
- Entered via an alternative method authorized under *CCP § 668.5*.

 Cross Reference:

Discussion of appeals, see California Forms of Pleading and Practice, Chs. 40- 54, Appeal (Matthew Bender).

19.29[2] Effect of Filing Post-Judgment Motions on Time for Appeal.

19.29[2][a] Motion for New Trial. If a party serves a valid notice of motion for a new trial and the motion is denied, the time to appeal from the judgment is extended for all parties. The extended appeal period lasts until the earliest of [*Cal Rules Ct, Rule 8.108(b)*]:

- 30 days after the superior court clerk mails or a party serves an order denying the motion or a notice of entry of that order.
- 30 days after the denial of the motion as a matter of law.
- 180 days after entry of the judgment.

 Cross Reference:

Discussion of extension of appeal period upon filing of motion for new trial, see *Ch. 21, Motion for New Trial, 21.30*.

California Forms of Pleading and Practice, Ch. 46, Appeal: Extending or Shortening Time (Matthew Bender).

19.29[2][b] Motion to Vacate Judgment. If a party serves a valid motion, or valid notice of intention to file such a motion, to vacate the judgment during the appeal period set forth in *Cal Rules Ct, Rule 8.104*, the time to appeal from the judgment is extended for all parties. The extended appeal period lasts until the earliest of [*Cal Rules Ct, Rule 8.108(c)*]:

- 30 days after the court clerk mails or a party serves an order denying the motion or a notice of entry of that order.
- 90 days after the first notice of the motion or intention to file the motion is filed.
- 180 days after entry of the judgment.

 Cross Reference:

Discussion of extension of appeal period upon filing of motion to vacate, see *Ch. 29, Setting Aside Judgments and Orders*, 29.09[2].

California Forms of Pleading and Practice, Ch. 46, Appeal: Extending or Shortening Time (Matthew Bender).

19.29[2][c] Motion for Judgment Notwithstanding the Verdict. If a party serves a valid motion for judgment notwithstanding the verdict and the motion is denied, the time to appeal from the judgment is extended for all parties. The extended appeal period lasts until the earliest of [*Cal Rules Ct, Rule 8.108(d)*]:

- 30 days after the superior court clerk mails or a party serves an order denying the motion or a notice of entry of that order.
- 30 days after denial of the motion as a matter of law.
- 180 days after entry of the judgment.

 Cross Reference:

Discussion of extension of appeal period upon filing of motion for judgment notwithstanding the verdict, see *Ch. 20, Motion for Judgment Notwithstanding the Verdict*, 20.30.

California Forms of Pleading and Practice, Ch. 46, Appeal: Extending or Shortening Time (Matthew Bender).

19.29[3] Appeal Generally Removes Trial Court Jurisdiction to Consider Posttrial Motions. An appeal removes from the trial court's jurisdiction the subject matter of the judgment or order appealed from [*CCP § 916(a)*; *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 666, 73 CR2d 242]. The trial court's power to enforce, vacate, or modify an appealed judgment or order is suspended while the appeal is pending. Further trial court proceedings in contravention of the *CCP § 916(a)* stay are in excess of the court's jurisdiction [*see Elsea v. Saberi* (1992) 4 CA4th 625, 629, 5 CR2d 742 (*CCP § 473(b)* order vacating default judgment set aside as in excess of trial court's jurisdiction)].

 Warning:

An appeal from a nonappealable order does not stay the trial court's jurisdiction to set aside the order [*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 666, 73 CR2d 242 (no stay)]. Counsel should immediately determine whether a judgment or order that is appealed is appealable, to preserve the filing period for setting aside a nonappealable judgment or order.

Example:

A judgment order pursuant to acceptance of offer of compromise under *CCP § 998* is not appealable, and thus filing a notice of appeal from such an order does not divest the trial court of jurisdiction over the matters before it [*Roden v. Bergen Brunswick Corp.* (2005) 107 CA4th 620, 634-635, 132 CR2d 549 ; *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 667, 73 CR2d 242] .

Exception:

The trial court also retains jurisdiction over ancillary or collateral matters that do not affect the judgment on appeal [*CCP § 916(a)*; *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 666, 73 CR2d 242 (motion to tax attorney fees); *Silver v. Gold* (1989) 211 CA3d 17, 26, 259 CR 185 (imposition of sanctions for frivolous motion)].

Examples:

- The general rule that a pending appeal deprives the trial court of jurisdiction of the cause does not apply to a judgment that is void on its face, because a court may set such a judgment aside at any time [*Betz v. Pankow* (1993) 16 CA4th 931, 938, 20 CR2d 841 ; *Andrisani v. Saugus Colony Ltd.* (1992) 8 CA4th 517, 523, 10 CR2d 444] .
- A trial court does not have jurisdiction to set aside a judgment that is void in fact once an appeal is filed [*Betz v. Pankow* (1993) 16 CA4th 931, 940, 20 CR2d 841 (judgment confirming arbitration award may not be set aside after appeal is filed)].

With respect to post-judgment trial court proceedings, whether a matter is "embraced" in or "affected" by a judgment within the meaning of *CCP* § 916(a), and therefore in excess of jurisdiction of the trial court, depends on whether those proceedings on the particular matter would have any impact on the "effectiveness" of the appeal [*Betz v. Pankow* (1993) 16 CA4th 931, 940, 20 CR2d 841 (order vacating judgment confirming arbitration award affected judgment)].

 Cross Reference:

Discussion of stay of proceedings in the trial court pending appeal, see California Forms of Pleading and Practice, Ch. 43, Appeal: Stay of Proceedings (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionLower Court JurisdictionCivil ProcedureAppealsReviewabilityTime Limitations



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19.30 Finality of Judgments.

19.30[1] Judgment Is Final After Appeals Exhausted and Appeal Period Has Run. A judgment is not "final," that is, safe from direct attack or review, until it has been affirmed in response to direct attack or review, or the time for attacking or seeking review has expired [*In re Marriage of Van Dyke* (1985) 172 CA3d 145, 149, 218 CR 11] unless judgment is sooner satisfied [*South Coast Reg'l Comm'n v. Gordon* (1978) 84 CA3d 612, 619, 148 CR 775 ; *Estate of Molera* (1972) 23 CA3d 993, 998, 100 CR 696] .



Trap:

Although a judgment is described as a final determination of the rights of the parties [see 19.05], whether the judgment itself is final is a different question addressed to whether the judgment is subject to attack or challenge.

19.30[2] Judgment Is Final Only Within Its Scope. As a general test to be adapted to particular circumstances of the individual case, where no issue is left for future consideration except fact of compliance or noncompliance with terms of first decree, the decree is final [*Olmstead v. West* (1960) 177 CA2d 652, 655, 2 CR 443] . A judgment is final only when it determines all of the rights of the parties and requires no further judicial action to give effect to its provisions [*Associated Convalescent Enters. v. Carl Marks & Co.* (1973) 33 CA3d 116, 121, 108 CR 782] .

Consider:

When a trial court judgment decides a case on two alternate grounds and the appellate court affirms based the judgment on only one ground, the judgment is binding under principles of res judicata and collateral estoppel only on the ground addressed by the appellate court [Newport Beach Country Club, Inc. v. Founding Members of the Newport Beach Country Club (2006) 140 CA4th 1120, 1126-1132, 45 CR3d 207].

19.30[3] Reservation of Jurisdiction Limits Finality Until Exercised. In some instances, a judgment may be deemed final for all purposes as the final determination of the rights of the parties, but still may be subject to modification by the court [see *Allen v. Allen* (1956) 138 CA2d 706, 708, 292 P2d 581] . Independent of statute, a court that renders an equitable decree may appropriately reserve jurisdiction to take steps to carry it into effect [*Estes v.*

Rowland (1993) 14 CA4th 508, 536, 17 CR2d 901] .

Distinguish:

An individual judge, as distinguished from the court, is not empowered to retain jurisdiction of a cause. The cause is before the court, not the individual judge of the court, and the jurisdiction that the judge exercises is the jurisdiction of the court [*In re Marriage of Regnery (1989) 214 CA3d 1367, 1377, 263 CR 243]* .

Examples:

- A statutory right to continue jurisdiction may allow a court to make additional necessary orders, as in the case of the maintenance and support of minor children pursuant to a divorce [see *Fam Code §§ 2010(c), 3651, 4330, 4335, 4336*].

- If requested by the parties before dismissal of the suit in accordance with a settlement agreement, the trial court may retain jurisdiction to enforce the settlement until there is performance of its terms [see *CCP § 664.6; Osumi v. Sutton (2007) 151 CA4th 1355, 1360, 60 CR3d 693]* .



Cross References:

Discussion of trial court retention of jurisdiction to enforce settlement agreement, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 37.47[3] -[7]* (Matthew Bender); or

California Forms of Pleading and Practice, Ch. 220, Dissolution of Marriage and Related Proceedings (Matthew Bender).

The court in which a prior petition was filed under *CCP §§ 1280-1294.2* retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition is required to be filed in that proceeding [*CCP § 1292.6*].

The trial court has the inherent power to reserve jurisdiction to ensure compliance with its injunctive orders [*Estes v. Rowland (1993) 14 CA4th 508, 536, 17 CR2d 901]* .

A court has the power to reserve continuing jurisdiction to amend judgment to insert amount of additional damages when amounts are determined [*GHK Assocs. v. Mayer Group, Inc. (1990) 224 CA3d 856, 880, 274 CR 168]* .

19.30[4] Final Judgment May Be Challenged Only on Equitable Grounds or If Void.

19.30[4][a] Equity Is Basis to Change Mode or Procedure of Executing Final Judgment. Even in the absence of statutory authority, with or without an express reservation of such right in the judgment, a court having equity jurisdiction has the inherent power to change the mode or procedure in executing a judgment although the decree itself specifies a particular method [*Lesser & Son v. Seymour (1950) 35 C2d 494, 500, 218 P2d 536]* . The power to change or modify an equitable decree is limited to matters of procedure. It may not be exercised in such a fashion as to materially change a substantial adjudicated portion of the judgment [*Orban Lumber Co. v. Fearrien (1966) 240 CA2d 853, 858, 50 CR 41]* .

19.30[4][b] Equitable Jurisdiction Is Basis for Setting Aside Final Judgment That Is Void. In general, once the time for appealing a judgment has passed, a court may only set aside or modify the judgment if the judgment is void on the face of the record, or on the basis of its equitable jurisdiction to correct extrinsic fraud or mistake [*Estate of Beard (1999) 71 CA4th 753, 774, 84 CR2d 276]* .

► Cross References:

Discussion of setting aside or modifying judgment if the judgment is void on the face of the record, see *Ch. 29, Setting Aside Judgments and Orders*, 29.29, 29.30.

Discussion of equitable jurisdiction to correct extrinsic fraud or mistake, see *Ch. 29, Setting Aside Judgments and Orders*, 29.34 et seq.

19.30[5] Final Judgment May Be Enforced by Separate Action. An action on a domestic judgment is an action based on a contract, because the judgment becomes a debt which the judgment debtor is obligated to pay. The law implies a contract on the part of the judgment debtor to pay [*Minor v. Minor* (1959) 175 CA2d 277, 279, 345 P2d 954]



Timing:

An action on a judgment must be brought within 10 years [CCP § 337.5] after the date the judgment becomes final [*The Cadle Company II, Inc. v. Sundance Financial, Inc.* (2007) 154 CA4th 622, 624, 64 CR3d 824] .

► Cross Reference:

Discussion of finality of judgments, see 19.30[1].

Separate provisions apply to actions on judgments from other states and from other countries.



Cross Reference:

Discussion of actions on judgments, see Matthew Bender[(R)] Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, Planning Enforcement of Judgment.

Legal Topics:

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

Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionLower Court Jurisdiction



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Cathcart Durie McGee Prather

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Chapter 19 Introduction to Judgments
VII. FORMS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.31

19.31 Request for Judgment Ordering That Future Damages Be Paid in Periodic Payments.

Request for Judgment Ordering That Future Damages Be Paid in Periodic Payments.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	REQUEST THAT FUTURE
_____ [name],	)	DAMAGES BE PAID BY
Defendant.	)	PERIODIC PAYMENTS
	)	[Code Civ. Proc. § 667.7]
	)	

TO THE HONORABLE _____ [name of judge], JUDGE OF THE ABOVE ENTITLED COURT:

_____ [Name of plaintiff or defendant], as the _____ [plaintiff or defendant] in the above-entitled action, respectfully requests that the court enter a judgment ordering that money damages or its equivalent for future damages of _____ [name of plaintiff] be paid in whole or in part by periodic payments rather than by a lump-sum payment.

[If jury trial: _____ (Name of plaintiff or defendant) also requests that the court stay the clerk's entry of judgment until a periodic payment schedule has been formulated.]

Dated: _____

_____ [signature]

Attorney for _____ [Plaintiff or Defendant]

NOTES.

Authority:

CCP § 667.7



Timing:

See 19.11

Related Form of Decision:

See 19.32

Related Form for Memorandum:

See California Points and Authorities, § 175.60 (Matthew Bender)



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Chapter 19 Introduction to Judgments
VII. FORMS

2-19 MB Practice Guide: Trial & Post-Trial Civil Proc 19.32

19.32 Judgment Ordering That Future Damages Be Paid in Periodic Payments.

Judgment Ordering That Future Damages Be Paid in Periodic Payments.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	JUDGMENT THAT FUTURE
_____ [name],	)	DAMAGES BE PAID IN
Defendant.	)	PERIODIC PAYMENTS
	)	[Code Civ. Proc. § 667.7]
	)	

The request of _____ [name of plaintiff or defendant] for a judgment ordering that payment of future damages be made by periodic payments rather than by a lump-sum payment came before this court on _____ [date].

The court finds that the award of future damages in the above-entitled action _____ [equals or exceeds] the amount of \$ 50,000 provided by *Section 667.7 of the Code of Civil Procedure* as a prerequisite for a judgment of periodic payments.

IT IS ORDERED as follows:

1. That \$ _____ is the dollar amount of each periodic payment to be paid to _____ [name(s) of judgment creditor(s)], the judgment creditor(s) in the above-mentioned action, to compensate for future damages.

2. The interval between payments will be _____ [*specify interval, e.g., one month*].

[*EITHER*]

3. The total number of payments will equal _____.

[*OR*]

3. The period of time over which the payments will be made is _____ [*specify time, e.g., 20 years*].

Judge of the Superior Court [signature]

NOTES.

Authority:

CCP § 667.7

Related Form of Request for Judgment Ordering That Future Damages Be Paid in Periodic Payments:

See 19.31

Related Form for Memorandum:

See California Points and Authorities, § 175.60 (Matthew Bender)



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VII. FORMS

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19.33 Judicial Council Form JUD-100--Judgment.

Judicial Council Form JUD-100--Judgment.

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 664. California Judicial Council Form JUD-100, pictured above, has been approved for optional use [*see Cal Rules Ct, Rule 1.35*]

Elements of Judgment:

See *Ch. 26, Entry of Judgment*, 26.18[5]

Use of Form:

See *Ch. 26, Entry of Judgment*, 26.18[5][a]



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Chapter 20 Motion for Judgment Notwithstanding the Verdict

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.syn

§ 20.syn Synopsis to Chapter 20: Motion for Judgment Notwithstanding the Verdict

20.01 Scope.

20.02 Objective and Strategy.

20.03 CHECKLIST: Making Motion for Judgment Notwithstanding the Verdict.

20.04 Options and Strategies for Moving Party.

20.05 No Requirement That Prior Motion for Directed Verdict Be Made.

20.06 Plaintiff or Defendant May Make Motion.

20.07 Determine Whether Grounds for Motion Exist.

20.08 There Must Be Valid Jury Verdict.

20.09 Determine Whether Alternative Procedure Is Available.

20.09[1] Nonsuit Compared to Motion for JNOV.

20.09[2] Directed Verdict Compared to Motion for JNOV.

20.09[3] Other Alternative Procedures Compared to Motion for JNOV.

20.10 Determine Whether to Obtain Stay in Execution of Judgment.

20.11 Determine Whether to Request Partial Judgment Notwithstanding the Verdict.

20.12 Observe Time Limits for Serving and Filing Motion.

20.13 Make Motion Orally or in Writing.

- 20.14 Court May Grant Judgment Notwithstanding Verdict on Its Own Motion.
- 20.15 CHECKLIST: Opposing Motion for Judgment Notwithstanding the Verdict.
- 20.16 Options and Strategies for Opposing Party.
- 20.17 Determine Potential Bases for Opposing Motion for Judgment Notwithstanding the Verdict.
- 20.17[1] Substantial Evidence Supports Verdict.
- 20.17[2] Trial Court Must Accept, Not Weigh, Evidence.
- 20.17[3] Reasonable Inference Supports Verdict.
- 20.17[4] Substantial Conflict in Evidence.
- 20.17[5] Evidence Presents Question for Jury's Determination.
- 20.18 Observe Time Limits for Opposing Motion.
- 20.19 CHECKLIST: Hearing on Motion for Judgment Notwithstanding the Verdict.
- 20.20 Time Limits for Court to Rule on Motion for Judgment Notwithstanding the Verdict.
- 20.21 Court May Not Weigh Evidence.
- 20.22 Court Must Determine Whether There Is Lack of Substantial Evidence to Support Verdict.
- 20.23 Judgment Notwithstanding the Verdict Affects Issue of Damages.
- 20.24 Court May Grant Partial Judgment Notwithstanding the Verdict.
- 20.25 Prevailing Party Must Give Notice of Court's Order.
- 20.26 CHECKLIST: Appealing Motion for Judgment Notwithstanding the Verdict.
- 20.27 Order Granting Judgment Notwithstanding the Verdict Is Not Appealable.
- 20.28 Order Denying Judgment Notwithstanding the Verdict Is Appealable.
- 20.29 Standard on Review Is Same As Trial Court Standard.
- 20.30 Reversal on Appeal Reinstates Prior Judgment.
- 20.31 Appeal Affects Motion for New Trial.
- 20.31[1] Effect of Appeal When Motion for Judgment Notwithstanding the Verdict and Motion for New Trial Are Denied.
- 20.31[2] Effect of Appeal When Motion for Judgment Notwithstanding the Verdict Is Denied and Motion for New Trial Is Granted.
- 20.31[3] Effect of Appeal When Motion for Judgment Notwithstanding the Verdict and Motion for New Trial Are

Granted.

20.32 Notice of Motion and Motion for Judgment Notwithstanding the Verdict.

20.33 Opposition to Motion for Judgment Notwithstanding the Verdict.

20.34 Order Denying Motion for Judgment Notwithstanding the Verdict.

20.35 Order for and Judgment Notwithstanding the Verdict.



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
I. STRATEGY

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.01

20.01 Scope.

This chapter covers:

- Objectives and strategy for motions for judgment notwithstanding the verdict [*see 20.02*].
- Making a motion for judgment notwithstanding the verdict [*see 20.03 -20.14*; Form: *see 20.32*].
- Opposing a motion for judgment notwithstanding the verdict [*see 20.15 -20.18*; Form: *see 20.33*].
- Hearings on motions for judgment notwithstanding the verdict [*see 20.19 -20.25*].
- Seeking review of an order granting or denying a motion judgment notwithstanding the verdict [*see 20.26 -20.31*].

Core Statutes:

CCP §§ 629, 659

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureAppealsAppellate
JurisdictionState Court Review



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
I. STRATEGY

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.02

20.02 Objective and Strategy.

A motion for judgment notwithstanding the verdict is commonly referred to as a motion for JNOV (i.e., a motion for judgment non obstante veredicto). Under this procedure, the court, on its own motion or on the motion of a party against whom a verdict has been rendered, must render judgment in favor of an aggrieved party notwithstanding the verdict if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied [*see CCP § 629; Garcia v. Duro Dyne Corporation (2007) 156 CA4th 92, 97, 67 CR3d 100*] .

By definition, the JNOV procedure applies only to claims in which a jury reached a verdict, not to claims decided by the court [*Herr v. Nestle U.S.A., Inc. (2003) 109 CA4th 779, 788, 135 CR2d 477*] .

It can be difficult for counsel, immediately after a verdict has been delivered, to objectively consider whether there is any evidence to support the verdict (the substantial evidence test). If, objectively, there is insufficient evidence to support a verdict, particularly in a lengthy trial in which the appeal will involve many legal issues, a motion for JNOV may help to frame the evidentiary portion of the appeal and focus the appellate court on the merits of that aspect of the appeal if the trial court denies the motion. Also, the motion will take advantage of the trial court's familiarity with the evidence in reaching a ruling. The disadvantage a motion for JNOV on almost any record is that the trial court is unlikely except in the most egregious case to take a verdict away from a jury after one has been reached. Cases in which motions for JNOV are successful and most likely to be upheld on appeal, are cases in which the verdict is clearly an emotional one, especially with exorbitant or unsubstantiated damages or extremely large punitive damages.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

California Points and Authorities, Ch. 155, Motions After Trial (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 ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
II. MAKING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.03

20.03 CHECKLIST: Making Motion for Judgment Notwithstanding the Verdict.



Determine timing.



File and serve notice of motion, supporting memorandum, and other supporting documents within one of following deadlines:



15 days after the court clerk or moving party mails notice of entry of judgment under *CCP* § 664.5;



15 days after any party serves written notice of entry of judgment on the moving party; or



180 days after judgment is entered.

Authority:

CCP §§ 629, 659

Discussion:

See 20.12



Determine whether judgment has been entered.

Authority:

CCP §§ 629, 659



Determine whether grounds for judgment notwithstanding the verdict exist.

- ☐ No substantial evidence to support verdict; and
- ☐ A motion for directed verdict would have been granted if a previous motion had been made.

Authority:

CCP § 629

Discussion:

See 20.07

☐ Determine whether alternative procedure is available.

- ☐ Nonsuit.

Authority:

CCP § 581c

Discussion:

See 20.09[1]

- ☐ Directed verdict.

Authority:

CCP § 630

Discussion:

See 20.09[2]

- ☐ Motion for new trial.

Authority:

CCP § 657

Discussion:

See Ch. 21, Motion for New Trial

- ☐ Motion for judgment on special finding.

Authority:

CCP § 625

- ☐ Motion to vacate.

Authority:

CCP § 663

Discussion:

See Ch. 27, Motion to Vacate Judgment and Enter Different Judgment

- ☐ Motion to correct clerical error or set aside void judgment.

Authority:

CCP § 473(d)

Discussion:

See Ch. 29, Setting Aside Judgments and Orders

- ☐ Determine whether to request partial judgment notwithstanding the verdict.

Authority:

Beavers v. Allstate Ins. Co. (1990) 225 CA3d 310, 323, 274 CR 766

Discussion:

See 20.11

- ☐ Draft notice of motion to move for judgment notwithstanding the verdict.

Authority:

CCP § 629

Form:

See 20.32

- ☐ Draft supporting memorandum.

Authority:

Cal Rules Ct, Rule 3.113

- ☐ Draft proposed order.

Authority:

CCP § 629

Form:

See 20.35

- ☐ Apply to trial judge unless unavailable.

Authority:

CCP §§ 629, 659

- ☐ Determine whether to obtain stay in execution of judgment.

Authority:

CCP § 664

Discussion:

See 20.35

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
II. MAKING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.04

20.04 Options and Strategies for Moving Party.

A motion for judgment notwithstanding the verdict is used to seek a judgment in spite of unfavorable jury verdict if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support that verdict [CCP § 629]. The court may grant a judgment notwithstanding the verdict on all or part of the issues.

While preparing a motion for JNOV, keep a checklist at hand. In the event the jury returns a verdict adverse to the attorney's client, the checklist will be available for reference, particularly as to the critical timing issues. Frequently, juries are moved by passion and other inappropriate bases in reaching their verdicts, regardless of the instructions they receive. The trial attorney moving for JNOV should, if appropriate, emphasize this point and set forth, in an impartial fashion, the facts on which it is made clear to the court there was no evidence in support of the jury's verdict.

— Judge's Perspective:

Some judges are hesitant to grant a directed verdict when the matter can be sent to the jury and then reassessed on a motion for judgment notwithstanding the verdict. Should the trial court err in granting a motion for judgment notwithstanding the verdict, the appellate court will reinstate the jury verdict, while erring on a motion for directed verdict means retrying the case. Many judges recognize this situation, and the denial of a motion for directed verdict should not dissuade counsel from bringing a motion for judgment notwithstanding the verdict when the facts and law support the motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
II. MAKING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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20.05 No Requirement That Prior Motion for Directed Verdict Be Made.

There is no requirement that a motion for a directed verdict be made before the court may consider a motion for judgment notwithstanding the verdict [see *CCP* § 629]. In addition, a prior denial of a motion for a directed verdict does not prevent a court from granting a motion for judgment notwithstanding the verdict [*Teich v. General Mills, Inc.* (1959) 170 CA2d 791, 794, 339 P2d 627] .

Strategic Point:



Although there is no requirement that a prior motion be made to bring a motion to JNOV, the attorney should keep pushing the case, within the limits of what the facts and law support, at every step. It is not unheard of to have motions for summary judgment, nonsuit, and directed verdict all denied, and then have a motion for JNOV granted. It pays not to give up.



Cross Reference:

Discussion of motions for directed verdict, see Ch. 14, Motion for Directed Verdict.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
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2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.06

20.06 Plaintiff or Defendant May Make Motion.

A motion for judgment notwithstanding the verdict is ordinarily brought by a defendant. However, the motion may also be brought by an unsuccessful plaintiff [*CCP* § 629].



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
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20.07 Determine Whether Grounds for Motion Exist.

The grounds for a motion for judgment notwithstanding the verdict are as follows [CCP § 629]:

- There is no substantial evidence to support the verdict; and
- A motion for directed verdict should have been granted if that previous motion had been made.

The court must disregard all conflicting evidence and indulge in every legitimate inference that may be drawn in support of the judgment [*Jones & Matson v. Hall* (2007) 155 CA4th 1596, 1607, 66 CR3d 872 ; *Fassberg Construction Company v. Housing Authority of the City of Los Angeles* (2007) 152 CA4th 720, 746, 60 CR3d 375] .

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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II. MAKING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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20.08 There Must Be Valid Jury Verdict.

For a court to grant a motion for judgment notwithstanding the verdict, the jury must have first reached a valid verdict. A motion for judgment notwithstanding the verdict will not be granted if the jury rendered a verdict that is so contradictory and unintelligible that the jury's intent cannot be ascertained [*Mish v. Brockus* (1950) 97 CA2d 770, 776, 218 P2d 849] .

CCP § 629 refers only to a "verdict." It is unclear whether a motion for judgment notwithstanding the verdict is appropriate when the jury renders a special verdict and not a general verdict [see CCP § 629]. A special verdict is one in which the jury finds the conclusions of fact, leaving the conclusions of law to the court, which then enters judgment accordingly [see CCP § 624]. Therefore, a special verdict may be inherently consistent with the evidence presented, thus obviating the need to correct a verdict that is erroneous as a matter of law by making a motion for judgment notwithstanding the verdict. However, counsel may consider making the motion with respect to a special verdict when the grounds for a judgment notwithstanding the verdict exist, because it may be the only way to save the client the delay and expense of a new trial.



Strategic Points:

- Counsel should determine whether the jury's special verdict is consistent with the facts, as opposed to whether it is consistent with counsel's argument concerning what the facts show. If the special verdict is inconsistent with the facts admitted at trial, then a motion for JNOV is appropriate. Counsel is merely attacking the jury's findings as unsupported by substantial evidence. In such a case, and particularly after a lengthy trial, a JNOV motion will focus the court, and may help focus the appeal on the inconsistency of the facts better than simply appealing on the basis that there is insufficient factual support for the verdict. Be aware that such a motion will be more laborious, because each element of the special verdict will need to be attacked. A written motion will likely be the preferable course to set forth the lack of support for each interrogatory.
- Keep in mind that the judge may have an opinion of what the verdict in the case should properly be, and want the jury to make that decision for the judge. If the jury does not return what counsel believes is

the proper verdict in the judge's mind, a motion for JNOV can be appropriate.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury
TrialsVerdictsGeneral Overview



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20.09 Determine Whether Alternative Procedure Is Available.

20.09[1] Nonsuit Compared to Motion for JNOV. A motion for a nonsuit may be made only by a defendant or a cross-defendant and is made either at the end of the plaintiff's opening statement or at the end of the plaintiff's presentation of evidence [CCP § 581c]. A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the plaintiff's evidence does not permit the jury to find in the plaintiff's favor [*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.* (1993) 16 CA4th 202, 210, 20 CR2d 62] .

➡ **Cross Reference:**

Discussion of nonsuits, see *Ch. 12, Motion for Nonsuit and Other Motions During Trial, 12.03 et seq.*

20.09[2] Directed Verdict Compared to Motion for JNOV. A trial judge's power to grant a motion for judgment notwithstanding the verdict is identical to the judge's power to grant a directed verdict [see CCP §§ 629, 630; *Sweatman v. Department of Veterans Affairs* (2001) 25 C4th 62, 68, 104 CR2d 602, 18 P3d 29] . The judge may not weigh the evidence or judge the credibility of witnesses, as can be done on a motion for new trial, but must accept the evidence tending to support the verdict as true, unless on its face it is inherently incredible [*Begnalv. Canfield & Assocs., Inc.* (2000) 78 CA4th 66, 72, 92 CR2d 611] .

➡ **Cross Reference:**

Discussion of directed verdicts, see *Ch. 14, Motion for Directed Verdict.*

20.09[3] Other Alternative Procedures Compared to Motion for JNOV. The aggrieved party may also obtain a judgment in his or her favor through other procedures, including:

- Motion for new trial [CCP § 657].

➡ **Cross Reference:**

Discussion, see *Ch. 21, Motion for New Trial.*

- Motion for judgment on special finding [CCP § 625].

 Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 326A, Jury Verdicts (Matthew Bender).

- Motion to vacate [*CCP* § 663].

 Cross Reference:

Discussion, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

- Motion to correct clerical error or set aside void judgment [*CCP* § 473(d)].

 Cross Reference:

Discussion, see Ch. 29, Setting Aside Judgments and Orders.

Strategic Point:

Consider the elements of these other motions in light of the basis for post-trial motions, and then to make a determination of which motion is most likely to succeed. If counsel elects to make a motion for JNOV, it is important to stay entry of the judgment separately.

 Cross Reference:

Discussion of stay in execution of judgment, see 20.10.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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20.10 Determine Whether to Obtain Stay in Execution of Judgment.

A motion for judgment notwithstanding the verdict does not automatically stay entry of judgment until the motion is heard and decided [*see CCP § 664*]. Judgment must be entered within 24 hours after a verdict is rendered, whether or not a motion for judgment notwithstanding the verdict is pending, unless the court orders the case to be reserved for argument or further consideration, or grants a stay of proceedings [*CCP § 664*].

A court may stay the enforcement of any judgment or order whether or not an appeal will be taken from it and whether or not a notice of appeal has been filed [*CCP § 918(a), (c)*]. If the enforcement of a judgment or order would be stayed on appeal only by giving an undertaking, a trial court does not have the power without the consent of the adverse party to stay the enforcement of the judgment or order for a period that exceeds more than 10 days beyond the last date on which a notice of appeal could be filed [*CCP § 918(b)*].



Cross Reference:

Discussion of stay of enforcement, see California Forms of Pleading and Practice, Ch. 43A, Appeal: Stay of Proceedings (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview



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20.11 Determine Whether to Request Partial Judgment Notwithstanding the Verdict.

A court may grant judgment notwithstanding the verdict as to some but not all of the issues [*Beavers v. Allstate Ins. Co. (1990) 225 CA3d 310, 323, 274 CR 766*] . A partial judgment notwithstanding the verdict has the effect of modifying the judgment on the verdict [*Beavers v. Allstate Ins. Co. (1990) 225 CA3d 310, 330, 274 CR 766*] .



Warning:

Keep in mind that the part of the judgment that is not subject to a motion for JNOV, or that is not the subject of an order granting such a motion, is not only *not* stayed, but the time for appeal begins to run.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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20.12 Observe Time Limits for Serving and Filing Motion.

The motion for JNOV, points and authorities, and other supporting documents must be served and filed within the period prescribed for serving and filing a notice of intention to move for a new trial [CCP §§ 629, 659]. That period is as follows [CCP § 659]:

- Before entry of judgment, but after the jury has rendered a decision [CCP §§ 659, 664]; or
- The earliest of the following:
 - ☐ 15 days after the court clerk or moving party mails notice of entry of judgment under CCP § 664.5;
 - ☐ 15 days after any party serves written notice of entry of judgment on the moving party; or
 - ☐ 180 days after judgment is entered.



Warning:

The 10-day extension for filing and serving supporting papers in a motion for new trial [CCP § 659] does not apply to motions for judgment notwithstanding the verdict.



Cross Reference:

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

If a party fails to make a motion for judgment notwithstanding the verdict within the applicable deadline, the court has no jurisdiction to hear the motion [*Younesi v. Lane* (1991) 228 CA3d 967, 972-973, 279 CR 89 , *disapproved on other grounds in Van Beurden Ins. Serv., Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 C4th 51, 63].

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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20.13 Make Motion Orally or in Writing.

A motion for judgment notwithstanding the verdict may be made either orally in court immediately after the rendition of the verdict, or at a later hearing pursuant to a written notice of motion [*see Abreu v. Svenhard's Swedish Bakery* (1989) 208 CA3d 1446, 1452 n.2, 257 CR 26] .



Strategic Point:

Although it is advisable to file a writing with any motion, the exigencies of timing on motions for JNOV dictate that it be made when the verdict is rendered, immediately, and orally. Counsel should have the points necessary, with authorities, so that the motion can be read into the record, together with any necessary request that the "court order the case to be reserved for argument or further consideration or grant a stay of proceedings" pursuant to *CCP* § 664. The points and authorities can be preliminarily read into the record and counsel can offer to provide a written memorandum to the court, asking for a briefing schedule. Courts are reluctant to "take cases away" from juries. Making the motion orally makes it easier for the court to deny such a motion.



Cross Reference:

Discussion of similar oral motion for directed verdict and sample text of motion, see *California Trial Guide*, § 80.20 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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20.14 Court May Grant Judgment Notwithstanding Verdict on Its Own Motion.

Although rare in practice, the court may grant judgment notwithstanding the verdict on its own motion after return of the verdict, if the court decides that the verdict is not supported by substantial evidence [CCP § 629]. The court must act before the expiration of its power to rule on a motion for new trial, and after five days' notice to the parties [CCP §§ 629, 659].

Exception:

One court held that the requirement that a motion for judgment notwithstanding the verdict be made within the time limits for filing and serving a notice of a motion for new trial [CCP § 629; *see* 20.12] does not apply when the court acts on its own motion [*see Sturgeon v. Leavitt* (1979) 94 CA3d 957, 963-964, 156 CR 687]. Therefore, there would be no time restrictions on the court as long as it gives five days' notice to the parties and acts on the motion after the time for serving and filing a motion for new trial has expired and before the time for ruling on a motion for new trial expires [*see Sturgeon v. Leavitt* (1979) 94 CA3d 957, 963-964, 156 CR 687].

— Judge's Perspective:

Most judges are very cautious in setting aside a jury verdict. It is very rare for a judge to grant this motion sua sponte. If the court is inclined to act sua sponte, the more prudent approach would be to request briefs on the motion.

Legal Topics:

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

Civil Procedure Trials Judgment as Matter of Law Judgments Notwithstanding Verdicts Governments Courts Authority to Adjudicate



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20.15 CHECKLIST: Opposing Motion for Judgment Notwithstanding the Verdict.



Calendar response and hearing dates.

☐ File and serve supporting memorandum within 10 days after moving party serves and files its moving papers; or

☐ If the court sets a hearing date, the opposing papers may be due nine court days before the hearing date.

Authority:

CCP § 659a; see CCP § 1005(b)

Discussion:

See 20.18

☐ Review motion for adequacy.

☐ Examine motion to determine whether grounds exist to oppose motion (that substantial evidence supports the verdict), by establishing one of the following:

☐ The trial court improperly weighed the evidence.

☐ A reasonable inference supports the verdict.

☐ There is a substantial conflict in the evidence.

- ☐ The evidence presents a question for jury's determination.

Authority:

CCP § 629

Discussion:

See 20.17

- ☐ Draft opposing memorandum.

Authority:

CCP § 629

Form:

See 20.33

- ☐ Serve and file opposition.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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20.16 Options and Strategies for Opposing Party.

The goal in opposing a motion for JNOV is to persuade the court that one of the following applies:

- The court must accept, not weigh, the evidence as determined by the jury.
- Some reasonable inference from the evidence support's the jury's finding.
- There is a substantial conflict on a material issue in the evidence.
- The evidence presents an issue for the jury's determination.

In sum, counsel should emphasize deference to the jury verdict, and that any evidence is sufficient to support it.



Strategic Point:

The party opposing the motion for JNOV should take advantage of the significant burden on the party making the motion. Argue that the jury carefully considered all the evidence that amply supports their finding, and the court should not insert its own determination in place of the jurors who, after deliberating at length, reached their verdict, which should not be disturbed.



Cross Reference:

Discussion of these bases, see 20.17.

Legal Topics:

For related research and practice materials, see the following legal topics:
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20.17 Determine Potential Bases for Opposing Motion for Judgment Notwithstanding the Verdict.

20.17[1] Substantial Evidence Supports Verdict. An opposition to a motion for judgment notwithstanding the verdict may be based on the fact that substantial evidence supports the jury's verdict [CCP § 629]. That substantial evidence supports the jury's verdict can be established by the criteria outlined in 20.17[2]-[5].

20.17[2] Trial Court Must Accept, Not Weigh, Evidence. In ruling on a motion for judgment notwithstanding the verdict, the trial court may not weigh the evidence or judge the credibility of witnesses, but must accept the evidence tending to support the verdict as true, unless such evidence is inherently incredible on its face [*Begnal v. Canfield & Assocs., Inc.* (2000) 78 CA4th 66, 72, 92 CR2d 611] .

20.17[3] Reasonable Inference Supports Verdict. A motion for judgment notwithstanding the verdict must be denied if any reasonable inferences drawn from the evidence supports the verdict [*McFarland v. Voorheis-Trindle Co.* (1959) 52 C2d 698, 706, 343 P2d 923] . Accordingly, the opposing party should show that the evidence supports the verdict.

20.17[4] Substantial Conflict in Evidence. A motion for judgment notwithstanding the verdict must be denied if there is a substantial conflict on a material issue in the evidence [*Robinson v. North Am. Life & Cas. Co.* (1963) 215 CA2d 111, 118, 30 CR 57] . If applicable, the opposing party should demonstrate that the evidence is in substantial conflict.

20.17[5] Evidence Presents Question for Jury's Determination. A judgment notwithstanding the verdict should be denied when the evidence presents a question for the jury's determination [*Meyser v. American Bldg. Maint., Inc.* (1978) 85 CA3d 933, 939-940, 149 CR 808] . If appropriate, the party opposing the motion should show that the evidence presents a question that the jury must determine.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury
TrialsProvince of Court & JuryEvidenceInferences & PresumptionsInferences



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20.18 Observe Time Limits for Opposing Motion.

CCP § 629 does not provide any time limits for serving and filing papers opposing a motion for judgment notwithstanding the verdict. However, the court is required to rule on a motion for judgment notwithstanding the verdict at the same time as a motion for new trial [*CCP* § 629]. Thus, arguably, the opposing papers should be filed within the same time limits as an opposition to a motion for new trial, within 10 days after service of the moving papers [*see CCP* § 659a]. If the court sets a hearing date, the opposing papers may be due nine court days before the hearing date [*see CCP* § 1005(b)].



Strategic Point:

Always ask the court to set a briefing schedule on all post-trial motions, and put it on the record.

Legal Topics:

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

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20.19 CHECKLIST: Hearing on Motion for Judgment Notwithstanding the Verdict.



Calendar hearing date.



Motion for judgment notwithstanding the verdict may be made orally in court immediately after the rendition of the verdict, or at a later hearing pursuant to a written notice of motion.

Authority:

Abreu v. Svenhard's Swedish Bakery (1989) 208 CA3d 1446, 1452 n2, 257 CR 26

Discussion:

See 20.13



Court may not rule on motion for judgment notwithstanding the verdict until the time within which notice of intention to move for new trial must be served and filed expires.

Authority:

CCP § 629

Discussion:

See 20.20; see also Ch. 21, Motion for New Trial



If moving party has not also filed a motion for a new trial, the latest date for ruling on motion for judgment notwithstanding the verdict is earlier of the following [*CCP §§ 629, 660*]:



60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to *CCP § 664.5*; or

☐ 60 days from and after service on the moving party by any party of written notice of the entry of the judgment.

☐ If moving party also filed notice of intention to move for new trial, court must rule on both motions together.

Authority:

CCP § 629

Discussion:

See 20.20

☐ Court may stay enforcement of judgment pending motion.

Authority:

CCP § 918

Discussion:

See 20.10

☐ Prevailing party must give notice of ruling to other parties.

Authority:

CCP § 1019.5(a)

Discussion:

See 20.25

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief
From JudgmentMotions for New Trials



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20.20 Time Limits for Court to Rule on Motion for Judgment Notwithstanding the Verdict.

The court may not rule on a motion for judgment notwithstanding the verdict until the time within which a notice of intention to move for a new trial must be served and filed expires [CCP § 629].

► Cross Reference:

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

If the moving party has not also filed a motion for a new trial, the latest date for ruling on a motion for JNOV is either of the following, whichever is earlier [CCP §§ 629, 660]:

- Sixty days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to CCP § 664.5.
- Sixty days from and after service on the moving party by any party of written notice of the entry of the judgment.

If the moving party has also filed a notice of intention to move for a new trial, the court must rule on both motions at the same time [CCP § 629].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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20.21 Court May Not Weigh Evidence.

The judge may not weigh the evidence or judge the credibility of witnesses, as is permitted on a motion for new trial, but must accept the evidence tending to support the verdict as true, unless on its face the evidence is inherently incredible [*Begnal v. Canfield & Assocs., Inc. (2000) 78 CA4th 66, 72, 92 CR2d 611*] . The court must disregard all conflicting evidence and indulge in every legitimate inference that may be drawn in support of the judgment, and may grant the motion only if there is no substantial evidence to support the verdict [*Tognazzini v. San Luis Coastal Unified Sch. Dist. (2001) 86 CA4th 1053, 1057-1058, 103 CR2d 790*] .

Legal Topics:

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

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20.22 Court Must Determine Whether There Is Lack of Substantial Evidence to Support Verdict.

The primary requirement for judgment notwithstanding the verdict is that there be no substantial conflict in the evidence [*Begnal v. Canfield & Assocs., Inc. (2000) 78 CA4th 66, 72, 92 CR2d 611*] . A court will grant a motion for judgment notwithstanding the verdict only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion will be denied [*Hauter v. Zogarts (1975) 14 C3d 104, 110, 120 CR 681, 534 P2d 377*] .

Example:

In an wrongful termination case involving age discrimination, the terminated employee's replacement with an older employee, and other relevant substantial evidence taken together, did not preclude the jury from finding that the employer engaged in age discrimination [*Begnal v. Canfield & Assocs., Inc. (2000) 78 CA4th 66, 72-78, 92 CR2d 611*] .

Legal Topics:

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

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20.23 Judgment Notwithstanding the Verdict Affects Issue of Damages.

If a court sets aside a judgment for a defendant, notwithstanding the verdict, and proceeds to assess damages for the plaintiff, it deprives the defendant of the constitutional right to jury trial on the question of damages [*Spillman v. San Francisco* (1967) 252 CA2d 782, 787, 60 CR 809] .

There is a split of authority over the propriety of the court's granting of a plaintiff's motion for judgment notwithstanding the verdict with a concurrent order for a new trial on the sole issue of damages. One line of authority holds that it is error for the court to declare liability, notwithstanding the verdict, and to grant a new trial as to damages because this would violate the established rule of no multiple final judgments in a single action [see *Moore v. San Francisco* (1970) 5 CA3d 728, 734, 85 CR 281] .

Another line of cases holds that granting a new trial on all issues would involve a costly repetition of testimony, and, therefore, granting a motion for judgment notwithstanding the verdict and a new trial on the issue of damages is within the court's discretion [see *Gordon v. Strawther Enters., Inc.* (1969) 273 CA2d 504, 517-518, 78 CR 417] .



Strategic Point:

Counsel for the party prevailing on the jury's verdict should of course attempt to bring the case within the bounds of *Moore*. However, declaring liability JNOV does not violate the one final judgment rule, because the "final judgment" would be entered, but the trial on damages would also result in the issuance of a "judgment", which could then be merged into one final judgment. This conforms to the concept articulated in CCP § 598 permitting, before the final pretrial conference (or if no such conference, the court may order), issues to precede other issues. The court may, under CCP § 598, make orders at any time on its own motion. If the partial JNOV will result in a subsequent trial of other issues, such as damages, a court might use CCP § 598 to sever those issues for later trial. Issues thus tried separately may be tried before the same or a different jury, so that it would seem there is no impediment to a JNOV on some issues (such as liability) and a jury retrial on damages.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury
TrialsRight to Jury TrialCivil ProcedureRemediesDamagesGeneral OverviewConstitutional LawBill of
RightsFundamental RightsTrial by Jury in Civil Actions



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20.24 Court May Grant Partial Judgment Notwithstanding the Verdict.

A court may grant judgment notwithstanding the verdict as to some but not all issues [*Beavers v. Allstate Ins. Co.* (1990) 225 CA3d 310, 323, 274 CR 766] .



Strategic Point:

It may be useful to move on the full JNOV, and use a partial JNOV as a fallback if necessary. It can help to set the matter for argument or in any argument for a stay of execution.



Warning:

The part of the judgment that is not subject to a motion for JNOV, or that is not the subject of an order granting such a motion, is not only *not* stayed, but the time for appeal begins to run.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts



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20.25 Prevailing Party Must Give Notice of Court's Order.

When a court grants or denies a motion for judgment notwithstanding the verdict, unless the court orders otherwise, notice of the court's decision or order must be given by the prevailing party 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 is entered in the minutes [*CCP* § 1019.5(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 20 Motion for Judgment Notwithstanding the Verdict
V. APPEALING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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20.26 CHECKLIST: Appealing Motion for Judgment Notwithstanding the Verdict.

☐ Determine whether trial court granted, in whole or part, or denied motion for judgment notwithstanding the verdict.

☐ If court granted motion, opposing party may appeal final judgment.

Authority:

Sweatman v. Department of Veterans Affairs (2001) 25 C4th 62, 68, 104 CR2d 602, 18 P3d 29

Discussion:

See 20.27

☐ If court granted motion for partial judgment notwithstanding the verdict, parties may appeal final judgment as modified.

Authority:

Beavers v. Allstate Ins. Co. (1990) 225 CA3d 310, 330, 274 CR 766

Discussion:

See 20.28

☐ If court denied motion, moving party may appeal.

Authority:

CCP § 904.1(a)

Discussion:

See 20.28

- ☐ Determine effect of appeal on motion for new trial.

Authority:

CCP § 629

Discussion:

See 20.31

- ☐ Determine whether to file cross-appeal.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief
From JudgmentMotions for New TrialsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil
ProcedureAppealsAppellate JurisdictionState Court Review



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20.27 Order Granting Judgment Notwithstanding the Verdict Is Not Appealable.

An order granting a judgment notwithstanding the verdict is neither a final judgment nor an appealable order [*Jordan v. Talbot* (1961) 55 C2d 597, 602, 12 CR 488, 361 P2d 20] . Instead, an appeal lies from the judgment entered pursuant to the court's order [*Sweatman v. Department of Veterans Affairs* (2001) 25 C4th 62, 68, 104 CR2d 602, 18 P3d 29] . However, a court may reconsider an order granting a motion for judgment notwithstanding the verdict any time before judgment is entered on the order [*Jach v. Edson* (1968) 255 CA2d 96, 99, 62 CR 925] .

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionState Court Review



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
V. APPEALING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.28

20.28 Order Denying Judgment Notwithstanding the Verdict Is Appealable.

An appeal will lie from an order denying a motion for judgment notwithstanding the verdict [CCP § 904.1(a)(4)]. The moving party may appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict, or both [CCP § 904(a)(1); *McCoy v. Gustafson* (2010) 180 CA4th 56, 84, 103 CR3d 37] .

An order granting partial judgment notwithstanding the verdict has the effect of modifying the judgment on the verdict. If the trial court otherwise upholds the verdict, the judgment, as modified by the partial judgment notwithstanding the verdict, is immediately appealable [*Beavers v. Allstate Ins. Co.* (1990) 225 CA3d 310, 330, 274 CR 766] .

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionState Court Review



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20.29 Standard on Review Is Same As Trial Court Standard.

The appellate court's function is to review the discretion exercised by the trial court in light of the evidence, but not to replace that discretion unless it was arbitrarily exercised [*Gordon v. Strawther Enters., Inc.* (1969) 273 CA2d 504, 511, 78 CR 417] .

When reviewing the validity of a judgment notwithstanding the verdict, the appellate court must resolve any conflict in the evidence and draw all reasonable inferences from the evidence in favor of the jury's verdict [*Henriouille v. Marin Ventures, Inc.* (1978) 20 C3d 512, 515, 143 CR 247, 573 P2d 465] . The appellate court will affirm a judgment entered on an order granting judgment notwithstanding the verdict only if, reviewing all the evidence in the light most favorable to the party in whose favor the jury rendered the verdict, resolving all conflicts, and drawing all inferences in favor of that party, and deferring to the implicit credibility determinations of the trier of fact, there is no substantial evidence to support the jury's verdict [*Ajaxo, Inc. v. E*Trade Group, Inc.* (2005) 135 CA4th 21, 49-50, 37 CR3d 221] .

The scope of appellate review of a trial court's denial of a motion for judgment notwithstanding the verdict is whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's conclusion, and if found, to uphold the trial court's denial of the motion [*McCoy v. Gustafson* (2010) 180 CA4th 56, 84, 103 CR3d 37] . If the issues deal solely with statutory interpretation and application of a statute to undisputed facts, review takes place de novo [*Cabral v. Ralphs Grocery Co.* (2009) 179 CA4th 1, 10-11, 101 CR3d 474] .



Cross Reference:

Discussion of standards of review, see California Forms of Pleading and Practice, Ch. 41, Appeal: Review Standards and Appellate Rules of Law (Matthew Bender).

Legal Topics:

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

Civil Procedure Trials Judgment as Matter of Law Judgments Notwithstanding Verdicts Civil Procedure Appeals Standards of Review Abuse of Discretion



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V. APPEALING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.30

20.30 Reversal on Appeal Reinstates Prior Judgment.

The effect of a reversal on a judgment notwithstanding the verdict is to restore the proceeding to the state of the record before the erroneous judgment was entered. In other words, the appellant will have a recorded verdict in his or her favor, but will have no judgment entered. The appellant is then entitled to have judgment entered in his or her favor in conformity with the verdict [*CCP § 664; Ferran v. Mulcrevy (1935) 9 CA2d 129, 131, 48 P2d 984*].



Cross Reference:

Discussion of entry of judgment, see Ch. 26, Entry of Judgment.

When a judgment notwithstanding the verdict is reversed on appeal, the reinstated judgment on the verdict is a new judgment for purposes of appeal, and the time for filing a notice of appeal from the reinstated judgment begins to run on the issuance of remittitur from the appellate court [*Lippert v. AVCO Cmty. Developers, Inc. (1976) 60 CA3d 775, 779, 131 CR 730*].

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureAppealsRemands



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
V. APPEALING MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.31

20.31 Appeal Affects Motion for New Trial.

20.31[1] Effect of Appeal When Motion for Judgment Notwithstanding the Verdict and Motion for New Trial Are Denied. The trial judge may decide that the evidence substantially supports the verdict, and, on examining the weight of the evidence, that the judgment rendered should stand. If the motions for judgment notwithstanding the verdict and for new trial are both denied and it appears on appeal that the motion for judgment notwithstanding the verdict should have been granted, the appellate court may order judgment to be so entered [*CCP* § 629; see *Saxena v. Goffney* (2008) 159 CA4th 316, 323-324, 71 CR3d 469].

20.31[2] Effect of Appeal When Motion for Judgment Notwithstanding the Verdict Is Denied and Motion for New Trial Is Granted. If a new trial is granted, but a motion for judgment notwithstanding the verdict is denied, the aggrieved party may seek review of the order denying the motion for judgment notwithstanding the verdict [*CCP* § 629].

20.31[3] Effect of Appeal When Motion for Judgment Notwithstanding the Verdict and Motion for New Trial Are Granted. If the court grants both the motion for judgment notwithstanding the verdict and the motion for new trial, the order granting a new trial becomes effective only if the judgment notwithstanding the verdict is reversed on appeal and the order granting a new trial is either not appealed or is confirmed on appeal [*CCP* § 629]. Thus, the motion for judgment notwithstanding the verdict will determine the outcome of the case in favor of the movant and a new trial will not proceed. However, if the opposing party appeals and the judgment notwithstanding the verdict is reversed, the motion for new trial becomes effective [see *Dietrich v. Litton Indus., Inc.* (1970) 12 CA3d 704, 719, 90 CR 856] .

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsRemands



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
VI. FORMS

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.32

20.32 Notice of Motion and Motion for Judgment Notwithstanding the Verdict.

Judgment Ordering That Future Damages Be Paid in Periodic Payments.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION FOR JUDGMENT
Defendant.	)	NOTWITHSTANDING THE
	)	VERDICT
	)	

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], _____ [city], _____ [party, e.g., Defendant Mary Jones] will, and hereby does, move for an order for judgment in his/her favor, notwithstanding the verdict. The motion will be made on the following grounds:

1. After viewing the evidence in the light most favorable to _____ [specify party securing verdict, e.g., Plaintiff John Smith], there is no substantial evidence to support the jury's verdict in that party's favor and a directed verdict for _____ [moving party, e.g., Defendant Mary Jones] should have been granted had a previous motion been made.

The motion will be based on this notice of motion 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.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

NOTES.

Authority:

CCP § 629



Timing:

See 20.12

Grounds:

See 20.07

Related Form of Order:

See 20.35

Related Forms of Memoranda:

See California Points and Authorities, §§ 155.10 -155.55 (Matthew Bender)



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
VI. FORMS

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.33

20.33 Opposition to Motion for Judgment Notwithstanding the Verdict.

Judgment Ordering That Future Damages Be Paid in Periodic Payments.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	OPPOSITION TO MOTION
_____ [name],	)	FOR JUDGMENT
Defendant.	)	NOTWITHSTANDING
	)	THE VERDICT
	)	

THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT SHOULD BE DENIED BECAUSE SUBSTANTIAL EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE PREVAILING PARTY, SUPPORTS THE VERDICT.

A. Substantial Evidence Supports Verdict. The motion for judgment notwithstanding the verdict should be denied because it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is substantial evidence to support the verdict [*Sweatman v. Department of Veterans Affairs* (2001) 25 C4th 62, 68, 104 CR2d 602, 18 P3d 29 ; *Clemmer v. Hartford Ins. Co.* (1978) 22 C3d 865, 878, 151 CR 285, 587 P2d 1098] .

B. Power of Trial Court. In ruling on a motion for judgment notwithstanding the verdict, the court cannot weigh the evidence or judge the credibility of witnesses, but must accept the evidence tending to support the verdict as true, unless that evidence is inherently incredible on its face [*Begnal v. Canfield & Assocs., Inc.* (2000) 78 CA4th 66, 72, 92 CR2d 611 ; *Hale v. Farmers Ins. Exch.* (1974) 42 CA3d 681, 690, 117 CR 146] .

[EITHER]

C. Reasonable Inference Supports Verdict. The motion for judgment notwithstanding the verdict should be denied because a reasonable inference drawn from the evidence supports the verdict [*McFarland v. Voorheis-Trindle Co.* (1959) 52 C2d 698, 706, 343 P2d 923] .

[AND/OR]

D. Substantial Conflict in Evidence. The motion for judgment notwithstanding the verdict should be denied because there is a substantial conflict on a material issue in the evidence [*Robinson v. North Am. Life & Cas. Co.* (1963) 215 CA2d 111, 118, 30 CR 57] .

[AND/OR]

E. Evidence Presents Question for Jury's Determination. The motion for judgment notwithstanding the verdict should be denied because the evidence presents a question for the jury's determination [*Meyser v. American Bldg. Maint., Inc.* (1978) 85 CA3d 933, 939-940, 149 CR 808] .

[Add further points and authorities setting out substantive law pertaining to cause of action or defense to show why motion should be denied.]

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [moving party]

NOTES.

Authority:

CCP § 629



Timing:

See 20.18

Grounds:

See 20.17

Related Form of Order:

See 20.34

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 155.10 -155.30 (Matthew Bender)



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
VI. FORMS

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.34

20.34 Order Denying Motion for Judgment Notwithstanding the Verdict.

Judgment Ordering That Future Damages Be Paid in Periodic Payments.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER DENYING MOTION
_____ [name],	)	FOR JUDGMENT
Defendant.	)	NOTWITHSTANDING
	)	THE VERDICT
	)	

The motion of _____ [*specify moving party, e.g., Defendant Mary Jones*] for an order for judgment notwithstanding the verdict came on regularly for hearing by the Court on this 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 denied,

IT IS ORDERED that the motion, be and it hereby is, denied on the following grounds: [*specify grounds such as the following*]:

1. The evidence is conflicting.
2. Several reasonable inferences are deducible from the evidence.
3. The verdict is sustained by sufficient or substantial evidence.

4. The evidence presents a question for the jury's determination].

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

CCP § 629



Timing:

See 20.20

Related Form of Motion:

See 20.33



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Chapter 20 Motion for Judgment Notwithstanding the Verdict
VI. FORMS

2-20 MB Practice Guide: Trial & Post-Trial Civil Proc 20.35

20.35 Order for and Judgment Notwithstanding the Verdict.

Judgment Ordering That Future Damages Be Paid in Periodic Payments.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER FOR AND JUDGMENT
_____ [name],	)	NOTWITHSTANDING THE VERDICT
Defendant.	)	
	)	
	)	

This cause came on regularly for trial on _____ [date], in [_____ (Department or Division) _____ of] the above-entitled court, the Honorable _____ [name], Judge, presiding. Plaintiff appeared by his/her attorney _____ [name] and defendant appeared by his/her attorney _____ [name].

A jury of _____ [number] persons was regularly impaneled and sworn to try the action. Witnesses on the part of both plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider their verdict, subsequently returned to court, and being called, answered to their names and duly rendered their verdict in words and figures as follows: _____ [set forth verdict and date judgment was entered].

Thereafter, _____ [specify moving party, e.g., Defendant Mary Jones] moved the court for judgment in his/her favor, notwithstanding the verdict, and this motion came on regularly to be heard before this court on _____ [date], _____ [name] appearing as counsel for _____ [

specify party, e.g., Plaintiff John Smith] and _____ [*name*] as counsel for _____
[*specify party, e.g., Defendant Mary Jones*].

The motion was argued and submitted for decision, and the court being fully advised in the matter, and good cause appearing therefor:

IT IS HEREBY ORDERED AND ADJUDGED:

1. That the motion of _____ [*specify moving party, e.g., Defendant Mary Jones*] for judgment in his/her favor, notwithstanding the verdict of the jury, is hereby granted.

2. That the judgment entered on _____ [*date*], on the verdict is vacated and set aside.

3. That _____ [*specify moving party, e.g., Defendant Mary Jones*] have judgment
_____ [*set forth terms of judgment in favor of moving party*].

4. That _____ [*specify moving party, e.g., Defendant Mary Jones*] have and recover from
_____ [*specify opposing party, e.g., Plaintiff John Smith*] costs and disbursements in the sum of
\$ ____.

Dated: _____

_____ [*signature*]

Judge of the Superior Court

NOTES.

Authority:

CCP § 629



Timing:

See 20.20

Related Form of Motion:

See 20.32



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Chapter 21 Motion for New Trial

2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.syn

§ 21.syn Synopsis to Chapter 21: Motion for New Trial

21.01 Scope.

21.02 Objective and Strategy.

21.03 CHECKLIST: Making Motion for New Trial.

21.04 Options and Strategies for Moving Party.

21.05 Only Aggrieved Party May Apply for New Trial.

21.06 Motion for New Trial Available After Trial on Merits or After Judgment Granted Without Trial on Merits.

21.06[1] Make Motion After Trial on Merits.

21.06[2] Make Motion After Judgment Granted Without Trial on Merits.

21.06[3] Do Not Make Motion After Certain Types of Judgments.

21.07 Observe Time Limits for Filing and Serving Motion Documents.

21.07[1] Notice of Intention to Move for New Trial Subject to Strict Time Limits.

21.07[1][a] Notice of Intention to Move for New Trial May Be Filed and Served Before Entry of Judgment.

21.07[1][b] Notice of Intention to Move for New Trial May Be Filed and Served Within Earliest of 15 Days of Date of Mailing Notice of Entry of Judgment by Clerk of Court, Service by Any Party of Written Notice of Entry of Judgment, or 180 Days After Entry of Judgment.

21.07[1][c] Notice of Intention to Move for New Trial May Be Filed and Served Within 15 Days After Service of Notice by Other Party of Filing Motion for New Trial.

21.07[2] Supporting Memorandum Must Be Filed and Served Within 10 Days After Filing Notice of Intention to Move for New Trial.

21.07[3] Affidavits or Declarations Must Be Filed and Served Within 10 Days After Filing Notice of Intention to Move for New Trial.

21.08 Motion for New Trial Must Be Made to Trial Judge.

21.09 Motion for New Trial Must Include Statutory Grounds.

21.09[1] Irregularity in the Proceedings Is Ground for New Trial.

21.09[2] Juror Misconduct Is Ground for New Trial.

21.09[2][a] Jury Misconduct in General.

21.09[2][b] Concealment of Bias on Voir Dire Is Juror Misconduct.

21.09[2][c] Prejudicial Communication by or to Juror Is Juror Misconduct.

21.09[2][d] Experimentation Producing New Evidence Is Juror Misconduct.

21.09[2][e] Chance Verdict Is Juror Misconduct.

21.09[2][f] Juror Misconduct Leads to Presumption of Prejudice.

21.09[3] Accident or Surprise Is Ground for New Trial.

21.09[4] Newly Discovered Evidence Is Ground for New Trial.

21.09[5] Excessive or Inadequate Damages Is Ground for New Trial.

21.09[6] Insufficiency of Evidence Is Ground for New Trial.

21.09[7] Error in Law Is Ground for New Trial.

21.09[8] Error in Law Occurring at Trial Is Ground for New Trial.

21.09[9] Lack of Phonographic Report of Trial Is Ground for New Trial.

21.09[10] Loss or Destruction of Bill of Exceptions or Statement of Case Is Ground for New Trial.

21.10 Affidavits or Declarations May Be Required to Support Motion for New Trial.

21.10[1] Affidavit or Declaration in Support of Motion for New Trial May be Required.

21.10[2] Affidavit or Declaration by Juror May Be Required.

21.10[3] Affidavit or Declaration Showing No Knowledge of Juror Misconduct May Be Required.

21.11 Motion May Be Based on Reporter's Notes, Pleadings, and Court Files.

- 21.12 Motion for New Trial May Be Filed With Motion for Judgment Notwithstanding the Verdict.
- 21.13 CHECKLIST: Opposing Motion for New Trial.
- 21.14 Options and Strategies for Opposing Party.
- 21.15 Determine Potential Bases for Opposing Motion for New Trial.
- 21.15[1] Opposition to Motion for New Trial May Be Based on Untimeliness of Motion.
- 21.15[2] Opposition to Motion for New Trial May Be Based on Nonexistence of Grounds for Motion.
- 21.15[3] Opposition to Motion for New Trial May Be Based on Non-Existence or Inadequacy of Affidavits or Declarations.
- 21.15[4] Opposition to Motion for New Trial May Be Based on Lack of Prejudice to Moving Party.
- 21.16 Opposing Memorandum and Counter-Affidavits Must Be Filed and Served Within 10 Days After Moving Party Files and Serves Memorandum.
- 21.17 CHECKLIST: Hearing on Motion for New Trial.
- 21.18 Court Designates Hearing Date After Time For Filing Counter-Affidavits Expires.
- 21.19 Court May Stay Enforcement of Judgment or Order Pending Motion for New Trial.
- 21.20 Court Must Rule on Motion Within Earliest of 60 Days After Clerk Mails Notice of Entry of Judgment or 60 Days After Any Party Serves Written Notice of Entry of Judgment on Moving Party.
- 21.21 Court May Grant Conditional Relief.
- 21.22 Court May Grant Alternative Relief.
- 21.22[1] Court May Amend Statement of Decision.
- 21.22[2] To Grant Alternative Relief, Court Must Observe Jurisdictional Requirements.
- 21.22[3] If Court Grants Alternative Relief, Modified Judgment Supersedes Prior Judgment.
- 21.23 Court May Grant Motion For New Trial.
- 21.23[1] If Court Grants Motion, Court Must Prepare Statement of Grounds.
- 21.23[2] If Court Grants Motion, Court Must Specify Reasons.
- 21.23[3] If Court Grants Motion, Court Must Observe Time Limitations.
- 21.23[4] If Court Grants Motion, Counsel May Not Prepare Grounds and Reasons.
- 21.23[5] If Court Grants Motion, Court May Not Correct Order Nunc Pro Tunc.
- 21.24 Court May Deny Motion for New Trial.

- 21.25 Prevailing Party Must Give Notice of Ruling to Other Parties.
- 21.26 CHECKLIST: Seeking Review of Order Granting or Denying New Trial.
- 21.27 Order Granting New Trial Is Appealable.
- 21.28 Order Denying New Trial Is Reviewable on Appeal From Judgment.
- 21.29 Appellate Court Reviews New Trial Order Under Abuse of Discretion Standard.
- 21.30 Observe Time Limits for Filing and Serving Notice of Appeal After Court Denies Motion for New Trial.
- 21.31 If Order Granting New Trial Is Reversed on Appeal, Original Judgment Is Reinstated.
- 21.32 Notice of Intention to Move for New Trial.
- 21.33 Declaration in Support of Motion for New Trial.
- 21.34 Declaration of Juror in Support of Motion for New Trial.
- 21.35 Declaration Supporting Motion for New Trial Showing "No Knowledge" of Jury Misconduct.
- 21.36 Stipulation and Order Extending Time to File Affidavits or Declarations.



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Chapter 21 Motion for New Trial
I. STRATEGY

2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.01

21.01 Scope.

This chapter covers:

- Objectives and strategy for motions for new trial [see 21.04].
- Making a motion for new trial [see 21.03 -21.11; Forms: see 21.32-21.36].
- Opposing a motion for new trial [see 21.13 -21.16].
- Hearings on motions for new trial [see 21.17 -21.25].
- Seeking review of an order granting or denying a motion for new trial [see 21.26 -21.31].

Core Statutes:

CCP §§ 655-663.2, 914.

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsAppellate
JurisdictionState Court Review



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Chapter 21 Motion for New Trial
I. STRATEGY

2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.02

21.02 Objective and Strategy.

Motions for new trial are commonly used to seek reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee [CCP § 656]. If the required grounds exist, the court may modify or vacate the verdict or any other decision, in whole or in part, and grant a new or further trial on all or some of the issues [CCP § 657].

The motion for new trial is also commonly used when there has been error in the jury instructions or jury misconduct.

► Cross References:

Discussion of instructional error, see 21.09[8].

Discussion of jury misconduct, see 21.09[2].

The three main hurdles for the moving party to overcome and, hence, points of attack for the opposing party, are:

- Time limits [see CCP § 659].
- The requirement to show proper grounds [see CCP § 657].
- The requirement to provide the proper declarations [see CCP § 658].



Strategic Point--Timing:

In making a motion for a new trial in a jury case, the motion may be required if it addresses a matter that can be cured before the jury is dismissed. Failure to do so, when the court can address the matter raised (particularly if the motion addresses procedural irregularities), may result in waiver of the issue. If the motion addresses juror misconduct, particular attention should be paid to cases involving the extent to which evidence of juror deliberations and conduct can be submitted. For example, juror declarations in support of the motion are not routinely permitted if the declaration discusses jurors' deliberations, while declarations may be accepted to show juror misconduct (as, for example, a jury deciding the matter on a

chance verdict, flip of the coin, and the like.)

Judge's Perspective--Timing:

Counsel moving for new trial should ensure that the motion is timely calendared. Court staff setting the hearing may not be aware of the strict time limits for hearing this motion. Ideally, the hearing should be set in advance of the deadline to avoid unforeseen delays.



Strategic Point--Additur and Remittitur:

An important consideration in making a motion for new trial are the issues of additur and remittitur where damages awarded are inconsistent with the facts of the case. Be aware that the decision of whether to grant a new trial motion may be conditioned on whether the party accepts the court's suggested changes to the damage award.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

California Points and Authorities, Ch. 155, Motions After Trial (Matthew Bender).

Cross Reference:

Discussion of juror declarations, see *21.10[2]*.

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 ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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Chapter 21 Motion for New Trial
II. MAKING MOTION FOR NEW TRIAL

2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.03

21.03 CHECKLIST: Making Motion for New Trial.



Determine timing.

- ☐ File and serve notice of intention to move for new trial within one of following deadlines:
 - ☐ Before entry of judgment, but after jury, court, or referee renders decision.
 - ☐ Within earliest of:
 - ☐ 15 days of date of mailing notice of entry of judgment by clerk of court.
 - ☐ Service by any party of written notice of entry of judgment.
 - ☐ 180 days after entry of judgment.
 - ☐ Within 15 days after service of notice by other party of filing motion for new trial.
- ☐ File and serve supporting memorandum within 10 days after filing notice of intention to move for new trial.
- ☐ File and serve declaration within 10 days of filing notice of intention to move for new trial.

Authority:

CCP § 659; Cal Rules Ct, Rule 3.1600

Discussion:

See 21.07

☐ Determine whether motion for new trial is appropriate.

- ☐ Motion may be made after trial on merits.
- ☐ Motion may be made after judgment is granted without trial on merits.
- ☐ Motion may not be made after certain judgments.

Authority:

Carney v. Simmonds (1957) 49 C2d 84, 315 P2d 305

Discussion:

See 21.06

☐ Determine whether judgment has been entered.

Authority:

CCP § 659

☐ Determine whether statutory grounds for new trial exist.

- ☐ Irregularity in the proceedings is ground for new trial.
- ☐ Juror misconduct is ground for new trial.
 - ☐ Concealment of bias on voir dire is juror misconduct.
 - ☐ Prejudicial communication by or to juror is juror misconduct.
 - ☐ Experimentation producing new evidence is juror misconduct.
 - ☐ A chance verdict is juror misconduct.
 - ☐ Juror misconduct leads to presumption of prejudice.
- ☐ Accident or surprise is ground for new trial.
- ☐ Newly discovered evidence is ground for new trial.
- ☐ Excessive or inadequate damages is ground for new trial.

- ☐ Insufficiency of evidence is ground for new trial.
- ☐ Error in law occurring at trial is ground for new trial.
- ☐ Error in law is ground for new trial.
- ☐ Lack of phonographic report of trial is ground for new trial.
- ☐ Loss or destruction of bill of exceptions or statement of case is ground for new trial.

Authority:

CCP §§ 657, 657.1, 914

Discussion:

See 21.09

- ☐ Draft notice of intention to move for new trial.

Authority:

CCP § 659

Form:

See 21.32

- ☐ Draft supporting memorandum.

Authority:

Cal Rules Ct, Rule 3.1600

- ☐ Draft supporting declaration.

Authority:

CCP § 658

Discussion:

See 21.10

Forms:

See 21.33 -21.35

- ☐ Apply to trial judge unless unavailable.

Authority:

CCP § 661

Discussion:

See 21.08

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.04 Options and Strategies for Moving Party.

The purpose of a motion for a new trial is to reexamine an issue of fact or law in the same court after a trial and decision by a jury, court, or referee [CCP § 656]. After granting certain types of orders, a trial court may reexamine issues of law when there has been no trial on the merits [*Carney v. Simmonds* (1957) 49 C2d 84, 90, 315 P2d 305 ; see 21.06[2]]. If the required statutory grounds exist, the court may modify or vacate, in whole or in part, the verdict and any other decision [CCP § 657]. The court may grant a new or further trial on all or part of the issues. The effect of an order granting a new trial is to leave the case at large and to place the parties in the same position as if the case had never been tried [*Gordon v. Nissan Motor Co.* (2009) 170 CA4th 1103, 1111, 88 CR3d 778] .

If the statutory grounds of a motion for new trial cannot be met, consider other motions, such as a CCP § 473(b) motion for relief from the order based on mistake, inadvertence, surprise, or excusable neglect [see Ch. 29, Setting Aside Judgments and Orders]. Another option is a CCP § 629 motion for judgment notwithstanding the verdict [see Ch. 20, Motion for Judgment Notwithstanding the Verdict]. A CCP § 1008 motion for reconsideration or renewed motion sounds similar to a motion for new trial, but is in fact very different [see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 29, Motions to Reconsider and Renewed Motions].



Cross Reference:

Discussion of other motions for relief, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 29, Motions to Reconsider and Renewed Motions; Ch. 36, Defaults and Motions for Relief.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.05 Only Aggrieved Party May Apply for New Trial.

The new trial procedure is strictly statutory. Therefore, the court has no inherent power to grant a new trial on its own motion. Only the aggrieved party may apply for a new trial [see CCP § 657; *Sanchez-Corea v. Bank of Am.* (1985) 38 C3d 892, 899, 215 CR 679, 701 P2d 826 ; *Schroeder v. Auto Driveaway Co.* (1974) 11 C3d 908, 919, 114 CR 622, 523 P2d 662] .

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsGovernmentsCourtsAuthority to Adjudicate



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21.06 Motion for New Trial Available After Trial on Merits or After Judgment Granted Without Trial on Merits.

21.06[1] Make Motion After Trial on Merits. An aggrieved party may challenge a judgment entered after a jury or nonjury trial as long as one of the statutory grounds exists [*see CCP § 657*].

➡ **Cross Reference:**

Discussion, see 21.09.

21.06[2] Make Motion After Judgment Granted Without Trial on Merits. In certain circumstances, a trial court may reexamine issues of law when there has been no trial on the merits [*Carney v. Simmonds* (1957) 49 C2d 84, 88, 90, 315 P2d 305] .

Examples:

A motion for new trial may be appropriate after any of the following:

- A judgment of dismissal after a demurrer is sustained [*Carney v. Simmonds* (1957) 49 C2d 84, 88, 315 P2d 305] .
- A judgment of dismissal generally [*Carney v. Simmonds* (1957) 49 C2d 84, 88, 315 P2d 305] .
- A judgment on the pleadings [*Carney v. Simmonds* (1957) 49 C2d 84, 88, 315 P2d 305] .
- A judgment on an agreed statement of ultimate facts [*Carney v. Simmonds* (1957) 49 C2d 84, 88, 315 P2d 305] .
- A judgment of nonsuit either on plaintiff's opening statement or after his or her evidence is presented [*Carney v. Simmonds* (1957) 49 C2d 84, 89, 315 P2d 305] .

- A judgment on a directed verdict [*Carney v. Simmonds* (1957) 49 C2d 84, 89, 315 P2d 305] .
- A summary judgment [*Aguilar v. Atlantic Richfield Co.* (2001) 25 C4th 826, 858, 107 CR2d 841, 24 P3d 493] .
- A default judgment granted as a sanction for defendant's failure to comply with discovery orders [*Jacuzzi v. Jacuzzi Bros., Inc.* (1966) 243 CA2d 1, 24, 52 CR 147] .
- An order granting a motion to quash a writ of execution [*In re Marriage of Beilock* (1978) 81 CA3d 713, 719, 146 CR 675] .
- A judgment entered when an appellate court vacated a previous judgment with instructions for entry of a new judgment for a greater amount of damages [*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 C2d 452, 459-460, 72 CR 217, 445 P2d 881] .

21.06[3] Do Not Make Motion After Certain Types of Judgments. A motion for new trial is inappropriate after certain types of judgments, including:

- A default judgment when the moving party may be able to object to the judgment [*Carney v. Simmonds* (1957) 49 C2d 84, 90, 315 P2d 305] .
- A mistrial [*Sullivan v. Delta Air Lines, Inc.* (1997) 15 C4th 288, 307, n11, 63 CR2d 74, 935 P2d 781] .

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.07 Observe Time Limits for Filing and Serving Motion Documents.

21.07[1] Notice of Intention to Move for New Trial Subject to Strict Time Limits.

21.07[1][a] Notice of Intention to Move for New Trial May Be Filed and Served Before Entry of Judgment.

A party moving for a new trial may file a notice of intention to move for a new trial before the entry of judgment [*CCP* §§ 656, 659].

21.07[1][b] Notice of Intention to Move for New Trial May Be Filed and Served Within Earliest of 15 Days of Date of Mailing Notice of Entry of Judgment by Clerk of Court, Service by Any Party of Written Notice of Entry of Judgment, or 180 Days After Entry of Judgment. A party moving for a new trial may file a notice of intention to move for a new trial within the earliest of [*CCP* § 659]:

- 15 days of date of mailing notice of entry of judgment by clerk of court;
- 15 days of service by any party of written notice of entry of judgment; or
- 180 days after entry of judgment.



Strategic Point:

It can be difficult to determine when the judgment has been entered. Counsel for the prevailing party should contact the clerk of the court regularly (at the risk of becoming a pest) to determine when the notice of entry of judgment has been mailed or served. It helps to maintain a cordial relationship with the court clerk to ask to be notified when the judgment is entered, and most clerks will welcome counsel's help in picking up the notice of entry of judgment personally. The time limits are so important that it is imperative counsel pay particular attention to the mailing of the notice. Often, at the conclusion of a trial (particularly a lengthy complex trial), confusion concerning what is being filed with the court, the identification and removal of exhibits and demonstrative items and the like,

and the fact that most courts need to move on to the next trial, create an opportunity for mistake that should be guarded against assiduously. Counsel intending to move for new trial likely will not want to wait until such notice to begin preparing the motion. Instead, the motion for new trial should be drafted as soon as it becomes apparent that is a strategy to be explored, using notice of entry of judgment as the signal to finalize the motion for filing.

21.07[1][c] Notice of Intention to Move for New Trial May Be Filed and Served Within 15 Days After Service of Notice by Other Party of Filing Motion for New Trial. A party moving for a new trial may file a notice of intention to move for a new trial within 15 days after service of notice by another party filing a notice of intention to move for a new trial [*CCP* § 659].

21.07[2] Supporting Memorandum Must Be Filed and Served Within 10 Days After Filing Notice of Intention to Move for New Trial. Within 10 days after filing a notice of intention to move for a new trial, the moving party must serve and file a memorandum in support of the motion. If the moving party fails to serve and file a memorandum, the court may deny the motion without a hearing on the merits [*Cal Rules Ct, Rule 3.1600*].

21.07[3] Affidavits or Declarations Must Be Filed and Served Within 10 Days After Filing Notice of Intention to Move for New Trial. Within 10 days of filing the notice of intention to move for a new trial, the moving party must serve on all other parties and file any declarations intended to be used in support of the motion. This 10-day period may be extended for good cause by declaration or by written stipulation of the parties, for a period not to exceed 20 days [*CCP* § 659a; Form, see 21.36].

A motion made on the grounds set out in *CCP* § 657(1)-(4), that is, irregularity of the proceedings, misconduct of the jury, accident or surprise, or newly discovered evidence [see 21.09] must be made on affidavits or declarations [*CCP* § 658]. A motion made on any other ground must be made on the court minutes [*CCP* § 658; see 21.11].



Warning:

CCP § 659a, which permits the trial court to extend the period within which to file a declaration supporting a new trial, is mandatory. Therefore, a court may not consider a party's declarations filed after that period expires [*Erikson v. Weiner* (1996) 48 CA4th 1663, 1666, 1672, 56 CR2d 362] .

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.08 Motion for New Trial Must Be Made to Trial Judge.

The judge who presided at trial must hear the motion for new trial, unless that judge is unable to do so or is absent from the county at the time [CCP § 661]. If that is the case, any other judge of the same court may hear the motion [CCP § 661; see *Dell'Oca v. The Bank of New York Trust Company, N.A.* (2008) 159 CA4th 531, 542-546, 71 CR3d 737]. If a judge other than the trial judge hears the motion, it must be argued or submitted without oral argument 10 days before expiration of the court's power to act on the motion [CCP § 661]. In a bifurcated trial in superior court, in which different judges heard the issues, each judge must hear and determine the motion with respect to the issues that he or she tried [Cal Rules Ct, Rule 3.1591].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.09

21.09 Motion for New Trial Must Include Statutory Grounds.

21.09[1] Irregularity in the Proceedings Is Ground for New Trial. A motion for new trial may be granted if there is an irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which a party was prevented from having a fair trial [CCP § 657(1)]. An "irregularity" is any overt act of the trial court, jury, or adverse party that violates the right to a fair and impartial trial and amounts to misconduct [*Gray v. Robinson* (1939) 33 CA2d 177, 182, 91 P2d 194] . The irregularity must materially affect a party's substantial rights [CCP § 657(1); *Gay v. Torrance* (1904) 145 C 144, 148, 78 P 540] . Attorney misconduct may justify a new trial only if it is reasonably probable that the moving party would have obtained a more favorable result absent the misconduct [*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 CA4th 1108, 1122, 105 CR3d 485 (attorney's comment regarding insurance not grounds for new trial)].

Irregularity in the proceedings must be shown by affidavit or declaration [see CCP § 658].

➡ **Cross Reference:**

Form, see 21.33.

Example:

Instructional error to the jury is a proper basis for a motion for new trial [see 21.09[8]].

21.09[2] Juror Misconduct Is Ground for New Trial.

21.09[2][a] Jury Misconduct in General. A motion for a new trial may be brought on the ground of jury misconduct [CCP § 657(2)]. The right to an unbiased and unprejudiced jury is an inseparable and inalienable part of the right to trial by jury guaranteed in the federal constitution [*Weathers v. Kaiser Found. Hosps.* (1971) 5 C3d 98, 110, 95 CR 516, 485 P2d 1132] . Thus, this ground is functionally equivalent to the ground of irregularity in the jury proceedings preventing a fair trial [see CCP § 657(1)].

➡ **Cross References:**

Discussion, see 21.09[1].

Additional discussion of juror misconduct during trial or deliberations, see *Ch. 17, Dealing With the Jury, 17.18 et seq., 17.40.*

A single act may show not only jury misconduct or bias, but may also help show another ground for vacating the jury's verdict and granting a new trial. For example, jury misconduct may be included as a reason for the conclusion that excessive damages were awarded [*Tramell v. McDonnell Douglas Corp. (1984) 163 CA3d 157, 166, 171, 209 CR 427* (jury in wrongful death action improperly considered income taxes on verdict and attorney's fees and discussed public benefit from taxes levied on verdict)].

Jury misconduct must be shown by affidavit or declaration [see *CCP § 658*]. Once established, jury misconduct gives rise to a rebuttable presumption of prejudice [*Whitlock v. Foster Wheeler, LLC (2008) 160 CA4th 149, 162, 72 CR3d 369*].



Cross Reference:

Forms, see 21.34, 21.35.

21.09[2][b] Concealment of Bias on Voir Dire Is Juror Misconduct. It is jury misconduct if a juror conceals during voir dire examination a state of mind that prevents his or her acting impartially. The concealment need not be intentional [*City of Pleasant Hill v. First Baptist Church (1969) 1 CA3d 384, 431, 82 CR 1*]. Thus, a juror's statement during recess that the jury could bring in a verdict at that time rather than waiting until conclusion of the trial showed misconduct on voir dire because that juror had stated on voir dire examination that he could keep an open mind until all the evidence and applicable law were presented [*Deward v. Clough (1966) 245 CA2d 439, 443-445, 54 CR 68*].

A moving party may use juror affidavits or declarations to show occurrences during the trial and deliberations that tend to prove the existence of prejudice in the mind of a juror that would prevent that juror from acting impartially and to show that bias or disqualification was concealed by false answers on voir dire. For example, affidavits were accepted to impeach a verdict when a juror had knowledge as to the qualifications of an expert appraisal witness as a result of a real estate course he was taking at the time of trial and failed to state that special knowledge on voir dire [*People ex rel. Dep't of Pub. Works v. Curtis (1967) 255 CA2d 378, 389, 63 CR 138*].

21.09[2][c] Prejudicial Communication by or to Juror Is Juror Misconduct. It is misconduct for a juror during trial to discuss the matter under investigation outside the court or receive any information on the subject of the litigation except in open court and in the manner provided by law [*City of Pleasant Hill v. First Baptist Church (1969) 1 CA3d 384, 431, 82 CR 1*].

Examples--Misconduct:

The following are examples of juror communications were held to constitute misconduct:

- A juror read newspaper accounts of the case and the subject matter of the accounts were likely to influence the juror [*Province v. Center for Women's Health & Family Birth (1993) 20 CA4th 1673, 1679, 25 CR2d 667*].

- A juror communicated to the rest of the jury information outside the evidence that was relevant to important issues in the case [*People v. Southern Cal. Edison Co. (1976) 56 CA3d 593, 598, 128 CR 697* (juror questioned non-juror acquaintance who was employed by a party to the case concerning the likelihood of alleged injuries, and communicated the employee's answers during deliberations); *People ex rel. Dep't of Pub. Works v. Curtis (1967) 255 CA2d 378, 390, 63 CR 138* (juror conveyed information the juror had previously learned in a class concerning methods of appraisal and appraiser qualifications,

which bore directly on controlling issues in case)].

- A juror communicated to the rest of the jury a statement of law not contained in the court's instructions [*Young v. Brunicardi* (1986) 187 CA3d 1344, 1349-1350, 232 CR 588] .
- A juror referred to a dictionary for the definition of the term "preponderance," and discussed the definition during deliberations in relation to a jury instruction concerning "preponderance of the evidence" [*Glage v. Hawes Firearms Co.* (1990) 226 CA3d 314, 323, 276 CR 430 (variance between legal meaning and dictionary meaning created clear and substantial risk that jury might misapply burden of proof)].
- A juror communicated to other jurors an opinion on the merits of the case before it had been submitted for consideration [*City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 434, 82 CR 1] .
- A juror solicited a personal physician's opinion concerning an issue in a malpractice case and communicated the response to other jurors [*Weathers v. Kaiser Found. Hosps.* (1971) 5 C3d 98, 106-107, 95 CR 516, 485 P2d 1132] .

Examples--No Misconduct:

Instances in which a juror communication was not held to justify a new trial include the following:

- A communication between a witness and a juror on matters unrelated to the case, without any showing that the juror was influenced by the communication to the prejudice of the moving party [*City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 427-428, 82 CR 1 (social greeting between juror and appraisal witness on courthouse steps recollecting previous business transaction not involving discussion of case)].
- A juror communicated with a witness, seeking information concerning the case, but the witness specifically refused to answer the questions or converse with the juror [*City of Los Angeles v. Lowensohn* (1976) 54 CA3d 625, 636-638, 127 CR 417] .
- In an automobile products liability action, a juror communicated to the rest of the jury information he heard on a news broadcast regarding the case and the results of his view of similar cars at a dealership. The court held this information was cumulative and not prejudicial [*Karlsson v. Ford Motor Company* (2006) 140 CA4th 1202, 1232-1236, 45 CR3d 265].

21.09[2][d] Experimentation Producing New Evidence Is Juror Misconduct. It is misconduct for a juror to engage in an experiment that produces new evidence [*Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co.* (1991) 234 CA3d 1724, 1746, 286 CR 435] . For example, it is improper for a juror to compare turnstiles in supermarkets and communicate the results of this investigation to other jurors in a case involving an injury allegedly resulting from a market turnstile [*Lankster v. Alpha Beta Co.* (1993) 15 CA4th 678, 682, 18 CR2d 923] .

It is also not misconduct for the jurors to duplicate a demonstration presented at trial [see *Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co.* (1991) 234 CA3d 1724, 1746-1747, 286 CR 435] .

21.09[2][e] Chance Verdict Is Juror Misconduct. Jury misconduct expressly includes the jury's arriving at a verdict or finding "by a resort to a determination by chance" [see CCP § 657(2)]. Thus, verdicts reached by tossing a coin, casting a die, drawing lots, or other forms of gambling are improper chance verdicts [*Dixon v. Pluns* (1893) 98 C

384, 387, 33 P 268 ; *Chronakis v. Windsor* (1993) 14 CA4th 1058, 1064, 18 CR2d 106] .

A "quotient verdict" that the jury reaches by adding the damages favored by each juror and dividing by the number of jurors, after previously agreeing to be bound by such a verdict without further deliberation, may also be an improper chance verdict [*Dixon v. Pluns* (1893) 98 C 384, 387, 33 P 268 ; *Chronakis v. Windsor* (1993) 14 CA4th 1058, 1064, 18 CR2d 106] . However, a quotient verdict is not improper when it does not result from the jurors' prior agreement to be bound without further consideration. If the jurors discuss and ballot on the adoption or rejection of an average sum, it is conclusive evidence they were not bound by a previous agreement to accept it without further consideration [*Bardessono v. Michels* (1970) 3 C3d 780, 794-795, 91 CR 760, 478 P2d 480] .

Evidence that jurors rounded off an average sum before reaching a final verdict is also proof that they had no prior agreement to adopt the average [*Glass v. Gulf Oil Corp.* (1970) 12 CA3d 412, 436, 96 CR 902] .

Jury misconduct consisting of a chance verdict may be proved by the affidavit or declaration of any one of the jurors [CCP § 657(2)]. The only evidence sufficient to rebut juror affidavits showing that jurors reached a chance verdict is credible counter-affidavits showing that the verdict was proper, affirmative statements or evidence of subsequent deliberation by the jury, or evidence of rounding off the average figure [*Bardessono v. Michels* (1970) 3 C3d 780, 794, 91 CR 760, 478 P2d 480]].

Examples:

- Counter-affidavits showed that an average figure served as the basis for further deliberation) [*Bardessono v. Michels* (1970) 3 C3d 780, 794, 91 CR 760, 478 P2d 480] .
- No counter-affidavits rebutted the evidence of an improper verdict [*Will v. Southern Pac. Co.* (1941) 18 C2d 468, 477, 116 P2d 44] .

When jurors' affidavits conflict on the issue of a chance verdict, the trial court may make its determination on the issue, which will not be disturbed on appeal [*Diamond Springs Lime Co. v. American River Constructors* (1971) 16 CA3d 581, 605, 94 CR 200 ; see *Chronakis v. Windsor* (1993) 14 CA4th 1058, 1067, 18 CR2d 106 (appellate court will not draw inferences from jury affidavits to rebut prima facie evidence of quotient verdict)].

21.09[2][f] Juror Misconduct Leads to Presumption of Prejudice. Jurors are presumed to have followed the court's instructions [*People v. Sanchez* (2001) 26 C4th 834, 852, 111 CR2d 129, 29 P3d 209] . However, juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that a party was prejudiced and may establish juror bias [*Romo v. Ford Motor Co.* (2002) 99 CA4th 1115, 1131, 122 CR2d 139] . This presumption may be rebutted only by an affirmative evidentiary showing that prejudice does not exist [*Karlsson v. Ford Motor Company* (2006) 140 CA4th 1202, 1232-1236, 45 CR3d 265].

The presumption of prejudice is rebutted if the reviewing court reaches one of the following three conclusions [*Romo v. Ford Motor Co.* (2002) 99 CA4th 1115, 1131-1132, 122 CR2d 139] :

- The record establishes the absence of prejudice;
- There is no reasonable probability of actual harm to the complaining party under the constitutional standard [see *Hasson v. Ford Motor Co.* (1982) 32 C3d 388, 416-417, 185 CR 654, 650 P2d 1171] ; or
- In the case of possible "actual bias" of a juror whose vote may have been determinative of the verdict, there is no substantial likelihood that at least one juror was impermissibly influenced [see

Province v. Center for Women's Health & Family Birth (1993) 20 CA4th 1673, 1679-1680, 25 CR2d 667] .

Prejudice exists when there is a substantial likelihood that enough jurors were impermissibly influenced by the misconduct such that it affected the verdict to the detriment of the moving party. Because only three fourths of a civil jury are required to render a verdict, the number of tainted jurors necessary to permit a finding of substantial likelihood of impermissible influence will vary depending on the circumstances of the case. For example, conclusive evidence of only one tainted juror would be sufficient to preclude rebuttal of the presumption of prejudice when the jury's verdict is nine to three and the tainted juror voted with the majority. By contrast, if the evidence indicates that only one juror is tainted and the jury's verdict was unanimous, the remaining untainted jurors are sufficiently numerous to render a proper and fair verdict [*see Glage v. Hawes Firearms Co. (1990) 226 CA3d 314, 321-323 n5, 276 CR 430*] .

A party requesting that the court grant a new trial on the ground of jury misconduct must file a "no-knowledge" declaration, stating that neither the attorney nor the client was aware of the alleged juror misconduct before the verdict.



Cross Reference:

Form, see 21.34.

21.09[3] Accident or Surprise Is Ground for New Trial. A motion for new trial may be granted on the ground of accident or surprise that ordinary prudence could not have guarded against [*CCP § 657(3)*]. The terms "accident" and "surprise" have substantially the same meaning, because each denotes some condition or situation in which a party is unexpectedly placed, to that party's injury, without any negligence of his or her own [*Kauffman v. De Mutiis (1948) 31 C2d 429, 432, 189 P2d 271* ; *see In re Marriage of Liu (1987) 197 CA3d 143, 154-155, 242 CR 649* (negligence of party's counsel is not a ground on which a new trial may be granted under *CCP § 657(3)*].

Examples:

- An expert, designated properly and deposed before trial, who is allowed to testify beyond the expert's designated expertise.
- New evidence that was not subject to discovery.

The right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to court and no motion is made for mistrial or continuance [*Garcia v. County of Los Angeles (1986) 177 CA3d 633, 638-639, 223 CR 100*] .

21.09[4] Newly Discovered Evidence Is Ground for New Trial. A motion for new trial may be granted on the grounds of newly discovered material evidence that the party making the application could not with reasonable diligence have discovered and produced at trial [*CCP § 657(4)*].

To prevail on this ground, all of the following elements must be established [*Doe v. United Air Lines, Inc. (2008) 160 CA4th 1500, 1506, 73 CR3d 541*]

- The evidence is newly discovered.
- There was reasonable diligence in discovering and producing the evidence.
- The evidence is material to the moving party's case.

Because a litigant should exhaust every reasonable effort to produce all existing evidence at trial, courts look with suspicion and disfavor on the claim of newly discovered evidence as a basis for a new trial [*Horowitz v. Noble* (1978) 79 CA3d 120, 138, 144 CR 710] .

Newly discovered evidence must be established by affidavit or declaration [see CCP § 658].

 Cross Reference:

Form, see 21.33.

21.09[5] Excessive or Inadequate Damages Is Ground for New Trial. A motion for new trial may be granted on the ground of excessive or inadequate damages if, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences drawn from it, that the court or jury clearly should have reached a different verdict or decision [CCP § 657(5)]. The judge may not substitute his or her judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper. For example, a trial judge's personal opinion based on the ranges of awards in other cases is not a proper basis for granting a new trial for excessive damages [*Bigboy v. County of San Diego* (1984) 154 CA3d 397, 406-407, 201 CR 226] .

The court may grant a new trial subject to the condition that the motion is denied if the court obtains consent from the appropriate party for the addition or reduction of damages [CCP § 662.5].

 Cross Reference:

Discussion of conditional relief, see 21.21.

Excessive or inadequate damages must be established by the minutes of the court, rather than by a declaration or affidavit [see CCP § 658].

 Cross Reference:

Discussion of motion based on minutes, see 21.11.

21.09[6] Insufficiency of Evidence Is Ground for New Trial. A motion for new trial may be granted on the ground of insufficiency of the evidence to justify the verdict or other decision [CCP § 657(6)]. A new trial may not be granted on this ground unless the court is convinced from the entire record, including inferences from it, that the court or jury should have reached a different verdict or decision [see CCP § 657(6)].

On motion for a new trial, the court should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. Insufficiency of the evidence in this context means an absence of evidence or that the evidence received, in the trial judge's individual judgment, is lacking in probative force to establish the proposition of fact to which it is addressed [*Boeken v. Philip Morris Inc.* (2005) 127 CA4th 1640, 1689, 26 CR3d 638] .

If a trial court rules on a motion for a new trial made on the ground of insufficiency of the evidence, the trial judge must weigh the evidence and judge the credibility of witnesses. Although this is the jury's exclusive province, it is the trial court's duty to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict. The ground that the evidence was insufficient to justify the verdict must be established by the minutes of the court rather than by a declaration or affidavit [see CCP § 658].

 Cross Reference:

Discussion of motion based on minutes, see 21.11.

21.09[7] Error in Law Is Ground for New Trial. A ground for granting a motion for new trial is that the verdict or decision is against law [CCP § 657(7)]. A verdict is "against law" when it is contrary to correct jury instructions [*Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co.* (1973) 35 CA3d 948, 958, 111 CR 210] .

Distinguish:

This ground is limited to situations that are not covered by the other subdivisions of CCP § 657, such as error in law occurring at trial [*McCown v. Spencer* (1970) 8 CA3d 216, 229 n3, 87 CR 213 ; see 21.09[8]] or insufficiency of evidence [*Brooks v. Harootunian* (1968) 261 CA2d 680, 686, 68 CR 374 ; see 21.09[6]].

A decision or verdict is against law if [*Kralyevich v. Magrini* (1959) 172 CA2d 784, 789, 342 P2d 903] :

- There is a failure to find on a material issue;
- The findings are irreconcilable; or
- The evidence is insufficient in law and without conflict on any material point.

If the jury returns a general verdict, it is against law only when it is unsupported by any substantial evidence. The court cannot merely weigh conflicting evidence and find a balance against the judgment [*Kralyevich v. Magrini* (1959) 172 CA2d 784, 789, 342 P2d 903] .

A decision may also be against law when the court failed to resolve a specified controverted issue in its statement of decision or if the statement of decision is inconsistent, ambiguous, or uncertain [see CCP §§ 632, 634; *Renfer v. Skaggs* (1950) 96 CA2d 380, 383, 215 P2d 487] . However, these errors must materially affect the aggrieved party's substantial rights for a court to grant a new trial [see CCP § 657].

The ground that the verdict or decision is against the law must be established by the minutes of the court rather than by affidavit or declaration [see CCP § 658].

 Cross Reference:

Discussion of granting conditional relief, see 21.21.

21.09[8] Error in Law Occurring at Trial Is Ground for New Trial. A motion for a new trial may be granted for an error in law occurring at trial and excepted to by the party making the motion [CCP § 657(7)].

Examples:

Errors of law occurring at trial may include:

- Erroneous ruling on evidence [*Richard v. Scott* (1978) 79 CA3d 57, 63, 144 CR 672] .
- Erroneous or misleading jury instructions [*Bruck v. Adams* (1968) 259 CA2d 585, 587, 66 CR 395] .
- Erroneous denial of a jury trial [*Johnson v. Superior Court* (1932) 121 CA 288, 292, 8 P2d 1047] .
- Erroneous grant of nonsuit [*Castillo v. Warren* (1941) 44 CA2d 903, 907, 113 P2d 232] .
- Erroneous denial of a motion for directed verdict [*Steele v. Werner* (1938) 28 CA2d 554, 556, 83

P2d 56] .

Distinguish:

The ground of error of law occurring at trial differs from irregularity in proceedings of court, jury, or adverse party [*CCP* § 657(1); *see* 21.09[1]], in that this motion must be made on the minutes of the court, as opposed to affidavits or declarations, and the moving party must have excepted to the error of law occurring at trial [*see CCP* §§ 657(7), 658]. Note that many orders and rulings are deemed excepted to without formal objection at trial [*see CCP* § 647].

The error in law must be established by the minutes of the court rather than by affidavit or declaration [*CCP* § 658].

21.09[9] Lack of Phonographic Report of Trial Is Ground for New Trial. The court may grant a motion for new trial if the right to a phonographic report [i.e. transcript] has not been waived and it is impossible to have a phonographic report of trial due to death or disability of the reporter or loss or destruction of the reporter's notes in substantial part [*CCP* §§ 657.1, 914]. The moving party must show all of the following [*Rambo v. Rambo* (1948) 84 CA2d 632, 634, 191 P2d 480 ; *see In re Marriage of Liu* (1987) 197 CA3d 143, 151-152, 242 CR 649] :

- The transcript is necessary to present substantial issues.
- The transcript cannot be procured for one of the reasons in the statute.
- Proper diligence has been exercised.

When determining whether the reporter's transcript is necessary to present substantial issues, a reasonable test of substantiality is whether questions the moving party wants to raise on appeal could be properly considered without the lost portion of the transcript. If they could, then the loss is not considered substantial [*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 CA4th 141, 147, 43 CR2d 366] .

If a court orders a new trial, it must order a complete, not a partial, new trial. For example, if reporter's notes for the first day of a three-day trial are lost, a court may not order that a witness who previously testified on that first day testify again, and that a transcript of the new testimony be added to the transcript of the second and third days of trial to "complete" a record for appeal. Other than a complete new trial, the permissible solutions to the problem of the missing reporter's notes are limited to stipulations, agreed statement, or settled statement [*Weinstein v. E.F. Hutton & Co.* (1990) 220 CA3d 364, 369, 269 CR 443] .

 Cross Reference:

Detailed discussion of grounds for new trial, *see* California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

21.09[10] Loss or Destruction of Bill of Exceptions or Statement of Case Is Ground for New Trial. The court may grant a new trial of any action or proceeding when all of the following conditions exist [*CCP* § 663.1]:

- Any proposed bill of exceptions or statement of the case on motion for new trial is lost or destroyed by reason of conflagration or other public calamity.
- No other record of the proceedings of the trial can be obtained.
- The action or proceeding is subject to review by motion for new trial pending at the time of the destruction.

- The court in which the action or proceeding is pending deems it impossible or impracticable to restore those proceedings and to settle a bill of exceptions or statement of the case containing those proceedings, so as to enable the court to review the judgment or order by motion for new trial.
- At the time of the loss or destruction, a motion for new trial was pending.
- To grant a new trial on these grounds, it is unnecessary to have any bill of exceptions or statement of the case settled [CCP § 663.1].

Example:

The 1906 San Francisco earthquake and fire qualified as a "public calamity" [*Bassford v. Earl* (1916) 172 C 653, 655, 158 P 124] .

Pending the hearing on a motion to grant a new trial based on this ground, the time within which a bill of exceptions may be prepared, served, or presented for settlement is extended and does not begin to run until the decision on the motion. The motion must be made within 30 days after the loss or destruction of the records [CCP § 663.2].

**Warning:**

Caution should be exercised in relying on older cases interpreting the terms "conflagration" and "public calamity."

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureAppealsRecords on AppealEvidenceInferences & PresumptionsPresumptions



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2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.10

21.10 Affidavits or Declarations May Be Required to Support Motion for New Trial.

21.10[1] Affidavit or Declaration in Support of Motion for New Trial May be Required. A motion made on the grounds set out in *CCP* § 657(1)-(4), that is, irregularity of the proceedings [*see* 21.09[1]], misconduct of the jury [*see* 21.09[2]], accident or surprise [*see* 21.09[3]], or newly discovered evidence [*see* 21.09[4]], must be made on affidavits or declarations [*CCP* § 658]. A motion made on any other ground must be made on the court minutes [*CCP* § 658].

21.10[2] Affidavit or Declaration by Juror May Be Required. The affidavit or declaration of any juror may be used to show jury misconduct by reason of a chance verdict [*see* *CCP* § 657(2)]. Jurors' affidavits or declarations may also be used to show jury misconduct generally [*see* *City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 428, 82 CR 1 ; *Campbell v. Zokelt* (1969) 272 CA2d 315, 319, 77 CR 561] .

➡ **Cross Reference:**

Form, *see* 21.34.

Juror affidavits used to impeach a verdict may show statements made, or conduct, conditions, or events, when these are likely to have improperly influenced the verdict. They may not be used to show that a juror was actually influenced or to show mental processes of jurors in reaching the verdict [*Evid Code* § 1150(a)]. In other words, a juror affidavit must provide overt facts that can be objectively corroborated, rather than subjective thoughts that cannot be corroborated [*Province v. Center for Women's Health & Family Birth* (1993) 20 CA4th 1673, 1678, 25 CR2d 667 ; *Chronakis v. Windsor* (1993) 14 CA4th 1058, 1068-1069, 18 CR2d 106] .

A juror's affidavit may not be used to construe or interpret the verdict [*Telles v. Title Ins. & Trust Co.* (1969) 3 CA3d 179, 187, 83 CR 444] .

21.10[3] Affidavit or Declaration Showing No Knowledge of Juror Misconduct May Be Required. If a party or the party's counsel becomes aware of facts constituting jury misconduct at any time during trial, the party must promptly bring the matter to the court's attention. Failure to do so in a timely manner results in the point being deemed waived as a basis for a motion for a new trial [*Weathers v. Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516,

485 P2d 1132] . Thus, a party seeking a new trial on the grounds of jury impropriety must present, in addition to other affidavits or declarations showing jury misconduct, a "no knowledge" affidavit or declaration showing that neither the moving party nor that party's counsel knew of that misconduct before the verdict was returned [*Weathers v. Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516, 485 P2d 1132] .



Cross Reference:

Form, see 21.35.

A "no knowledge" affidavit or declaration may be submitted by one person, but it must affirmatively establish that neither the attorney nor the client had knowledge before the verdict of jury misconduct [*People v. Southern Cal. Edison Co.* (1976) 56 CA3d 593, 599, 128 CR 697] . The "no knowledge" affidavit or declaration is not required when the alleged jury misconduct is of a nature that could not have been known to a party until after a verdict was rendered, such as improper comments jurors made during deliberations [*Krouse v. Graham* (1977) 19 C3d 59, 82, 137 CR 863, 562 P2d 1022] .

Failure to file a "no knowledge" affidavit or declaration is a curable procedural defect. A party who does not object in the trial court to the absence of this declaration waives the right to raise the issue for the first time on appeal [*Wiley v. Southern Pac. Transp. Co.* (1990) 220 CA3d 177, 186-188, 269 CR 240] .



Cross Reference:

Further discussion of "no knowledge" affidavit, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.11 Motion May Be Based on Reporter's Notes, Pleadings, and Court Files.

At the hearing on the motion, counsel may refer to pleadings and court orders on file. When the motion is made on the court minutes, counsel may refer to depositions, documentary evidence offered at trial, and the reporter's report of the trial proceedings or a certified transcript of this report. If there is no report or certified transcript, counsel may refer to proceedings occurring at trial that are within the judge's recollection. If the proceedings have been phonographically reported, but the reporter's notes have not been transcribed, the court or either party may request that the reporter attend the hearing and read the notes or any part of the notes that the court or either party require [CCP § 660].

► **Cross Reference:**

Discussion of motion based on reporter's notes, pleadings, and court files, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsRecords on Appeal



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21.12 Motion for New Trial May Be Filed With Motion for Judgment Notwithstanding the Verdict.

A motion for new trial is often made with a motion for judgment notwithstanding the verdict [*Schroeder v. Auto Driveaway Co.* (1974) 11 C3d 908, 919, 114 CR 622, 523 P2d 662] . Making a motion for judgment notwithstanding the verdict does not extend the time within which a party may file and serve a notice of intention to move for a new trial [CCP § 629]. If both motions are filed, the court must rule on them at the same time [CCP § 629]. However, the court cannot grant the motion for judgment notwithstanding the verdict with a conditional order granting the motion for new trial if for any reason the judgment notwithstanding the verdict is reversed on appeal [*Widener v. Pacific Gas & Elec. Co.* (1977) 75 CA3d 415, 436, 142 CR 304] .

➡ **Cross Reference:**

Detailed discussion, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief
From JudgmentMotions for New Trials



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21.13 CHECKLIST: Opposing Motion for New Trial.



Calendar response and hearing dates.



File and serve opposing memorandum within 10 days after moving party serves and files its memorandum.



File and serve counter-affidavits or counter-declarations within 10 days after moving party serves and files its affidavits or declarations, if any.

Authority:

Cal Rules Ct, Rule 3.1600; CCP § 659a

Discussion:

See 21.16



Review motion and supporting documents for adequacy.



Examine moving documents to determine whether grounds exist to oppose motion, including:



Motion is untimely.

Discussion:

See 21.15[1]



Grounds for motion do not exist.

Discussion:

See 21.15[2]

- ☐ Moving party did not suffer any prejudice.

Discussion:

See 21.15[3]

- ☐ Motion was not made to same judge or court that presided over trial.

Discussion:

See 21.15[4]

- ☐ Supporting declarations or affidavits are lacking or are inadequate.

Discussion:

See 21.08

- ☐ Draft opposing memorandum.

Authority:*Cal Rules Ct, Rule 3.1600***Discussion:**

See 21.15

- ☐ Draft counter-affidavit or counter-declaration.

Authority:*CCP § 658*

- ☐ Serve and file opposition.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.14 Options and Strategies for Opposing Party.

Principally, the opponent to a motion for new trial needs to demonstrate the lack of prejudice from the offending circumstances, and the overwhelming evidence against the party making the motion (to show that whatever is the subject of the motion would not have altered the outcome). If the motion is based on declarations, particularly of jurors, the opponent must demonstrate the impropriety of the declarations, if not the questionable validity of any assertions made.

Counsel should bear in mind he or she is opposing this motion because they prevailed in the underlying action. In that regard, counsel has the advantage of being able to argue the underlying verdict, reached after deliberation by the trier of fact, should not be disturbed and nothing being presented in the moving papers warrants doing so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.15 Determine Potential Bases for Opposing Motion for New Trial.

21.15[1] Opposition to Motion for New Trial May Be Based on Untimeliness of Motion. A notice of intention to move for new trial must be filed and served within one of following deadlines [*CCP* § 659]:

- Before entry of judgment, but after the jury, court, or referee renders its decision.
- Within the earliest of 15 days of the date of mailing the notice of entry of judgment by the clerk of court, service by any party of written notice of entry of judgment, or 180 days after entry of judgment.
- Within 15 days after service of notice by other party of filing a motion for new trial.

The moving party must file and serve a memorandum and any affidavits or declarations within 10 days after filing the notice of intention to move for new trial [*CCP* §§ 656, 659; *Cal Rules Ct, Rule 3.1600*]. Therefore, the opposing party may oppose a motion for new trial based on the moving party's failure to abide by these time limits.

➡ **Cross Reference:**

Discussion of time limits, see 21.07.

21.15[2] Opposition to Motion for New Trial May Be Based on Nonexistence of Grounds for Motion. A court may not vacate a verdict, or vacate or modify any other decision, and grant a new or further trial on some or all of the issues if none of the following grounds exist [*CCP* § 657]:

- Irregularity in the proceedings [*see 21.09[1]*].
- Juror misconduct [*see 21.09[2]*].
- Accident or surprise [*see 21.09[3]*].
- Newly discovered evidence [*see 21.09[4]*].

- Excessive or inadequate damages [see 21.09[5]].
- Insufficiency of evidence [see 21.09[6]].
- Error in law [see 21.09[7]].
- Error in law occurring at trial [see 21.09[8]].
- Lack of phonographic report of trial [see 21.09[9]].
- Loss or destruction of bill of exceptions or statement of case [see 21.09[10]].

Therefore, the opposing party may oppose a motion for new trial based on the moving party's failure to establish one of these grounds.

Cross References:

Discussion of grounds, see 21.09.

Detailed discussion of grounds for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

21.15[3] Opposition to Motion for New Trial May Be Based on Non-Existence or Inadequacy of Affidavits or Declarations. A motion made on the grounds set out in *CCP* § 657(1)-(4), that is, irregularity of the proceedings [see 21.09[1]], misconduct of the jury [see 21.09[2]], accident or surprise [see 21.09[3]], or newly discovered evidence [see 21.09[4]], must be made on affidavits or declarations [*CCP* § 658]. Jurors' affidavits or declarations may also be used to show jury misconduct generally [see *City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 428, 82 CR 1 ; *Campbell v. Zokelt* (1969) 272 CA2d 315, 319, 77 CR 561] .

In addition, a party seeking a new trial on the grounds of jury impropriety must present a "no knowledge" affidavit or declaration showing that neither the moving party nor that party's counsel knew of the misconduct before the verdict was returned [*Weathers v. Kaiser Found. Hosps.* (1971) 5 C3d 98, 103, 95 CR 516, 485 P2d 1132] .

Therefore, the opposing party may oppose a motion for new trial based on the moving party's failure to include proper affidavits or declarations.

Cross Reference:

Discussion of declarations, see 21.10.

21.15[4] Opposition to Motion for New Trial May Be Based on Lack of Prejudice to Moving Party. A court may not grant a motion for new trial if the error to the moving party is harmless [*Osborne v. Cal-Am Fin. Corp.* (1978) 80 CA3d 259, 265-266, 145 CR 584] . Therefore, even if the moving party establishes that grounds exist for a new trial, the opposing party may argue that the moving party was not prejudiced by the occurrence of the grounds.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule



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21.16 Opposing Memorandum and Counter-Affidavits Must Be Filed and Served Within 10 Days After Moving Party Files and Serves Memorandum.

An opposing party must file and serve a memorandum within 10 days after the moving party serves and files its memorandum [*Cal Rules Ct, Rule 3.1600; CCP § 659a*]. In addition, an opposing party must file and serve any counter-affidavits or counter-declarations within 10 days after the moving party serves and files its affidavits or declarations, if any [*Cal Rules Ct, Rule 3.1600; CCP § 659a*].



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Chapter 21 Motion for New Trial
IV. HEARING ON MOTION FOR NEW TRIAL

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21.17 CHECKLIST: Hearing on Motion for New Trial.



Calendar hearing date.



Court must designate hearing date after time for filing counter-affidavits or counter-declarations expires.

Authority:

CCP § 661

Discussion:

See 21.18



Court may stay enforcement of judgment or order pending motion.

Authority:

CCP § 918

Discussion:

See 21.19



Court must rule on motion within earliest of:



60 days after clerk mails notice of entry of judgment; or



60 days after any party serves written notice of entry of judgment on moving party.

Authority:

CCP § 660

Discussion:

See 21.20

☐ Court has several options in ruling on motion for new trial:

☐ Court may grant conditional relief.

Discussion:

See 21.21

☐ Court may grant alternative relief.

Authority:

CCP § 662

Discussion:

See 21.22

☐ Court may grant motion.

Authority:

CCP § 657

Discussion:

See 21.23

☐ Court may deny motion.

Authority:

CCP § 660

Discussion:

See 21.24

☐ Prevailing party must give notice of ruling to other parties.

Authority:

CCP § 1019.5(a)

Discussion:

See 21.25

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.18 Court Designates Hearing Date After Time For Filing Counter-Affidavits Expires.

When the time for filing counter-affidavits expires, the clerk must immediately call the motion to the attention of the judge who then designates the time for hearing [CCP § 661]. The clerk must give the parties five days' notice by mail of the hearing date [CCP § 661]. The hearing takes precedence over all other matters except criminal cases, probate matters, and cases actually on trial [CCP § 660].

The notice of hearing and the hearing are mandatory unless the parties waive it [*Avery v. Associated Seed Growers, Inc. (1963) 211 CA2d 613, 627, 27 CR 625*]. Although the court cannot dispense with the hearing, it is not required to hear oral argument [CCP § 661].



Cross Reference:

Discussion of hearing on motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.19

21.19 Court May Stay Enforcement of Judgment or Order Pending Motion for New Trial.

The trial court may stay the enforcement of any judgment or order, whether or not an appeal will be taken from it and whether or not a notice of appeal has been filed [CCP § 918(a), (c)]. If enforcement of the judgment or order would be stayed on appeal only after the appellant gives an undertaking, a trial court does not have the power, without the adverse party's consent, to stay the enforcement for a period that extends for more than 10 days beyond the last date on which a notice of appeal could be filed [CCP § 918(b)].

➡ **Cross References:**

Additional discussion of hearing on motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Forms for use in staying the execution of a judgment pending determination of a motion for new trial, see *Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments*, Ch. 15, *Staying Enforcement of a Judgment*, 15.35 -15.39.

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief
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21.20 Court Must Rule on Motion Within Earliest of 60 Days After Clerk Mails Notice of Entry of Judgment or 60 Days After Any Party Serves Written Notice of Entry of Judgment on Moving Party.

The court's power to rule on a motion for new trial expires on the earlier of (1) 60 days after the court clerk mails notice of the entry of judgment, or (2) 60 days after any party serves a written notice of entry of judgment on the moving party [CCP § 660]. This deadline is not extended when service is made by mail [*Westrec Marina Mgmt., Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 CA4th 1042, 1047-1049, 102 CR2d 673 ; CCP § 12a (extension for holiday)].

If notice of entry of judgment has not been given, the court's power to rule expires 60 days after the first notice of intention to move for a new trial was filed [CCP § 660]. If the court does not rule on the motion within these time limits, the motion is deemed to be denied without further court order [CCP § 660].

The 60-day time limit is jurisdictional. It cannot be evaded by stipulation or nunc pro tunc order [see *Fischer v. First Int'l. Bank* (2003) 109 CA4th 1433, 1450-1451, 1 CR3d 162 (when there was no notice of entry of judgment, order granting motion for new trial more than 60 days after filing of notice of intention to move for new trial was void for lack of jurisdiction)].

If there has been no entry of judgment, the trial court is not bound by the 60-day time limitation. For example, when only a "Ruling After Court Trial" has been entered, the court may treat the motion for new trial as a motion to reconsider, reopen, or reargue and enter a judgment different from that first announced, even though the time to rule on a new trial motion has expired [*In re Marriage of Micalizio* (1988) 199 CA3d 662, 672, 245 CR 673] .



Cross Reference:

Additional discussion of hearing on motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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Chapter 21 Motion for New Trial
IV. HEARING ON MOTION FOR NEW TRIAL

2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.21

21.21 Court May Grant Conditional Relief.

The court's decision on a motion for new trial may be conditioned on the parties' performance of certain actions. If the parties perform the condition within the allotted time, the court will either grant or deny the motion for new trial [see *Horsford v. Board of Trs. of Cal. State Univ.* (2005) 132 CA4th 359, 386, 33 CR3d 644] .

Examples:

- The court may grant a motion for new trial if the parties do not agree to a greater or lesser amount of damages [CCP § 662.5; *Jehl v. Southern Pac. Co.* (1967) 66 C2d 821, 832, 59 CR 276, 427 P2d 988 (additur); *Hughes v. Hearst Publications, Inc.* (1947) 79 CA2d 703, 704, 180 P2d 419 (remittitur)].
- The court may grant a new trial if the moving party agrees to pay the other party's costs [*Chodos v. Superior Court* (1964) 226 CA2d 703, 707, 38 CR 301] .

As long as the trial court issues its order on the new trial motion within the 60-day period set forth in CCP § 660, it may exercise discretion in setting reasonable time limits extending beyond the 60-day period for parties to perform conditions set by the order [see *Schelbauer v. Butler Mfg. Co.* (1984) 35 C3d 442, 454 n6, 198 CR 155, 673 P2d 743] .

➡ Cross References:

Discussion of court's ruling on motion, see 21.20.

Additional discussion of hearing on motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursGeneral OverviewCivil
ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureRemediesCosts & Attorney

FeesCostsGeneral Overview



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21.22 Court May Grant Alternative Relief.

21.22[1] Court May Amend Statement of Decision. In a nonjury case, in lieu of granting a new trial, the court may change or add to the statement of decision, modify the judgment in whole or in part, or grant a new trial on all or part of the issues. The court may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and additional evidence [CCP § 662]. However, a court may not reopen a case to allow presentation of additional evidence if the motion to reopen is made before judgment. If the motion is made before judgment, the motion invokes the court's fundamental authority under CCP § 128(a)(3) and *Evid Code* § 320 to control the order of proof and the conduct of proceedings before it [*Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 CA3d 1035, 1052 n7, 237 CR 14] .

The purpose of allowing the trial court to change or amend its statement of decision is to avoid the necessity of a new trial [see *Spier v. Lang* (1935) 4 C2d 711, 714, 53 P2d 138 ; *Mayer v. C.W. Driver* (2002) 98 CA4th 48, 63, 120 CR2d 535] .

21.22[2] To Grant Alternative Relief, Court Must Observe Jurisdictional Requirements. If a trial court does not have jurisdiction to grant a new trial, it does not have jurisdiction to grant alternative relief. The court's power to grant alternative relief may be exercised only in conjunction with a ruling on a motion for new trial [*Avery v. Associated Seed Growers, Inc.* (1963) 211 CA2d 613, 622-623, 27 CR 625] .

For example, a notice of intention to move for a new trial that is prematurely filed confers no jurisdiction to the court to grant a new trial under CCP § 657 and, therefore, the trial court has no power to vacate a judgment and to enter a new and different judgment under CCP § 662 [see *Fong Chuck v. Chin Po Foon* (1947) 29 C2d 552, 553-554, 176 P2d 705] .

21.22[3] If Court Grants Alternative Relief, Modified Judgment Supersedes Prior Judgment. When a court grants alternative relief, the proper procedure is for the court to deny the motion for new trial and grant the alternative relief. However, even if the court's order does not expressly dispose of the new trial motion, when the court vacates the prior judgment and enters a new judgment within the CCP § 660 60-day period [see 21.20], the new judgment supersedes the prior judgment [*Medak v. Cox* (1970) 12 CA3d 70, 74, 90 CR 452] .

Once the court enters a modified judgment, a party may no longer appeal the superseded judgment [*Neff v. Ernst* (1957) 48 C2d 628, 634, 311 P2d 849] . However, if the modified judgment is subsequently vacated for lack of jurisdiction, the earlier judgment is reinstated [see *In re Marriage of Micalizio* (1988) 199 CA3d 662, 670, 245 CR 673] . The reinstated judgment is a new judgment for purposes of appeal and the time for filing a notice of appeal from that judgment begins to run from the date the trial court declares the second judgment void [*In re Marriage of Micalizio* (1988) 199 CA3d 662, 671-672, 245 CR 673] .



Cross Reference:

Discussion of relief after hearing on motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsAppellate JurisdictionState Court Review



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21.23 Court May Grant Motion For New Trial.

21.23[1] If Court Grants Motion, Court Must Prepare Statement of Grounds. If a court grants a motion for new trial, the order must state the ground or grounds on which the court relied [CCP § 657]. The court should use the language of CCP § 657 (list of statutory grounds) or a reasonable approximation [*Mercer v. Perez* (1968) 68 C2d 104, 111, 65 CR 315, 436 P2d 315] .

21.23[2] If Court Grants Motion, Court Must Specify Reasons. The court must specify in writing the reasons for granting the new trial for each of the grounds stated in the order [CCP § 657; see *Oakland Raiders v. National Football League* (2007) 41 C4th 624, 633-635, 61 CR3d 634, 161 P3d 151] . An order granting a new trial, under the limitations of CCP § 657, is subject to independent review when the order lacks an adequate specification of reasons for granting a new trial, rather than the normal review for abuse of discretion [*Oakland Raiders v. National Football League* (2007) 41 C4th 624, 632-633, 61 CR3d 634, 161 P3d 151] .

The reasons for granting the new trial must be in writing. An oral recital by the court during the hearing is insufficient [*La Manna v. Stewart* (1975) 13 C3d 413, 423, 118 CR 761, 530 P2d 1073] . A reference in a written order to a transcription of an oral statement of reasons made at a prior hearing is not sufficient [*Steinhart v. South Coast Area Transit* (1986) 183 CA3d 770, 773-774, 228 CR 283] . The judge must furnish a concise, clear statement of the reasons why he or she finds one or more of the grounds of the motion to be applicable to the case before him or her. There is no hard and fast rule as to the content of a specification of reasons, which necessarily varies according to the facts and circumstances of each case [*Mercer v. Perez* (1968) 68 C2d 104, 113, 115, 65 CR 315, 436 P2d 315 ; *Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 CA4th 1679, 1695, 42 CR2d 136] .

A court's specification of reasons may refer to findings located in a different part of the order. The court need not unnecessarily burden a new trial order by reiterating what it has already said at length with respect to another issue before it, as long as it makes clear to a reviewing court the basis for its decision [*Lane v. Hughes Aircraft Co.* (2000) 22 C4th 405, 413, 93 CR2d 60, 993 P2d 388] .

If the ground relied on is insufficiency of evidence or excessive or inadequate damages, the judge's specification of reasons must identify the portion of the record which convinces the judge that the court or jury should have reached a different verdict or decision [*Bigboy v. County of San Diego* (1984) 154 CA3d 397, 406, 201 CR 226] . On the other

hand, the court is not required to state the reasons why it considers any part of the jury's award to be supported by the evidence [*Martinides v. Mayer* (1989) 208 CA3d 1185, 1197, 256 CR 679] .

21.23[3] If Court Grants Motion, Court Must Observe Time Limitations. The court's statement of grounds [see 21.23[1]] must be made before the expiration of the 60-day period set forth in CCP § 660 [*Sanchez-Corea v. Bank of Am.* (1985) 38 C3d 892, 903-905, 215 CR 679, 701 P2d 826] .

The court may include the reasons in the order or may prepare a separate document filed 10 days after the filing of the order [CCP § 657; see *Fergus v. Songer* (2007) 150 CA4th 552, 564-566, 59 CR3d 273] . The 10-day period runs from the determination of the motion rather than from the filing of the order [*Swanson v. Western Greyhound Lines, Inc.* (1969) 268 CA2d 758, 759-760, 74 CR 383] . This 10-day period within which the court must specify its reasons for granting a new trial is included in the 60-day period set forth in CCP § 660 [*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 CA4th 1679, 1692, 42 CR2d 136] .

The additional 10-day period permitted by CCP § 657 for filing a statement specifying the reasons for granting the motion [see 21.23[2]] does not apply to the statement of the grounds for granting the motion [*Sanchez-Corea v. Bank of Am.* (1985) 38 C3d 892, 905, 215 CR 679, 701 P2d 826] .

If the court did not state the grounds for granting the motion in the order, the court cannot correct its order by filing a statement of the grounds after the expiration of the 60-day period provided by CCP § 660 [*Sanchez-Corea v. Bank of Am.* (1985) 38 C3d 892, 903-904, 215 CR 679, 701 P2d 826] .

Cross Reference:

Discussion of court's ruling on motion, see 21.20.

21.23[4] If Court Grants Motion, Counsel May Not Prepare Grounds and Reasons. The court may not direct an attorney for a party to prepare an order granting a new trial or the specification of reasons for granting it [CCP § 657]. The trial court is also precluded from adopting a specification of reasons voluntarily drafted by counsel [*Tramell v. McDonnell Douglas Corp.* (1984) 163 CA3d 157, 168-170, 209 CR 427] . However, a trial court may adopt material in a party's brief or memorandum. The critical factor is the court's reasoning process, not whose language is being employed [*Lane v. Hughes Aircraft Co.* (2000) 22 C4th 405, 415, 93 CR2d 60, 993 P2d 388] .

Counsel may further assist the court by calling any deficiency to its attention within the 10-day period for filing the specification of reasons so that the court may correct the order [*Mercer v. Perez* (1968) 68 C2d 104, 123 n8, 65 CR 315, 436 P2d 315] .

21.23[5] If Court Grants Motion, Court May Not Correct Order Nunc Pro Tunc. The court may not correct its order or specification of reasons nunc pro tunc after the expiration of the 10-day period for filing a separate specification of reasons. If the court does so, it acts in excess of its jurisdiction [*Mercer v. Perez* (1968) 68 C2d 104, 121, 65 CR 315, 436 P2d 315] .

Cross Reference:

Discussion of relief after hearing on motion for new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.24 Court May Deny Motion for New Trial.

The court may deny the motion for new trial by entering a minute order to that effect [CCP § 660]. The court is not required to prepare a statement of reasons for the denial [see CCP § 657].

There is no right to appeal from the trial court's denial of the motion; the ruling may be reviewed only through an appeal of the judgment [*Rodriguez v. Barnett* (1959) 52 C2d 154, 156, 338 P2d 907] .



Cross Reference:

Discussion of review on appeal, see 21.28.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.25 Prevailing Party Must Give Notice of Ruling to Other Parties.

When a court grants or denies a motion for new trial, unless the court orders otherwise, the prevailing party must give notice of the court's decision to all other parties or their attorneys, as set forth in *CCP* §§ 1010-1020, unless all the parties waive notice in open court, and the waiver is entered in the minutes [*CCP* § 1019.5(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials



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21.26 CHECKLIST: Seeking Review of Order Granting or Denying New Trial.

☐ Determine whether trial court granted, in whole or part, or denied, motion for new trial.

☐ If court granted motion for new trial, consider seeking writ relief.

Authority:
CCP § 1085

Discussion:
See 21.27

☐ If court denied motion for new trial, consider filing appeal from entire judgment.

Authority:
CCP § 904.1(a)

Discussion:
See 21.28

☐ File appeal papers before deadline.

☐ Observe proper time limits to file petition for writ.

Authority:
CCP § 1088

Discussion:
See 21.30

☐ Denial of motion for new trial extends time to appeal judgment until earliest of:

☐ 30 days after trial court clerk mails, or party serves, order denying motion or notice of entry of that order.

☐ 30 days after denial of motion by operation of law.

☐ 180 days after entry of judgment.

Authority:

Cal Rules Ct, Rule 8.108(b)

Discussion:

See 21.30

☐ File notice of cross-appeal, if desired.

Authority:

Cal Rules Ct, Rule 8.108(f)

Legal Topics:

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

Civil Procedure Judgments Relief From Judgment Motions for New Trials Civil Procedure Remedies Writs Common Law Writs General Overview Civil Procedure Appeals Reviewability Time Limitations



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21.27 Order Granting New Trial Is Appealable.

An order granting a new trial is reviewable by writ [*CCP § 1085*]. If a party moves for a new trial on all the issues and the court grants a new trial only on certain issues, the moving party may appeal the order [*Cobb v. University of S. Cal.* (1995) 32 CA4th 798, 802, 38 CR2d 543 ; *Ferraro v. Pacific Fin. Corp.* (1970) 8 CA3d 339, 355, 87 CR 226] .

If the trial court substantially modifies the judgment, for purposes of appeal, the amended judgment becomes the final judgment from which a new filing deadline begins to run [*Neff v. Ernst* (1957) 48 C2d 628, 634, 311 P2d 849] .

➡ Cross Reference:

Discussion on seeking review of order granting or denying new trial, see California Forms of Pleading and Practice, Ch. 371, Motions After Trial (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review



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21.28 Order Denying New Trial Is Reviewable on Appeal From Judgment.

An order denying a new trial is reviewable on appeal from the judgment [*CCP § 904.1(a)(4); City of Los Angeles v. Glair (2007) 153 CA4th 813, 819-820, 63 CR3d 280*].



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21.29 Appellate Court Reviews New Trial Order Under Abuse of Discretion Standard.

Determining a motion for a new trial is within the trial court's broad discretion. Therefore, an appellate court will not disturb the trial court's decision unless a manifest and unmistakable abuse of discretion clearly appears [*Whitlock v. Foster Wheeler, LLC* (2008) 160 CA4th 149, 157B160, 72 CR3d 369] . This is particularly true when the court grants a new trial, because an order granting a new trial does not finally dispose of the matter [*Jiminez v. Sears, Roebuck & Co.* (1971) 4 C3d 379, 387, 93 CR 769, 482 P2d 681] .

When an order granting a new trial states the ground as jury misconduct but fails to specify the reasons for that conclusion, the order is not void. The order may be sustained if a new trial should have been granted on any ground set out in CCP § 657, except the grounds of insufficiency of the evidence or inadequate or excessive damages. When the trial court provides a statement of reasons as required by CCP § 657, the appropriate standard of judicial review is abuse of discretion. But when there is no statement of reasons, an appellate court's use of an abuse of discretion standard of review would subvert the purposes that underly CCP § 657's statement-of-reasons requirement [*Oakland Raiders v. National Football League* (2007) 41 C4th 624, 636, 61 CR3d 634, 161 P3d 151] .

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsAppellate
JurisdictionState Court ReviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion



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21.30 Observe Time Limits for Filing and Serving Notice of Appeal After Court Denies Motion for New Trial.

If the court denies a motion for new trial, the time to appeal from the judgment is extended for all parties until the earliest of [*Cal Rules Ct, Rule 8.108(b)*]:

- 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal Rules Ct, Rule 8.108(b)(1)(A)*].
- 30 days after denial of the motion by operation of law [*Cal Rules Ct, Rule 8.108(b)(1)(B)*].
- 180 days after entry of judgment [*Cal Rules Ct, Rule 8.108(b)(1)(C)*].

If a party files a valid motion for new trial, and the trial court issues a timely order denying that motion but no one serves the order or notice of entry of that order, the applicable deadline for filing the notice of appeal from the judgment is 180 days after entry of judgment [*Anderson v. Chikovani (2010) 181 CA4th 1397, 1399-1401, 105 CR3d 553*] .



Cross Reference:

Discussion of time limits, see California Forms of Pleading and Practice, Ch. 42, Appeal: Notice of Appeal (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityTime Limitations



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21.31 If Order Granting New Trial Is Reversed on Appeal, Original Judgment Is Reinstated.

If the appellate court reverses the order granting a new trial, the original judgment is reinstated [*La Manna v. Stewart* (1975) 13 C3d 413, 425, 118 CR 761, 530 P2d 1073].



Warning:

If the party who moved for a new trial failed to make a protective cross-appeal from the judgment, the judgment automatically becomes final on reinstatement [*Miller v. Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 699, 106 CR 1, 505 P2d 193] .

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsRemands



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21.32 Notice of Intention to Move for New Trial.

Notice of Intention to Move for New Trial.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	NOTICE OF INTENTION TO MOVE FOR NEW
Defendant.	)	TRIAL
	)	
	)	

To _____ [party, e.g., Plaintiff John Smith] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____ [moving party, e.g., Defendant Mary Jones] intends to move this court, at a time to be set by the court, to vacate and set aside _____ [the verdict of the jury or the decision of the court] rendered in favor of _____ [adverse party, e.g., Plaintiff John Smith] and against _____ [moving party, e.g., Defendant Mary Jones] and the judgment entered on that _____ [verdict or decision] and to grant _____ [moving party, e.g., Defendant Mary Jones] a new trial on _____ [all of the issues or the following issues only: _____ (specify)].

The motion will be made on the following grounds:

[Choose appropriate statutory ground or grounds from the following and list separately.]

1. Irregularity in the proceedings of the court prevented _____ [*specify party, e.g., Defendant Mary Jones*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].
2. Irregularity in the proceedings of the jury prevented _____ [*specify party, e.g., Defendant Mary Jones*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].
3. Irregularity in the proceedings of the adverse party prevented _____ [*specify party, e.g., Defendant Mary Jones*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].
4. An order of the court prevented _____ [*specify party, e.g., Defendant Mary Jones*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].
5. An abuse of discretion prevented _____ [*specify party, e.g., Defendant Mary Jones*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].
6. There was misconduct of the jury as shown by the declaration(s) of _____ [*name(s)*].
7. There was _____ [*accident or surprise or accident and surprise*] at trial that ordinary prudence could not have guarded against as shown by the declaration(s) of _____ [*name(s)*].
8. There is newly discovered evidence, material for the moving party, _____ [*name*], that could not with reasonable diligence have been discovered and produced at trial as shown by the declaration(s) of _____ [*name(s)*].
9. _____ [*Excessive or Inadequate*] damages appear to have been awarded as shown by the minutes of the court.
10. The evidence is insufficient to justify the _____ [*verdict or decision*] as shown by the minutes of the court.
11. The _____ [*verdict or decision*] is against law as shown by the minutes of the court.
12. There was an error in law, occurring at trial and excepted to by the moving party, as shown by the minutes of the court.
13. There is a lack of a phonographic report of the trial due to _____ [*death of the reporter or disability of the reporter or loss or destruction of the reporter's notes in whole or substantial part*] as shown by the declaration(s) of _____ [*name(s)*].
14. There was a _____ [*loss or destruction*] of the _____ [*bill of exceptions or statement of the case*] due to public calamity as shown by the declaration(s) of _____ [*name(s)*].

[*EITHER*]

With respect to the grounds specified in Paragraphs _____ [*specify numbers*], above, this motion will be made on _____ [*affidavits or declarations*].

[*AND/OR*]

With respect to the grounds specified in Paragraphs _____ [*specify numbers*], above, this motion will be made on the minutes of the court.

[*CONTINUE*]

This motion is also based on a supporting memorandum to be served and filed _____ [herewith or hereafter].

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

NOTES.

Authority:

CCP § 659



Timing:

See 21.07

Grounds:

See 21.09

Related Forms of Declaration:

See 21.33, 21.34, 21.35

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 155.50 -155.55 (Matthew Bender)



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21.33 Declaration in Support of Motion for New Trial.

Declaration in Support of Motion for New Trial.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____

DECLARATION OF _____ [name]

IN SUPPORT OF MOTION FOR NEW TRIAL

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 Mary Jones or any other person with personal knowledge of the facts].

[In separate, consecutively numbered paragraphs state the grounds for the motion in the statutory language of CCP §§ 657, 657.1, or 663.1, specifying facts that support the grounds, e.g., if the ground is irregularity of the court, jury, or adverse party, use Paragraph 2.]

2. There was irregularity in the proceedings of the _____ [court and/or jury and/or adverse party] by which Defendant Mary Jones was prevented from having a fair trial in that _____ [specify misconduct of court, jury, or adverse party, e.g., the court expressed prejudice against Defendant's use of her daughter as a witness to testify against Plaintiff, notwithstanding the competency of the testimony or Juror Jane Lee witnessed the accident in

question and had formed an opinion that Defendant was negligent but on voir dire examination, Juror Jane Lee falsely denied having any knowledge of the accident or other misconduct]. This occurred on _____ [date], and was a departure from the orderly method of disposition of an action, materially affecting the substantial rights of _____ [specify moving party, e.g., Plaintiff John Doe] in that _____ [specify moving party, e.g., Plaintiff John Doe] did not receive a fair trial because _____ [specify reasons, e.g., the court prejudged the testimony of the witness and intimated that unless the witness were withdrawn, the use of the witness would arouse a prejudice in the court's mind against the plaintiff or the juror who had personal knowledge of the accident told the other jurors during deliberations that she knew the fence was poorly maintained and was not surprised that it fell and that this expression of opinion improperly influenced the jury's verdict]. A different result is likely on retrial in that _____ [specify how verdict may differ, e.g., the verdict may be rendered in favor of the moving party if the testimony of the witness is considered without prejudice because it is competent testimony to prove that defendant received the money in question or the amount of damages may be reduced if the jurors are guided solely by evidence produced at trial or specify other difference]. [If ground is irregularity of the jury add: _____ (specify, e.g., Counsel and/or Moving parties) had no knowledge of the facts constituting misconduct or irregularity in the proceedings of the jury before the rendition of the verdict.] Because of the nature and the effect of this irregularity, this declaration in support of a motion for new trial was prepared.

[If ground is accident or surprise]

3. There was _____ [accident and/or surprise] occurring at trial that ordinary prudence could not have guarded against in that _____ [specify party, e.g., Plaintiff John Doe] was _____ [surprised and/or accident occurred] when _____ [specify incident, e.g., a witness for Plaintiff gave testimony at trial that was entirely different from testimony that he/she had earlier stated would be given]. This incident materially affected the substantial rights of _____ [moving party, e.g., Plaintiff John Doe], prejudicing the outcome of the case in that _____ [state reasons, e.g., Plaintiff's case would have been stronger if the witness had testified as expected or if the witness were not called, Plaintiff's case would have been stronger than it was after the witness had testified against him]. A different result is likely on retrial in that _____ [state how verdict or decision may differ, e.g., damages may be reduced or a verdict may be rendered in Plaintiff's favor] because _____ [state reasons, e.g., counsel has procured a witness to testify to the facts as stated to counsel by the first witness or counsel has procured a witness to impeach the testimony of the first witness]. Due to the _____ [accident and/or surprise], counsel was unable to take these measures at trial. _____ [Specify person, e.g., Moving party or Counsel] exercised due diligence and prudence to guard against this _____ [accident and/or surprise] when _____ [state facts to show diligence, e.g., counsel diligently questioned the witness and investigated the facts of the case and it was impossible to foresee that the witness would testify differently from the facts previously stated to counsel]. This declaration in support of a motion for new trial has been prepared because of the prejudicial nature of the _____ [accident and/or surprise].

[If the ground is newly discovered evidence]

4. There is newly discovered evidence, material for _____ [specify moving party, e.g., Plaintiff John Doe], that he could not, with reasonable diligence, have discovered and produced at trial in that after the trial of the above-entitled action, _____ [specify moving party, e.g., Plaintiff John Doe] learned for the first time, on or about _____ [date], that _____ [state evidence on which reliance is placed, e.g., a new witness, Tom Doe, occupied a house near the scene of the accident and saw the accident in question]. Lack of this evidence at trial materially affected the substantial rights of _____ [specify moving party, e.g., Plaintiff John Doe] in that _____ [specify reasons, e.g., there were no eyewitnesses produced at trial]. A different result is likely on retrial because _____ [state how verdict or decision may differ, e.g., the amount of damages may be increased or the decision may be rendered in favor of Plaintiff]. This evidence is not merely cumulative or impeaching but is material in that _____ [explain probable effect of evidence, e.g., the

newly discovered evidence furnishes a plausible and probable explanation of what, in its absence, had seemed to present the impossible situation of two cars parked in the same place]. _____ [*Specify moving party, e.g., Plaintiff John Doe exercised due diligence to discover and produce this evidence for trial when _____ [specify person who exercised due diligence, e.g., his attorney] _____ [state facts to show due diligence, e.g., interviewed all neighbors near the scene of the accident, went twice to the house of the newly discovered witness only to find it closed and unoccupied, was never told that the witness was present at the accident]. After trial, this evidence was discovered and this declaration was prepared in support of a motion for new trial.*

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 § 658



Timing:

See 21.07

Grounds:

See 21.10[1]

Related Forms of Declaration:

See 21.34, 21.35

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 155.50 -155.55 (Matthew Bender)



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Chapter 21 Motion for New Trial
VI. FORMS

2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.34

21.34 Declaration of Juror in Support of Motion for New Trial.

Declaration of Juror in Support of Motion for New Trial.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF
_____ [name],	)	_____ [name]
Defendant.	)	IN SUPPORT OF MOTION
	)	FOR NEW TRIAL
	)	

I, _____ [name], declare:

1. I served as a juror in the above-captioned action.

2. _____ [Specify facts indicating irregularities in jury proceedings or jury misconduct, e.g., On the third day of trial, Juror John Smith approached me in the jury room during a recess. He stated that we should be sent to the jury room immediately because we could all arrive at a verdict without hearing any additional testimony. This statement was made before the close of the case and before submission of the case to the jury].

3. _____ [Specify any additional facts indicating irregularities in jury proceedings or jury misconduct, e.g., During deliberations Juror Mary Jones expressed the opinion that she opposed a city's right to condemn property for a public purpose. The plaintiff in this action is a municipality seeking to condemn private property for a public purpose].

4. _____ [*Specify any additional facts indicating irregularities in jury proceedings or jury misconduct, e.g., Juror John Smith stated to all jurors during deliberations that the moving party's expert witness was unqualified, and that he was enrolled in a class on the subject matter of the controversy and had solicited and received information from his instructor with respect to the qualifications of expert witnesses in that subject area*].

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 § 657(2)



Timing:

See 21.07

Grounds:

See 21.10[2]

Related Forms of Declaration:

See 21.33, 21.35

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 155.50 -155.55 (Matthew Bender)



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Chapter 21 Motion for New Trial
VI. FORMS

2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.35

21.35 Declaration Supporting Motion for New Trial Showing "No Knowledge" of Jury Misconduct.

Declaration Supporting Motion for New Trial Showing "No Knowledge" of Jury Misconduct.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____, [name],

Plaintiff,

VS.

_____ [name],

Defendant.

$$\begin{pmatrix}) \\) \\) \\) \\) \\) \end{pmatrix}$$

NO. _____

DECLARATION OF

_____ [name]

IN SUPPORT OF MOTION

FOR NEW TRIAL

I, _____ [*name*], declare:

1. I am _____ [attorney of record for the moving party herein *or* the moving party herein].

[EITHER]

2. There were irregularities in the proceedings of the jury that prevented _____ [name of moving party] from having a fair trial in that: _____ [specify acts taking place at trial which constituted irregularities].

[OR]

2. There was misconduct of the jury in that: _____ [*specify matters constituting instances of misconduct*].

3. I had no knowledge of the jury _____ [*irregularities or misconduct*] alleged before the rendering of the verdict in the above-captioned matter. Thereafter, I learned of the _____ [*irregularities or misconduct*] alleged.

4. To the best of my information and belief, _____ [*my client or my attorney*] had no knowledge of the jury _____ [*irregularities or misconduct*] before the rendering of the verdict in the above-captioned matter.

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:

Weathers v. Kaiser Found. Hosps. (1971) 5 C3d 98, 103, 95 CR 516, 485 P2d 1132



Timing:

See 21.07

Grounds:

See 21.10[3]

Related Forms of Declaration:

See 21.33, 21.34

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 155.50 -155.55 (Matthew Bender)



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Chapter 21 Motion for New Trial
VI. FORMS

2-21 MB Practice Guide: Trial & Post-Trial Civil Proc 21.36

21.36 Stipulation and Order Extending Time to File Affidavits or Declarations.

Stipulation and Order Extending Time to File Affidavits or Declarations.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION AND ORDER
_____ [name],	)	EXTENDING TIME TO FILE
Defendant.	)	AFFIDAVITS OR
	)	DECLARATIONS
	)	

IT IS HEREBY STIPULATED by the parties and their respective undersigned attorneys that _____
[specify moving party, e.g., Plaintiff Mary Jones may have an additional _____ [number not exceeding
20] days, up to and including _____ [date], in which to serve and file her _____
[affidavits or declarations] in support of her motion for new trial [continue if appropriate : and that
_____ (specify adverse party, e.g., Defendant John Smith) will have _____ (number
not exceeding 20) additional days to serve and file his _____ (affidavits or declarations)].

Dated: _____.

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Plaintiff

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

IT IS SO ORDERED:

_____ [*signature*]

Judge of the Superior Court

NOTES.

Authority:

CCP § 659a



Timing:

See 21.07[3]

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 155.50 -155.55 (Matthew Bender)



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Chapter 22 Mistrial

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.syn

§ 22.syn Synopsis to Chapter 22: Mistrial

22.01 Scope.

22.02 Objective and Strategy.

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22.05[3] Misconduct of Juror Is Grounds for Mistrial.

22.05[4] Misconduct of Judge Is Grounds for Mistrial.

22.05[5] Testimony by Presiding Judge or Juror Is Grounds for Mistrial.

22.05[6] Illness of Juror or Inability to Perform Is Grounds for Mistrial.

22.05[7] Inability of Judge to Complete Trial Is Grounds for Mistrial.

22.05[8] Discharge of Jury Without Rendering Verdict Is Grounds for Mistrial.

22.05[9] Jury Returns Incomplete Special Verdict.

22.06 Comparing Mandatory Grounds for Mistrial to Discretionary Grounds.

22.07 Make Motion for Mistrial Promptly.

22.07[1] Motion for Mistrial Requires Immediate In-Trial Motion and Request for Admonition.

22.07[2] Make Request for Evidentiary Hearing When Needed.

22.07[3] Counsel Need Not Make Multiple Objections.

22.08 Making Oral Motion for Mistrial.

22.08[1] Make Motion Promptly to Avoid Waiver.

22.08[2] Make Motion for Mistrial Orally During Trial.

22.08[3] Phrasing Oral Motion for Mistrial.

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22.09 CHECKLIST: Opposing Motion for Mistrial.

22.10 Options and Strategies.

22.11 Grounds for Opposing Motion for Mistrial

22.11[1] Motion for Mistrial Should Be Denied Because No Misconduct Occurred.

22.11[2] Motion for Mistrial Should Be Denied Because There Is No Incurable Prejudice.

22.11[3] Motion for Mistrial Should Be Denied Because Motion Was Untimely.

22.12 Phrasing Oral Motion Opposing Mistrial.

22.13 CHECKLIST: Actions Following Entry of Order Declaring Mistrial.

22.14 Provide Notice of Order Denying or Declaring Mistrial.

22.15 Court May Order Retrial of Action.

22.16 Court May Order Partial Mistrial.

22.17 Court May Dismiss Action for Failure to Prosecute.

22.18 CHECKLIST: Seeking Review of Order Granting or Denying Motion for Mistrial.

22.19 Order Declaring or Denying Mistrial Is Nonappealable.

22.20 Effect of Party's Failure to Timely Object at Trial.

22.21 Reviewing Court Applies Abuse of Discretion Standard.

22.22 Order on Motion for Mistrial.



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Chapter 22 Mistrial
I. STRATEGY

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.01

22.01 Scope.

This chapter covers:

- Objectives and strategy for motions for mistrial [*see 22.02*].
- Bringing a motion for mistrial [*see 22.03 -22.08*].
- Opposing a motion for mistrial [*see 22.09 -22.12*].
- Actions to take following an order declaring a mistrial [*see 22.13 -22.17*].
- Seeking review of an order granting or denying motion for mistrial [*see 22.18 -22.21*].

Core Statute:

CCP § 657

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for Mistrial



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Chapter 22 Mistrial
I. STRATEGY

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.02

22.02 Objective and Strategy.

A motion for mistrial is an important element in a litigation strategy. Generally, a motion for mistrial is brought when there has been some disruptive misconduct, either by counsel, judge or jury. When misconduct during trial may result in irreparable injury to a party, counsel must promptly decide whether to bring a motion for mistrial. The objection must be made *immediately* or the party risks waiving any claim of misconduct or error.

The motion for mistrial can be the most critical motion during trial because the subject matter is lost (by waiver) if counsel fails to make the motion. It also can disrupt opposing counsel, often at a critical stage. However, it can create hostility between counsel and the court in some instances, and should be judiciously used. In cases in which pretrial proceedings have indicated that opposing counsel is likely to violate previous orders, motions in limine that were granted, or other rules of proper procedure, or to divulge privileged matter, counsel should be ready to make such a motion. When opposing counsel makes a succession of small errors, a succession of motions for a mistrial (though unlikely to be granted) will help to focus the court on the overall failure of the trial court to control proceedings or to avoid reversal. In such a case, the cumulative effect of numerous small errors, for which motions for a mistrial were denied, might render the entire trial defective.

Judge's Perspective:

It is rare for there to be a written motion for mistrial, since the motion must be made immediately to avoid waiver. Generally, the motion could not have been anticipated and is made orally, as well as the opposition to the motion.

There may be strategic reasons not to bring a motion for mistrial, such as highlighting damaging evidence or alienating the judge or jury. Thus, the motion needs to be carefully considered before being made.

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 ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsMotions for Mistrial



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Chapter 22 Mistrial
II. MOVING FOR MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.03

22.03 CHECKLIST: Moving for Mistrial.

- ☐ Determine if there are grounds for a mistrial.
- ☐ Misconduct of counsel.
 - ☐ Misconduct of jury.
 - ☐ Misconduct of judge.
 - ☐ Testimony by judge or juror.
 - ☐ Illness of juror.
 - ☐ Judge's inability to complete trial.
 - ☐ Jury discharged without rendering verdict.
 - ☐ Failure to timely complete short cause trial.
 - ☐ Jury returned incomplete special verdict.
 - ☐ Misconduct is prejudicial.

Authority:

*CCP § 657***Discussion:**

See 22.05

- ☐ Determine if mistrial is mandatory or discretionary.

Discussion:

See 22.06

- ☐ Determine if bringing a motion for mistrial is the best strategy.

Discussion:

See 22.04

- ☐ Make the motion for mistrial immediately, as soon as the misconduct occurs.

Discussion:

See 22.07, 22.08[1]

- ☐ Make the motion orally during trial.

Discussion:

See 22.08[2], [3]

- ☐ Request evidentiary hearing, if necessary.

Discussion:

See 22.07[2]

- ☐ Request that the judge admonish the jury regarding the misconduct.

Discussion:

See 22.07[1]

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureTrialsMotions for MistrialEvidenceCompetencyJudgesEvidenceCompetencyJurorsGeneral Overview



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Chapter 22 Mistrial
II. MOVING FOR MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.04

22.04 Options and Strategies.

22.04[1] General Principles of Moving for Mistrial. For counsel to bring a motion for mistrial, both of the following must be conditions must be met:

- A valid ground for the motion [see 22.05].
- A timely motion made [see 22.07].

Counsel will generally bring a motion for a mistrial only during a jury trial. Judges rarely feel that misconduct by counsel in a non-jury trial, for example, will affect their ability to impartially decide the case.

Counsel should bring the motion for mistrial orally because it must be made immediately when the conduct in question occurs, or risks being waived.

If a mistrial is granted, it is as if there was never a trial at all. The case generally returns to trial setting. Similarly, discovery is reopened and the new discovery cut-off dates will be measured from the date set for retrial.

Consider:

Counsel should carefully consider making a motion for mistrial. Before bringing a motion for mistrial, consider how the case is currently proceeding. If the jury is likely to return a favorable verdict despite the misconduct, counsel may not want to pursue a mistrial. On the other hand, if the jury seems disposed against counsel's client, it may be more advantageous to move for a mistrial. Also, consider the extent of the prejudicial effect of the misconduct at issue. Will the jury truly be prejudiced? Can the prejudice be cured by an admonition to the jury? Finally, consider the impact of any delay on the client's interests. If a mistrial will result in a lengthy delay, it may not be in the client's best interests, depending on the extent of misconduct at issue.

Other considerations include:

- Will bringing a motion for mistrial underscore or highlight potentially damaging evidence?

- What will the retrial cost and will the client be disadvantaged in a retrial because the other side will have seen counsel's trial strategy?
- Will bringing a motion for mistrial alienate or anger the judge?
- If the error that would be the basis for mistrial is likely to be harmless error, is bringing the motion futile?

However, keep in mind whether there are situations in which a motion for a mistrial should be made. Counsel should make the motion at any point where it is evident that an error has occurred, and the matter *can* be corrected immediately, such as a witness's reference to protected material or testimony on a subject precluded by motion in limine. Failure to move for a mistrial on such events may result in waiver.



Warning:

Even if counsel believes a motion for mistrial may be denied by the trial judge, raise the issue during the trial to preserve the issue for appeal. This is especially true if the misconduct is truly prejudicial to the client. Failure to do so may result in a waiver of the right to later challenge the conduct through a motion for a new trial or an appeal.



Strategic Point:

A motion for mistrial should always be raised outside the presence of the jury. This allows the attorneys to fully argue their positions without influencing or prejudicing the jury. Counsel should ask the court to approach the bench, or for a break, to discuss. If this is not permitted, counsel should say "I make a motion under *CCP* § 657." If the motion is made in chambers or at the bench, counsel should request a court reporter to record the motion, argument in opposition, and the court's ruling.

If the court evidences a willingness to be completely wrong and to rule consistently for the opposing side when the bases for the rulings are clearly wrong, then as the trial continues it is advisable to move for mistrial immediately. It is often equally effective to object loudly and immediately seek a side bar to state the basis for the objection and to add, if necessary, a motion for a mistrial. Also, state to the court that the motion is being made to preserve the matter for appeal, and not as a matter of disrespect, which can avoid the potential to alienate the court.

22.04[2] Comparing Motion for Mistrial With Motion for New Trial. A motion for mistrial and a motion for a new trial are different motions. A mistrial is the termination of a trial before its conclusion, and has the effect of no trial at all. No matter how far along the trial is, the granting of a mistrial terminates the trial and the case must be retried from the start [*Estate of Bartholomae* (1968) 261 CA2d 839, 842, 68 CR 332] .

A motion for new trial is different in that there has been a completed trial which, if there is sufficient reason, may be set aside. A new trial constitutes a reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee [CCP § 656]. Although these two are different motions, several of the grounds for granting a mistrial and granting a new trial are identical.

Examples:

The following examples constitute grounds for bringing *either* a motion for a mistrial or a motion for a new trial [CCP § 657(1), (2)]:

- Misconduct of counsel.
- Misconduct of the judge.
- Misconduct of the jury.

Some grounds for a new trial are *not* grounds for a mistrial. These include the following [CCP § 657(3)-(7); see *Heavy Duty Truck Leasing, Inc. v. Superior Court* (1970) 11 CA3d 116, 119, 89 CR 598] :

- Insufficiency of the evidence to justify the verdict.
- Error in law occurring at the trial.
- Excessive or inadequate damages.
- Newly discovered evidence that is material for the party bringing the motion and that the party, with reasonable diligence could not have discovered and produced at trial.
- Accident or surprise.

➡ **Cross References:**

Discussion of grounds for granting new trial, see *Ch. 21, Motion for New Trial, 21.06* et seq.

Discussion of overlap between grounds for mistrial and grounds for new trial, see *California Forms of Pleading and Practice, § 551.152[1]* (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsJury
TrialsJurorsMisconductCivil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From
JudgmentMotions for New Trials



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Chapter 22 Mistrial
II. MOVING FOR MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.05

22.05 Grounds for Bringing Motion for Mistrial.

22.05[1] Misconduct Must Be Prejudicial. As a preliminary matter, to bring a motion for mistrial, it is essential to show irreparable prejudice to the client [*People v. Collins (2010) 49 C4th 175, 198-199, 110 CR3d 384, 232 P3d32*] . It is often a close call whether a mistrial is justified, or whether any prejudice can be offset by an admonition to the jury to disregard the misconduct [*Sabella v. Southern Pac. Co. (1969) 70 C2d 311, 318-321, 74 CR 534, 449 P2d 750*] .

Example:

An attorney's line of questioning that suggested to the jury that the defendant was indemnified against any judgment for damages was highly prejudicial and could not be cured by admonition [*Robinson v. Wada (1935) 10 CA2d 5, 9, 51 P2d 171*] .

Factors to consider in deciding whether misconduct is sufficiently prejudicial to require a mistrial include the following [*Sally v. Pacific Gas & Elec. (1972) 23 CA3d 806, 814, 100 CR 501*] :

- The nature and seriousness of the conduct or remarks.
- The good faith of counsel.
- Whether the misconduct was a single event or repeated, persistent conduct.
- The judge's control of the trial.
- The likelihood of prejudicing the jury.

22.05[2] Misconduct of Counsel Is Grounds for Mistrial.

22.05[2][a] Types of Improper Attorney Misconduct. When counsel deliberately engages in misconduct, the court may grant a mistrial [see *Hartman v. Gordon H. Ball, Inc. (1969) 269 CA2d 779, 783, 75 CR 618*] . Attorney misconduct during trial means a purposeful disregard for rules of evidence or procedure that is done in an effort to

prejudice the other party [see *People v. Chojnacky* (1973) 8 C3d 759, 766, 106 CR 106, 505 P2d 530] .



Timing:

If counsel believes there is attorney misconduct, bring the motion immediately. Counsel cannot challenge misconduct by opposing counsel for the first time on appeal [*Brokopp v. Ford Motor Co.* (1977) 71 CA3d 841, 860, 139 CR 888 ("Misconduct of counsel may not be urged as a ground for reversal absent both timely objection and request for admonition in the trial court")].



Cross Reference:

Discussion of timing of motion for mistrial, see 22.07.

Aggressive advocacy is desirable, but has a limit. Intentional, blatant misconduct on the part of counsel can result in a mistrial, especially when the conduct is committed by a seasoned and experienced trial lawyer [see *Love v. Wolf* (1964) 226 CA2d 378, 393-394, 38 CR 183] .

Examples:

Courts have found that it is attorney misconduct to engage in any of the following:

- Compare the wealth of the plaintiff and the defendant [*Hoffman v. Brandt* (1966) 65 C2d 549, 553, 55 CR 417, 421 P2d 425] . Thus, in an action for damages brought against a public entity, it was misconduct for trial counsel to disclose that the public entity might pay punitive damages for the public employee [Gov Code § 825(b)].
- Suggest to the jurors that they measure damages by what they would take to endure the plaintiff's suffering [*Horn v. Atchison, Topeka & Santa Fe Ry.* (1964) 61 C2d 602, 609, 39 CR 721, 394 P2d 561] .
- Appeal to the prejudice, passions, or sympathy of the jury [*Stone v. Foster* (1980) 106 CA3d 334, 355, 164 CR 901] .
- Accuse defense counsel of withholding evidence [*Keena v. United R.R. of S.F.* (1925) 197 C 148, 158-160, 239 P 1061] .
- Suggest facts not in evidence that counsel knows could be contradicted by evidence that the court had excluded [*Hoffman v. Brandt* (1966) 65 C2d 549, 553, 55 CR 417, 421 P2d 425] .
- Violate the California Rules of Professional Conduct [*Hernandez v. Paicius* (2003) 109 CA4th 452, 463-468, 134 CR2d 756] .
- Improperly communicate with jurors, directly or indirectly, or attempt to influence them [see *Cal Rules Prof Conduct, Rule 5-320(B)*].



Strategic Point:

If the motion for mistrial is not granted, ask the court to admonish the jury to disregard the objectionable conduct of counsel.



Cross Reference:

Discussion of misconduct of counsel as grounds for a mistrial, see *California Forms of Pleading and Practice*, § 551.152[2] (Matthew Bender).

22.05[2][b] Juror Inquiry Regarding Insurance May Be Improper. Raising the issue of insurance coverage may in some instances constitute misconduct by counsel. Counsel can generally ask prospective jurors questions about insurance companies that are reasonably necessary to ascertain whether they are free from bias or interest that may affect the verdict. However, the questions must be propounded in good faith and not in a manner that would unnecessarily convey the impression that the defendant is in fact insured [*Hart v. Wielt* (1970) 4 CA3d 224, 84 CR 220 ; *Evid Code* § 1155 (evidence that person was insured against loss arising from liability is inadmissible to prove negligence or other wrongdoing); *but see Scally v. Pacific Gas & Elec.* (1972) 23 CA3d 806, 814, 100 CR 501 (improper to ask prospective jurors questions about financial interest in insurance companies when insurance company was not party)].

22.05[3] Misconduct of Juror Is Grounds for Mistrial. Misconduct of a juror is grounds for a mistrial if the misconduct results in prejudice and denial of a fair trial [CCP § 657(2); *see Bunker v. City of Glendale* (1980) 111 CA3d 325, 168 CR 565 (court recognized mistrial as remedy but found no irregularities in juror deliberations); *Granone v. County of Los Angeles* (1965) 231 CA2d 629, 656-657, 42 CR 34 (juror discharged after soliciting bribe from plaintiff; mistrial was unnecessary because remaining jurors were unbiased)].



Timing:

Counsel should bring the motion immediately to avoid waiver of the claim of misconduct.

Examples:

Courts have found that the following actions constituted juror misconduct:

- Concealing bias or prejudice against the plaintiff or prejudging the case as grounds for a mistrial or new trial [*People v. Blackwell* (1987) 191 CA3d 925, 930, 236 CR 803] .
- Considering material extraneous to the record in the case [CCP § 613; *Jones v. Sieve* (1988) 203 CA3d 359, 367, 249 CR 821] .
- Bringing unauthorized documents into the jury room [CCP § 612].
- Inattentiveness during testimony [*Hasson v. Ford Motor Co.* (1982) 32 C3d 388, 415, 185 CR 654, 650 P2d 1171] .
- Consuming intoxicants during deliberations [*People v. Hedgecock* (1990) 51 C3d 395, 420, 272 CR 803, 795 P2d 1260] .
- Communicating with other jurors about the merits of the case before the case has been submitted to the jury for consideration [CCP § 611; *City of Pleasant Hill v. First Baptist Church* (1969) 1 CA3d 384, 434, 82 CR 1] .



Cross Reference:

Discussion of misconduct of counsel as grounds for mistrial, see *California Forms of Pleading and Practice*, § 551.152[3] (Matthew Bender).

**Strategic Point:**

An evidentiary hearing into juror misconduct should be requested if necessary to determine whether any misconduct in fact occurred.

**Cross Reference:**

Discussion of request for evidentiary hearing into juror misconduct, see 22.07[2].

22.05[4] Misconduct of Judge Is Grounds for Mistrial. Misconduct of a judge is grounds for a mistrial. It is a judge's duty to conduct the trial in a fair and impartial manner [*Etsel v. Rosenbloom* (1948) 83 CA2d 758, 762, 189 P2d 848 (grounds for a new trial)]. In addition, under the California Code of Judicial Ethics, a judge is required to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity" [Cal Code Judicial Ethics, Canon 3B(4)]. If a judge fails to meet these standards and a party will be irreparably prejudiced, a motion for a mistrial should be brought.

Generally, an isolated incident of judicial misconduct will not constitute grounds for a mistrial; it appears that a pattern of judicial hostility is required [*People v. Fatone* (1985) 165 CA3d 1164, 1175 211 CR 288]. However, even an isolated act can constitute grounds for misconduct if irreparably prejudicial [*Gubler v. Commission on Judicial Performance* (1984) 37 C3d 27, 50, 207 CR 171, 688 P2d 551 (judicial misconduct to increase criminal punishment because of disagreement with defense counsel)].

**Strategic Point:**

Challenging the judge in front of the jury may cause a negative reaction from the judge. The better practice is to ask to approach the bench before raising an objection to judicial misconduct, or to do so at the next recess. Consider how to phrase your objection to the judicial misconduct and do so diplomatically. Keep in mind that such a motion is unlikely to be granted, and thus that counsel will have to live with the judge for the rest of the trial.

**Cross Reference:**

Discussion of misconduct of a judge as grounds for a mistrial, see *California Forms of Pleading and Practice*, § 551.152[4] (Matthew Bender).

Examples:

The following actions have been held to constitute judicial misconduct:

- Prejudging the case before all the evidence has been received [*McVey v. McVey* (1955) 132 CA2d 120, 123, 281 P2d 898]. However, if the judge maintains an open mind on the case, there is no misconduct [see *Weil v. Weil* (1951) 37 C2d 770, 776, 236 P2d 159].
- Making comments that demonstrate bias toward one party [*Newman v. First Cal. Co.* (1975) 47 CA3d 60, 68, 120 CR 494 (misconduct not prejudicial)].
- Making comments that show the judge's opinion on issues of fact that are to be determined by the jury [*Berguin v. Pacific Elec. Ry.* (1928) 203 C 116, 121, 263 P 220 (judge remarked on injured plaintiff's ability to walk unassisted)].

- Making comments that misstate the evidence to the benefit of one party [*Lewis v. Bill Robertson & Sons, Inc.* (1984) 162 CA3d 650, 654, 208 CR 699, 701] .

- Disparaging the parties, counsel, or witnesses [*Fletcher v. Commission on Judicial Performance* (1998) 19 C4th 865, 905, 81 CR2d 58, 968 P2d 958] .

- Receiving information from sources outside the trial or conducting independent investigations [*Guadalupe A. v. Superior Court* (1991) 234 CA3d 100, 109, 285 CR 570] .

- Improper questioning of witnesses [*McCartney v. Commission on Judicial Qualifications* (1974) 12 C3d 512, 533, 116 CR 260, 526 P2d 268] .

22.05[5] Testimony by Presiding Judge or Juror Is Grounds for Mistrial. Two statutes provide authority for granting a mistrial if a judge or juror is required to provide testimony at trial [see *Evid Code* §§ 703, 704].

A judge presiding at a trial may not testify in that trial as a witness. On a party's objection, the judge must declare a mistrial and order the action assigned for trial before another judge [*Evid Code* § 703(b)]. Moreover, calling a judge presiding at a trial to testify as a witness is deemed to be consent for the granting of a motion of mistrial, and any objection is deemed a motion for a mistrial [*Evid Code* § 703(c)].

Exception:

In the absence of any objection, the judge presiding at the trial may testify as a witness [*Evid Code* § 703(b)].

Against a party's objection, a juror who is sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness [*Evid Code* § 704(b)]. If a party objects, the court must declare a mistrial and order the action assigned for trial before another jury. Calling a juror to testify as a witness is deemed to be a consent for the granting of a motion of mistrial, and any objection is deemed a motion for a mistrial [*Evid Code* § 704(c)].

Exception:

In the absence of any objection, a juror sworn and impaneled in a trial may testify as a witness [*Evid Code* § 704(b)].

22.05[6] Illness of Juror or Inability to Perform Is Grounds for Mistrial. If a juror becomes sick before the jury has rendered its verdict, or on other good cause shown is found unable to perform as a juror, the court may order the juror discharged. Normally, an alternate juror takes the place of the discharged juror. However, if all alternate jurors have been used or there is no alternate juror, the jury must be discharged, a new jury impaneled, and the case tried again [*CCP* § 233].

If all of the parties consent, the trial may proceed with only the remaining jurors or another juror may be sworn and the trial begins over [*CCP* § 233].

22.05[7] Inability of Judge to Complete Trial Is Grounds for Mistrial. If the trial judge is unable to complete the trial, such as when the judge dies, becomes disabled, or is appointed to another court, a mistrial results [see, e.g., *Linsk v. Linsk* (1969) 70 C2d 272, 275, 74 CR 544, 449 P2d 760 (disability of judge); *Reimer v. Firpo* (1949) 94 CA2d 798, 800-801, 212 P2d 23 (trial judge appointed to appellate court)].

Exception:

It appears that the parties, if fully informed about the matter and in agreement, may stipulate to the use of a replacement judge, as long as the parties' substantial rights or causes of action are not impaired [*Linsk v. Linsk* (1969) 70 C2d 272, 276-280, 74 CR 544, 449 P2d 760] .

22.05[8] Discharge of Jury Without Rendering Verdict Is Grounds for Mistrial. In cases where the jury is discharged without rendering a verdict or is prevented from rendering a verdict by accident or other cause, and judgment is not entered as provided in *CCP* § 630(f), the action may be tried again immediately or at a future time as the court directs [*CCP* § 616].

Example:

This commonly occurs when there is a hung jury [see *Sullivan v. Delta Air Lines, Inc.* (1997) 15 C4th 288, 307 n11, 63 CR2d 74, 935 P2d 781] .



Strategic Point:

Depending on the circumstances, when the jury is deliberating, counsel should consider whether to ask the judge to give the jury instructions to keep deliberating, compared to whether to urge that a mistrial be declared.

When the jury returns special verdicts on some, but not all, causes of action, a partial mistrial may be called [*Barmas, Inc. v. Superior Court* (2001) 92 CA4th 372, 375, 112 CR2d 71] .

22.05[9] Jury Returns Incomplete Special Verdict. A jury may be instructed by the court to use a special verdict form when deciding a case. When the jury uses a special verdict form, it must resolve each of the ultimate facts presented to it. If the jury cannot make a decision on each of the ultimate facts, a mistrial must be declared [*Valentine v. Baxter Healthcare Corp.* (1999) 68 CA4th 1467, 1475-1480, 81 CR2d 252] .



Cross Reference:

Discussion of special verdicts, see *Ch. 18, Jury Verdicts, 18.11 -18.22*.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsMotions for MistrialEvidenceCompetencyJudgesLegal EthicsJudicial ConductLegal EthicsProfessional ConductGeneral Overview



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Chapter 22 Mistrial
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2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.06

22.06 Comparing Mandatory Grounds for Mistrial to Discretionary Grounds.

Several statutes govern when a mistrial must be granted. Under the following circumstances, a statute provides that a mistrial is *mandatory*:

- Illness of a juror, if all alternate jurors have been used or there are no alternate jurors [CCP § 223].
- Discharge of the jury without rendering a verdict [CCP § 616].
- Calling a judge as a witness over a party objection [Evid Code § 703].
- Calling a juror as a witness over party objection [Evid Code § 704].

However, most mistrials are granted on *discretionary* grounds, such as when juror misconduct is so severe that the court, in its discretion, grants a mistrial to ensure a fair trial [see *Grimshaw v. Ford Motor Co.* (1981) 119 CA3d 757, 795, 174 CR 348]. One of the most common reasons for a mistrial is attorney misconduct. These decisions involve a balancing by the court.



Cross Reference:

Discussion of juror and attorney misconduct, see 22.05[2], [3].

Appellate court decisions discussing common law non-statutory grounds for a mistrial are rare, because an order granting a mistrial is not appealable and attempts to review by writ are usually futile. Thus, there are no appellate decisions specifically upholding the granting of a mistrial on non-statutory grounds. However, appellate courts and commentators have generally assumed that trial courts have the power to declare a mistrial when necessary to ensure a fair trial [see e.g., *Grimshaw v. Ford Motor Co.* (1981) 119 CA3d 757, 795, 174 CR 348; *People v. Guillebeau* (1980) 107 CA3d 531, 547-548, 166 CR 45].

Consider:

Courts generally view mistrials as a last resort when deciding whether to grant a mistrial on discretionary grounds. The offending conduct must be so prejudicial as to require a new trial.

**Cross Reference:**

Discussion of appeal of order granting or denying motion for mistrial, see 22.18 et seq.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral
OverviewCivil ProcedureTrialsMotions for MistrialEvidenceCompetencyJudgesEvidenceCompetencyJurorsGeneral
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22.07 Make Motion for Mistrial Promptly.

22.07[1] Motion for Mistrial Requires Immediate In-Trial Motion and Request for Admonition. In moving for a mistrial, counsel must make a timely and proper objection to any alleged misconduct and, in the case of a jury trial, request that the jury be admonished.



Warning:

Failure to make a timely and proper objection will result in waiver of the claim of error [*Horn v. Atchison, Topeka & Santa Fe Ry.* (1964) 61 C2d 602, 610, 39 CR 721, 394 P2d 561] .

Delay in objecting to any alleged misconduct acts as a bar to a motion for mistrial [*Horn v. Atchison, Topeka & Santa Fe Ry.* (1964) 61 C2d 602, 610, 39 CR 721, 394 P2d 561] . Raising the issue of misconduct at the first opportunity and requesting that the jury be admonished gives the court the opportunity to remedy the prejudice and forestall any further improprieties [*Sabella v. Southern Pac. Co.* (1969) 70 C2d 311, 316-317, 74 CR 534, 449 P2d 750] . For instance, courts have held that claims of surprise or prejudice are waived when counsel failed to move for mistrial after the alleged surprise testimony [*Gimbel v. Laramie* (1960) 181 CA2d 77, 83, 5 CR 88] .

In the absence of a timely objection, the aggrieved party is deemed to have waived the claim of error on appeal [*Weathers v. Kaiser Found. Hosp.* (1971) 5 C3d 98, 103, 95 CR 516, 485 P2d 1132] . Claims of misconduct cannot be raised for the first time on appeal when the prejudice could have been cured by a timely objection and admonition [see *People v. Raviart* (2001) 93 CA4th 258, 269, 112 CR2d 850 (on appeal, party cannot challenge judicial misconduct in questioning witnesses because no objection was made to conduct during trial)].



Strategic Point:

When a motion for mistrial is denied, counsel must alternatively request a curative admonition. Failure to request a curative admonition may be viewed as a waiver of the right to use the misconduct as the basis or partial basis for a subsequent motion for a mistrial [*Horn v. Atchison, Topeka & Santa Fe Ry.* (1964) 61 C2d 602, 610-611, 39 CR 721, 394 P2d 561] . For instance, courts have held that misconduct

is waived because of counsel's failure to object when any effect on the jury could have been entirely removed by an admonishing instruction [*Whitfield v. Roth* (1974) 10 C3d 874, 891-893, 112 CR 540, 519 P2d 588] .

Consider:

If it is apparent that counsel will need to make the same repetitive objections, a motion for a mistrial based on opposing counsel's behavior is warranted. However, that will succeed only if counsel had been preserving objections throughout the trial. Failure to object will in all likelihood result in a denial of the motion for a mistrial.

Examples:

The following are examples of the effect of failure to promptly object:

- Counsel waived the right to challenge misconduct of opposing counsel made during opposing counsel's closing argument to the jury by waiting until the end of the closing argument to object and move for a mistrial. Counsel should have objected to the misconduct when it occurred [*Warner Constr. Corp. v. City of Los Angeles* (1970) 2 C3d 285, 303, 85 CR 444, 466 P2d 996] .
- Counsel waived the right to a mistrial by failing to object during trial to the judge's allowing two jurors to sleep during the trial [*Newman v. Los Angeles Transit Lines* (1953) 120 CA2d 685, 693-693, 262 P2d 95] .
- A juror falsely stated in voir dire that she did not know the plaintiff in the case. Although counsel learned of this during trial, counsel made no objection until after a verdict was returned against his client, and so waived the right to mistrial by objecting at that time [*Lindemann v. San Joaquin Cotton Oil Co.* (1936) 5 C2d 480, 496, 55 P2d 870] .

Exceptions:

The following are instances in which failure to object during trial does not waive the right to mistrial:

- If the misconduct at issue is so prejudicial that it could not be cured by a timely objection and admonition to the jury, the failure to promptly bring a motion for a mistrial may not result in a waiver [*Love v. Wolf* (1964) 226 CA2d 378, 392, 38 CR 183 (court's admonition could not "unring the bell"); see *Peacock v. Levy* (1931) 114 CA 246, 252, 299 P 790 ("no admonition on the part of the court could extinguish the fire")].
- When there is repeated judicial misconduct, counsel may not need to make repeated objections [*People v. Robinson* (1960) 179 CA2d 624, 638, 4 CR 50] .
- When the record demonstrates that objection to the misconduct would be futile, failure to object may not result in a waiver of the right to raise the issue of misconduct on appeal [*Forte v. Schiebe* (1956) 145 CA2d 296, 301-302, 302 P2d 336] . For example, in a jury trial, the judge made remarks that the defendant was untruthful and that counsel was attempting to mislead the jury. Objecting and requesting an admonition at that time would have been "ineffectual and would have accentuated the error rather than have removed it" [*Etzel v. Rosenbloom* (1948) 83 CA2d 758, 762, 189 P2d 848] .

Strategic Point:



Counsel should always object to the misconduct immediately on learning of it, and not rely on any of these potential exceptions. It is safer to immediately make the objection than to risk waiver.

Cross Reference:

Discussion of requirement for timely objection to misconduct, see *California Forms of Pleading and Practice*, § 551.153 (Matthew Bender).

22.07[2] Make Request for Evidentiary Hearing When Needed. At times, a request for an evidentiary hearing into misconduct--such as jury misconduct--may be needed. For instance, if the possibility of juror misconduct comes to light during the trial, counsel should bring it to the court's attention and request an evidentiary hearing to determine the truth or falsity of allegations of juror misconduct [*People v. Chavez* (1991) 231 CA3d 1471, 1482, 283 CR 71] .

Cross Reference:

Discussion of request for evidentiary hearing into juror misconduct, see *California Trial Guide*, § 3.32[3][d] (Matthew Bender).

22.07[3] Counsel Need Not Make Multiple Objections. Counsel does not necessarily need to make multiple objections to alleged misconduct, and may in fact alienate the jury by doing so. Repeated and resounding misconduct cannot generally be cured by admonition, and thus objecting can become futile [*Love v. Wolf* (1964) 226 CA2d 378, 392, 38 CR 183] .

Example:

In one case, the court held that the defendant's failure to object to each repeated instance of misconduct did not constitute a waiver because the misconduct was "flagrant and repeated" and the court's admonitions were "mostly inadequate" [*Simmons v. Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 355, 133 CR 42, 49] .



Strategic Point:

If opposing counsel continues to engage in the same type of repeated misconduct after an initial objection, outside the presence of the jury, ask the judge for a continuing objection to the line of questioning to preserve the record for appeal. The continuing objection theory is used to avoid the need to make repetitive motions. If a continuing objection is warranted, due to opposing counsel's repeated questioning in a forbidden topic, for example, the continuing objection must be carefully, clearly, and fully stated. It also must be on the record. It is not sufficient to object "to 'that' line of questioning." To use the objection in assessing error, the appellate court must be able to tell exactly what the limits of the continuing objection were. If it is not possible to articulate clearly a continuing objection and counsel believes the matter is truly prejudicial, then counsel should make multiple objections until a sufficient basis is laid for a motion for a mistrial or for the issue to be raised successfully on appeal.

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice Time Limitations Civil Procedure Trials Motions for Mistrial Civil Procedure Appeals Reviewability Preservation for Review Evidence Procedural Considerations Objections & Offers of Proof Objections Evidence Procedural Considerations Objections & Offers of Proof Timeliness



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22.08 Making Oral Motion for Mistrial.

22.08[1] Make Motion Promptly to Avoid Waiver. A motion for mistrial must be made promptly during the trial or the claimed error may be considered waived [*Horn v. Atchison, Topeka & Santa Fe Ry.* (1964) 61 C2d 602, 610, 39 CR 721, 394 P2d 561] .

 Cross Reference:

Discussion of timing of motion, see 22.07.

22.08[2] Make Motion for Mistrial Orally During Trial. A motion for mistrial is made orally during trial, outside of the presence of the jury [see, e.g., *Richardson v. Employers Liab. Assurance Corp.* (1972) 25 CA3d 232, 242, 102 CR 547 (overruled on other grounds); see also Los Angeles Super Ct Rules, Rule 8.47 (motion for mistrial should be made and argued outside hearing of jurors)].

If the issue involves improper questioning of a juror by counsel, the motion may be made orally during voir dire [see *Stevenson v. Link* (1954) 128 CA2d 564, 568, 275 P2d 782] .

A motion for mistrial differs from a motion for a new trial in that a motion for a mistrial is brought promptly at any stage of the action up until a verdict is rendered, whereas a motion for new trial is made after the verdict [see *Estate of Bartholomae* (1968) 261 CA2d 839, 842, 68 CR 332 ; *Schouten v. Crawford* (1953) 118 CA2d 59, 65, 257 P2d 88 (counsel should have moved for mistrial before jury sent back for further deliberation); see also CCP § 656 (new trial is reexamination of issue of fact after trial and decision by jury, court or referee)].



Strategic Point:

Counsel should ask to approach the bench for purposes of making an appropriate motion. The motion should then be made orally outside of the jury's presence, with a court reporter present. Counsel can follow up the oral motion with a written brief.

 Cross Reference:

Comparison of mistrial and new trial, see 22.04[2].

22.08[3] Phrasing Oral Motion for Mistrial. The following is an example of how to phrase the oral motion for mistrial:

Your Honor, I object to _____ [*describe misconduct or irregularity that is basis of motion; state why it is improper or irregular, e.g., Defense counsel calling Juror Number 1, John Juror, as a defense witness in this case*].

If motion is based on misconduct, continue.

I assign _____ [*describe misconduct, e.g., the calling of Juror Number 1, John Juror, as a witness*] as misconduct.

I move for mistrial on the ground that _____ [*specify ground, e.g., a juror has been called as a witness over my objection*].



Strategic Point:

Make certain that a court reporter is present and records the argument and ruling on the record. This is true even if the motion is made in chambers or after the jury has been excused.



Cross Reference:

Discussion of oral motion for mistrial, see *California Trial Guide*, § 3.32 (Matthew Bender).

22.08[4] Moving Party Has Burden to Prove Misconduct. On a motion for mistrial, the moving party must prove the misconduct and the extent of the irreparable prejudice [*Gimbel v. Laramie* (1960) 181 CA2d 77, 85-86, 5 CR 88 ("To justify a mistrial ... an affirmative showing of prejudice which would alter the outcome of pending litigation is required")].



Cross Reference:

Discussion of burden of proof, see *Ch. 9, Burden of Proof and Persuasion*, 9.14 et seq.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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22.09 CHECKLIST: Opposing Motion for Mistrial.

- ☐ Determine if opposing motion is best strategy.

Discussion:

See 22.10

- ☐ Promptly state reasons for opposition to motion for mistrial.

- ☐ No misconduct occurred.
- ☐ There was not incurable prejudice.
- ☐ The motion for mistrial was untimely.

Authority:

CCP § 657

Discussion:

See 22.11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for Mistrial



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22.10 Options and Strategies.

In challenging a motion for mistrial, the party opposing the motion will want to show one of the following:

1. No misconduct occurred, whether by the judge, jury, or counsel;
2. If misconduct did occur, it was not so prejudicial that it could not be cured by an admonition to the jury; or
3. If misconduct did occur, the motion for mistrial was untimely made, and therefore should not be granted.



Strategic Point:

The first basis is the strongest. It should not present a problem to combine the first and third bases, or second and third bases, but arguing all three may denigrate the strength of the first basis.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for Mistrial



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2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.11

22.11 Grounds for Opposing Motion for Mistrial

22.11[1] Motion for Mistrial Should Be Denied Because No Misconduct Occurred. The primary opposition strategy to a motion for mistrial is that no misconduct occurred, whether by judge, jury, counsel, or otherwise.

➤ **Cross Reference:**

Discussion of types of misconduct justifying mistrial, see 22.05.

22.11[2] Motion for Mistrial Should Be Denied Because There Is No Incurable Prejudice. In cases where counsel can establish that there is no prejudice, or that any prejudice can be cured by an admonition to the jury, a mistrial is inappropriate [*Brassfield v. Moreland School District (2006) 141 CA4th 67, 69-73, 45 CR3d 662*].

➤ **Cross Reference:**

Discussion of prejudicial effect of misconduct, see 22.05[1].

22.11[3] Motion for Mistrial Should Be Denied Because Motion Was Untimely. Delay in objecting to any alleged misconduct will act as a bar to a motion for mistrial [*Horn v. Atchison, Topeka & Santa Fe Ry. (1964) 61 C2d 602, 610, 39 CR 721, 394 P2d 561*]. Accordingly, counsel should argue that it makes no sense to take the matter away from the jury on such a flimsy basis as that urged when a jury verdict is imminent. The closer to submission of the case to the jury, and a verdict, the better chance such an argument has.



Strategic Point:

Do not rely solely on the untimeliness of the motion in opposition. Raise other substantive arguments, i.e., the argued conduct was not prejudicial, in opposition.

➤ **Cross Reference:**

Discussion of effect of failure to timely object, see *Ch. 11, Questioning Witnesses and Objections, 11.72*.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsMotions for Mistrial



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2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.12

22.12 Phrasing Oral Motion Opposing Mistrial.

The following is an example of how to phrase the oral motion opposing mistrial:

Your Honor, I oppose the motion for mistrial on the ground that_____ [specify ground, e.g., the misconduct of the juror is not so prejudicial that it cannot be cured by an admonition. It is only in extreme cases that the prejudicial effect of misconduct or irregularities cannot be cured by a proper and timely admonition].



Strategic Point:

Counsel should be prepared to orally oppose a motion for mistrial as soon as it is made. A good opposition strategy is to point out to the court the necessity of written points, so that a day or so elapses and the trial continues subject to briefing and argument. The court will have a clearer view of the facts and issues surrounding the motion, and the opposition can be more focused.



Cross Reference:

Discussion of oral motion opposing mistrial, see *California Trial Guide*, § 3.32[4] (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for Mistrial



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IV. ACTIONS FOLLOWING ENTRY OF ORDER DECLARING MISTRIAL

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22.13 CHECKLIST: Actions Following Entry of Order Declaring Mistrial.

- Prepare order for court's signature.

Discussion:

See 22.14

Form:

See 22.22

- Provide notice of order to all parties.

Discussion:

See 22.14

- If case is to be retried, follow trial-setting procedures.

Discussion:

See 22.15

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for Mistrial



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Chapter 22 Mistrial

IV. ACTIONS FOLLOWING ENTRY OF ORDER DECLARING MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.14

22.14 Provide Notice of Order Denying or Declaring Mistrial.

An order determining a motion for mistrial may be made orally by the court and entered into the minutes [*Vitimin Milling Corp. v. Superior Court (1934) 1 C2d 116, 118, 33 P2d 1016*] . Alternatively, the court may sign and enter a written order denying or declaring a mistrial [*Barendregt v. Downing (1959) 175 CA2d 733, 735, 346 P2d 870*] .

In some instances, judges will deny the mistrial motion "without prejudice" to the party raising the same issue later in the trial or after the verdict as a motion for a new trial. If the motion is granted, it is as if there was never a trial at all. The case generally returns to trial setting. No matter how far the case progressed, it is retried over from the beginning.

The prevailing party must give notice of the court's decision to all other parties and their attorneys in the manner provided by *CCP §§ 1010-1020* unless notice is waived by all parties and entered into the minutes [*CCP § 1019.5(a)*].



Cross Reference:

Form of order on motion for mistrial, see 22.22.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for Mistrial



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Chapter 22 Mistrial

IV. ACTIONS FOLLOWING ENTRY OF ORDER DECLARING MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.15

22.15 Court May Order Retrial of Action.

When the jury is discharged without rendering a verdict, the action may be tried again immediately or at a future time, as the court may direct [CCP § 616]. It is up to the court to decide whether it should order an immediate retrial. If the case is not immediately retried, it has to be reset under normal trial setting procedures.



Strategic Point:

Mistried cases that are not immediately retried are not entitled to preference in trial setting. However, courts may favor providing an early trial date in the interests of justice.



Cross Reference:

Discussion of trial setting, see *Matthew Bender Practice Guide: California Pretrial Civil Procedure*, 23.11 *et seq.*

Legal Topics:

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

Civil Procedure Trials Motions for Mistrial



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IV. ACTIONS FOLLOWING ENTRY OF ORDER DECLARING MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.16

22.16 Court May Order Partial Mistrial.

A judge may declare a partial mistrial if some of the issues are severable from the rest of the issues, and reserve judgment on some, but not all, causes of action pending a second trial [*Valentine v. Baxter Healthcare Corp.* (1999) 68 CA4th 1467, 1475-1478, 81 CR2d 252] . In this case, retrial will proceed on just the issues on which the mistrial was declared.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for Mistrial



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IV. ACTIONS FOLLOWING ENTRY OF ORDER DECLARING MISTRIAL

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22.17 Court May Dismiss Action for Failure to Prosecute.

If no judgment has been entered because of a mistrial or because the jury is unable to reach a verdict, the action is subject to mandatory or discretionary dismissal unless it is brought to trial within three or two years, respectively, after entry of the order declaring a mistrial or disagreement by the jury [CCP §§ 583.320(a)(1), 583.360, 583.410, 583.420(a)(3)(A)].

Legal Topics:

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

Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureTrialsMotions for Mistrial



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Chapter 22 Mistrial

V. SEEKING REVIEW OF ORDER GRANTING OR DENYING MOTION FOR MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.18

22.18 CHECKLIST: Seeking Review of Order Granting or Denying Motion for Mistrial.

- Ensure that timely objection was made at trial.

Discussion:

See 22.20

- Mistrial order is reviewable only on appeal from final judgment.

Discussion:

See 22.19

Legal Topics:

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

Civil ProcedureTrialsMotions for MistrialCivil ProcedureAppealsAppellate JurisdictionFinal Judgment
RuleEvidenceProcedural ConsiderationsObjections & Offers of ProofTimeliness



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Chapter 22 Mistrial

V. SEEKING REVIEW OF ORDER GRANTING OR DENYING MOTION FOR MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.19

22.19 Order Declaring or Denying Mistrial Is Nonappealable.

An order granting or denying a motion for mistrial is nonappealable. However, the grounds asserted in the motion, such as attorney or judicial misconduct, can be reviewed on appeal from the final judgment [*Heavy Duty Truck Leasing, Inc. v. Superior Court* (1970) 11 CA3d 116, 119, 89 CR 598] .



Strategic Point:

It is generally not useful to devote time to seeking interim relief such as a writ, because the time for appeal is so imminent that a court of appeal would be unlikely to intervene at this point.

Legal Topics:

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

Civil ProcedureTrialsMotions for MistrialCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionState Court Review



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Chapter 22 Mistrial

V. SEEKING REVIEW OF ORDER GRANTING OR DENYING MOTION FOR MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.20

22.20 Effect of Party's Failure to Timely Object at Trial.

The record must show a timely objection at trial to any misconduct and a request that the jury be admonished, or the aggrieved party is deemed to have waived the claim of error on appeal [*Weathers v. Kaiser Found. Hosp.* (1971) 5 C3d 98, 103, 95 CR 516, 485 P2d 1132] .

➡ Cross Reference:

Discussion of necessity to promptly object to misconduct, see 22.07.

Legal Topics:

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

Civil ProcedureTrialsMotions for MistrialCivil ProcedureAppealsReviewabilityPreservation for
ReviewEvidenceProcedural ConsiderationsObjections & Offers of ProofTimeliness



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Chapter 22 Mistrial

V. SEEKING REVIEW OF ORDER GRANTING OR DENYING MOTION FOR MISTRIAL

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.21

22.21 Reviewing Court Applies Abuse of Discretion Standard.

A trial court has broad discretion in granting or denying a motion for a mistrial. The trial court's decision is reviewable only for abuse of discretion, and will remain undisturbed unless such abuse of discretion clearly appears to the appellate court [*People v. Romero* (1977) 68 CA3d 543, 548, 137 CR 675] .

Legal Topics:

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

Civil ProcedureTrialsMotions for MistrialCivil ProcedureAppealsStandards of ReviewAbuse of Discretion



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Chapter 22 Mistrial
VI. FORMS

2-22 MB Practice Guide: Trial & Post-Trial Civil Proc 22.22

22.22 Order on Motion for Mistrial.

Order on Motion for Mistrial.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____

ORDER ON MOTION FOR MISTRIAL

The motion for mistrial brought by _____ [party, e.g., Defendant Mary Jones] for an order _____ [specify nature of underlying motion] 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 or denied],

IT IS ORDERED that the motion for mistrial be, and hereby is _____ [granted or denied].

Dated: _____

_____, [signature]
Judge of the Superior Court



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Chapter 23 Contempt

2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.syn

§ 23.syn Synopsis to Chapter 23: Contempt

23.01 Scope.

23.02 Objective and Strategy.

23.03 CHECKLIST: Determining What Is Contempt of Court.

23.04 Contempt Is Affront to Court or Judge.

23.04[1] Court Has Inherent Power to Discern Contempt.

23.04[2] Statute Delineates Contemptuous Acts and Omissions.

23.04[3] Only Regular or Temporary Judge May Exercise Contempt Power Directly.

23.04[4] Freedom of Speech Must Be Accommodated.

23.05 Cases Distinguish Direct Contempt and Indirect (Constructive) Contempt.

23.06 Attorney Is Subject to Contempt for Improper Conduct.

23.06[1] Attorney Must Not Misbehave in Court Proceedings.

23.06[1][a] Disrespectful Remarks to Court May Be Contempt.

23.06[1][b] Insolent Examination of Witness or Argument May Be Contempt.

23.06[1][c] Filing of False Disqualification Affidavit May Be Contempt.

23.06[1][d] Lying to Judge May Be Contempt.

23.06[2] Attorney Must Conform to Courtroom Protocols.

23.06[2][a] Inexcusable Absence From Court May Be Contempt.

23.06[2][b] Unprofessional Conduct Before Jury May Be Contempt.

23.06[3] Attorney Must Comply With Court's Directives.

23.06[3][a] Failure to Take Procedural Step As Directed May Be Contempt.

23.06[3][b] Failure to Abide by Judge's Warning May Be Contempt.

23.07 Party, Witness, or Other Person May Be Held in Contempt.

23.07[1] Party May Be Punished for Disobeying Order.

23.07[2] Witness May Be Punished for Unprivileged Failure to Testify.

23.07[2][a] Willful Noncompliance With Subpoena Is Contempt.

23.07[2][b] Disobedience of Court's Order to Testify Might Be Contempt.

23.07[2][c] Person in News Reporting Has Special Immunity.

23.07[3] Any Person May Be Punished for Having Weapon in Court.

23.08 Contempt May Be Criminal or Civil.

23.08[1] Issue Does Not Arise in Case of Direct Contempt.

23.08[2] Indirect Contempt Is Criminal When Punishment Is Unconditional.

23.08[2][a] Due-Process Test Looks at Actual Punishment.

23.08[2][b] Test Can Be Applied Prospectively.

23.08[3] Some Contemptuous Acts Are Misdemeanors.

23.09 CHECKLIST: Adjudicating and Punishing Direct Contempt.

23.10 Contemnor May Be Summarily Adjudged and Punished.

23.10[1] Court Enters Order of Contempt.

23.10[2] Normal Due Process Is Not Required.

23.10[3] Judge May Not Be Statutorily Disqualified.

23.11 Warning Might Be Required.

23.11[1] Contemptuous Tone of Voice or Demeanor Raises Special Concerns.

23.11[1][a] Contemnor May Not Be Held in Contempt Without Warning.

23.11[1][b] Repeated Warnings Are Not Necessary.

23.11[1][c] Warning Must Be Carefully Worded.

23.11[1][d] Focusing on Content of Remarks or on Disobedience of Order May Obviate Warning.

23.11[2] Inexcusable and Unmistakable Misconduct May Be Punished Without Warning.

23.12 Notice and Hearing Might Be Required.

23.12[1] Deferral of Adjudication Entails Notice and Hearing.

23.12[1][a] Immediate Adjudication Is Not Necessary.

23.12[1][b] Contempt Will Still Be Summarily Adjudicated.

23.12[1][c] Hearing Is Set by Order to Show Cause.

23.12[2] Contemptuous Failure to Appear or File Paper Obliges Court to Set Hearing on Notice.

23.12[2][a] Contemnor Who Is Absent Is Not Able to Respond to Charge of Contempt.

23.12[2][b] So-Called Hybrid Contempt Is Case of Contemnor's Absence.

23.12[2][c] Hearing Is Set by Order to Show Cause.

23.12[3] Judge Might Treat Direct Contempt As Indirect Contempt.

23.12[4] Judge Who Is Personally Embroiled in Matter Must Set Hearing by Different Judge.

23.13 Court May Accept Explanation.

23.13[1] Court Usually Must Consider Mitigating Circumstances.

23.13[2] Hearing Gives Contemnor Opportunity to Explain.

23.13[3] Court May Investigate Circumstances.

23.14 Contemnor's Apology Merits Weighty Consideration.

23.15 Contemnor May Be Fined and Jailed.

23.15[1] Court Imposes Punishment.

23.15[1][a] Order of Contempt Must Specify Punishment.

23.15[1][b] Punishment Is at Court's Discretion.

23.15[1][c] Court's Discretion Has Constitutional Limitation.

23.15[2] Contemnor May Be Jailed to Coerce Act.

23.15[2][a] Confinement in Jail May Be Indefinite.

23.15[2][b] Confinement Must End When Pending Proceedings End.

23.15[2][c] Court Must Determine When Confinement Is No Longer Coercive.

23.15[3] Sexual-Assault Victim May Not Be Jailed to Coerce Testimony.

23.15[4] Witness Under 16 Years Old Requires Special Treatment.

23.15[4][a] Probation Officer's Report Is Required.

23.15[4][b] Minor's Confinement Outside Home Must Be Least Restrictive.

23.16 Order of Contempt Must Meet Specific Criteria.

23.16[1] Order Must Recite Relevant Facts.

23.16[1][a] Validity Depends on Sufficient Recital.

23.16[1][b] Specificity Is Required.

23.16[1][c] Order Must Be Sufficient for Review.

23.16[1][d] Occurrence in Court's Immediate View and Presence Must Be Shown.

23.16[1][e] Contemptuous Voice or Demeanor Must Be Described in Detail.

23.16[1][f] Attorney's Contemptuous Absence From Court Should Be Detailed.

23.16[1][g] Court's Warning Should Be Recited.

23.16[2] Order Must Adjudge Contemnor's Guilt.

23.16[3] Order Must State Punishment.

23.17 Imposition of Punishment Might Be Stayed.

23.17[1] Stay Is Automatic in Special Cases.

23.17[1][a] Attorney in Contempt Might Be Entitled to Automatic Stay.

23.17[1][b] Police Officer, Etc., in Contempt Might Be Entitled to Automatic Stay.

23.17[1][c] Sexual-Assault Victim in Contempt Might Be Entitled to Automatic Stay.

23.17[1][d] Domestic-Violence Victim in Contempt Might Be Entitled to Automatic Stay.

23.17[2] Court May Elect to Stay Execution of Sentence.

23.18 CHECKLIST: Adjudicating and Punishing Indirect Contempt.

23.19 Jurisdictional Prerequisites Must Be Established.

23.19[1] Requirements Are Strictly Applied.

23.19[2] Writ of Prohibition May Foreclose Unlawful Contempt Proceedings.

23.20 Court's Order May Be Enforced Through Indirect-Contempt Proceeding.

23.20[1] Order Must Be Clear.

23.20[2] Disobedient Party Must Have Knowledge of Order.

23.20[3] Disobedient Party Must Be Able to Comply.

23.21 Affidavit (or Statement of Facts) Is Filed.

23.21[1] Affidavit Must Show All Relevant Facts.

23.21[2] Several Affidavits May Together Be Sufficient.

23.21[3] Information and Belief Is Sufficient.

23.21[4] Judge or Other Judicial Officer May File Statement of Facts to Commence Proceeding.

23.22 Court Sets Hearing.

23.22[1] Party Normally Obtains Order to Show Cause.

23.22[2] Bench Warrant May Be Issued When Order to Show Cause Will Not Be Effective.

23.23 Papers Are Served.

23.23[1] Personal Service Normally Is Required.

23.23[2] Willful Concealment Obviates Personal Service.

23.23[3] Objection to Jurisdiction Based on Defective Service May Be Waived.

23.24 Hearing Is Duly Held.

23.24[1] Alleged Contemnor Must Appear.

23.24[2] Alleged Contemnor May Be Arrested on Failing to Appear.

23.24[2][a] Court May Issue Warrant.

23.24[2][b] Sheriff or Other Officer Executes Warrant.

23.24[2][c] Custody Must Be Least That Is Necessary.

23.24[2][d] Custody May Be Avoided With Undertaking.

23.24[2][e] Officer Makes Return on Hearing Day.

23.24[3] Plenary Hearing Is Required.

23.24[3][a] Court Must Hear Any Answer to Charge.

23.24[3][b] Due Process Requirements Must Be Satisfied.

23.24[3][c] Evidence in Mitigation of Punishment Must Be Received.

23.24[4] Jury Trial Is Rarely Appropriate.

23.24[4][a] Sixth Amendment Is Implicated When Actual Punishment Exceeds Six Months in Jail.

23.24[4][b] California Rule Depends on Maximum Possible Punishment.

23.24[4][c] Court Has No Discretion to Allow Jury Trial.

23.24[5] Judge Should Stand Aside When Personally Involved.

23.25 Contemnor May Be Fined and Jailed.

23.25[1] Statute Sets Maximum Punishment.

23.25[2] Multiple Acts May Be Separately Punished.

23.26 Contemnor May Be Jailed to Coerce Act.

23.26[1] Confinement in Jail May Be Indefinite.

23.26[2] Confinement Must End When Pending Proceedings End.

23.26[3] Court Must Determine When Confinement Is No Longer Coercive.

23.27 Contemnor May Be Liable for Attorney's Fees and Costs.

23.28 Order of Contempt Should Meet Specific Criteria.

23.28[1] Findings of Fact Should Be Recited.

23.28[2] Four Findings Are Necessary in Case of Disobeying Court's Order.

23.28[3] Elaboration Is Required for Conditional Confinement to Coerce Act.

23.29 CHECKLIST: Opposing Charge of Indirect Contempt.

23.30 Alleged Contemnor May File Affidavit in Opposition.

23.30[1] Practice Is Allowed by Cases.

23.30[2] Opposing Affidavit Is Like Answer to Complaint.

23.30[2][a] Affidavits Together Frame Issues.

23.30[2][b] Uncontroverted Statements Are Deemed Admitted.

23.30[3] Opposing Affidavit May Include Demurrer-Like Plea.

23.31 Sufficiency of Initiating Affidavit (or Statement of Facts) Is at Issue.

23.31[1] Alleged Contemnor May Attack Sufficiency.

23.31[2] Insufficiencies May Be Cured by Amendment.

23.31[3] Jurisdictional Defect May Be Cured by Amendment to Conform to Proof.

23.31[4] Nonprejudicial Defects of Form Will Be Disregarded.

23.31[5] No Relief From Irregularities Except to Prevent Miscarriage of Justice.

23.32 Charge of Disobeying Court Order May Be Contested.

23.32[1] Lack of Knowledge or Inability to Comply May Be Proved.

23.32[2] Disobedience of Order May Be Excused.

23.32[2][a] Superseding Court Order May Provide Excuse.

23.32[2][b] Later-Enacted Law May Provide Excuse.

23.32[3] Validity of Disobeyed Order May Be Attacked.

23.33 CHECKLIST: Review of Contempt Orders.

23.34 Order of Contempt Is Final and Not Appealable.

23.35 Contemnor May Move in Trial Court for Relief From Punishment.

23.36 Review Is by Petition for Extraordinary Writ.

23.36[1] Petition for Writ of Certiorari Is Appropriate.

23.36[2] Petition for Writ of Habeas Corpus Is Proper in Case of Confinement.

23.36[3] Scope of Review Is Same for Either Writ.

23.36[4] Reviewing Court Does Not Reconsider Evidence.

23.36[5] Contemnor in Jail May Be Released.

23.37 Invalid Contempt Order Is Annulled.

23.38 Declaration in Support of Order to Show Cause for Contempt--Disobedience of Court Order.

23.39 Order to Show Cause for Contempt--Disobedience of Court Order.

23.40 Order Adjudging Contempt--Disobedience of Court Order.



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Chapter 23 Contempt
I. STRATEGY

2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.01

23.01 Scope.

This chapter covers contempt of court during a trial and particularly:

- Determining what is contempt of court [see 23.03].
- Adjudicating and punishing direct contempt [see 23.09].
- Adjudicating and punishing indirect contempt [see 23.18].
- Opposing a charge of indirect contempt [see 23.29].
- Review of contempt orders [see 23.33].

Core Statutes:

CCP § 1209 et seq.; Pen Code § 166.

Legal Topics:

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



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Chapter 23 Contempt
I. STRATEGY

2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.02

23.02 Objective and Strategy.

A judge can discern and suppress contempt summarily when the judge witnesses a contemptuous act or omission and recognizes it as contempt. Due process requires nothing more than an order reciting the facts that the judge witnessed, adjudging those facts to constitute contempt, and stating the contemnor's punishment. It is critical that the order recite fully and in detail the facts adjudged to constitute contempt.

- No warning is required before citing the contemnor if the behavior in question is unmistakably and inexcusably contemptuous; but otherwise, the judge must first warn that a contempt citation will be made if the behavior recurs.
- Although the judge conducts a summary adjudication--meaning that no evidence is presented, either by the judge (who, after all, witnessed the contemptuous behavior) or by the contemnor--the judge must allow the contemnor to offer an explanation, must consider any mitigating circumstances that the contemnor mentions, and must give great weight to the contemnor's apology.
- If the contempt consists of a failure to appear as ordered or a failure to file a paper as ordered, the judge will have to hold a hearing, and give the contemnor notice, before adjudging the contempt.
- The judge may elect to defer adjudication until later in the trial (for instance, until after a verdict has been rendered), and in that event, the judge must give the contemnor notice and an opportunity to be heard before adjudging the contempt.
- If the judge is "personally embroiled" in the matter, the judge is constitutionally bound to have a different judge assigned, who will adjudge the contempt in a plenary hearing, which is initiated by the filing of the affronted judge's statement of the facts. This would be the same sort of hearing as in a case of indirect contempt.
- The judge may in any case elect to have a different judge assigned to adjudge the contempt; and this, too, would be handled as a case of indirect contempt.

Ordinarily, indirect-contempt proceedings during a trial are commenced by a party in the pending litigation, for the

purpose of enforcing the court's order made during the trial, which another party has disobeyed. In this situation, since the disobedience of the order is not a fact that the court knows by the judge's observation, there will be a plenary hearing. The proceeding is commenced by the filing of the aggrieved party's affidavit and the issuance of an order to show cause, with service of those papers on the party who allegedly is in contempt. (When a judge who witnesses a direct contempt is required, or elects, to have a different judge assigned to adjudge the contempt, the affronted judge files a statement of facts, in lieu of an affidavit. Otherwise, proceedings are the same in this case as in an ordinary case of indirect contempt.) There is almost never a right to a jury trial. The alleged contemnor may file an opposing affidavit; but whether or not that is done, the alleged contemnor may present evidence and witnesses to counter the case made by the initiating party.

Judge's Perspective:

- Control over attorney conduct is established by the judge early on in the case so the attorneys know what is expected. The bench recognizes that contempt is used as a last resort, and sufficient warnings should prevent contemptuous behavior. It is best to use progressive discipline before resorting to contempt proceedings: 1) private warning with other counsel in chambers, 2) warning in court at sidebar, 3) warning in court without jury present, 4) warning in front of jury, and 5) contempt proceedings. Private warnings may cure the improper conduct and not warrant entry into the record, but if counsel's conduct continues and the next level of progressive discipline is needed, be sure to enter into the record the nature of prior warnings, when they were made, and the reasons behind them.

- Contempt orders are subject to a high degree of review and compliance with all technical requirements are required. Judges considering issuing a contempt order should review that all necessary steps have been taken, and any documents supporting the order are carefully drafted and with sufficiently detailed facts to support the order.



Strategic Point:

Contempt can lie against anyone who violates an order in limine, a discovery order during trial, or a ruling on confidentiality or involving claims of or violations of privilege. Counsel must protect against the other side's violation of carefully won rulings, or of confidentiality and privilege by making sure that the order previously entered, regardless of type, was actually signed and entered by the judge and was clear enough to be enforceable in an indirect-contempt proceeding.

Any order of contempt is subject to being reviewed on a petition for a writ of certiorari (or a writ of habeas corpus, when the contemnor is in jail).

Note that an arbitrator's rules (such as JAMS or AAA rules) may provide for grounds for or proceedings for contempt, which should be reviewed.

Detailed Discussion/Forms:

California Trial Guide, Ch. 95, Contempt Proceedings During Trial (Matthew Bender).

California Forms of Pleading and Practice, Ch. 135, Contempt (Matthew Bender).

California Points and Authorities, Ch. 47, Contempt (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 Sanctions Contempt General Overview



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Chapter 23 Contempt
II. DETERMINING WHAT IS CONTEMPT OF COURT

2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.03

23.03 CHECKLIST: Determining What Is Contempt of Court.

☐ Determine that contempt proceedings may be undertaken because:

☐ Suspected contemnor is chargeable with act or omission in derogation of court's dignity or authority, such as act or omission specified in statute as contempt.

Authority:

CCP § 1209(a); *Morelli v. Superior Court* (1969) 1 C3d 328, 333, 82 CR 375, 461 P2d 655

Discussion:

See 23.04[1], [2]

☐ Regular or temporary judge (rather than some other judicial officer, such as commissioner) undertakes to adjudicate contempt.

Authority:

Fine v. Superior Court (2002) 97 CA4th 651, 662-665, 119 CR2d 376

Discussion:

See 23.04[3]

☐ Proceeding to adjudicate contempt is not unconstitutional or unwarranted infringement of free speech.

Authority:

Bridges v. California (1941) 314 US 252, 261 n3, 265, 62 S Ct 190, 86 L Ed 192 ; *Smith v. Superior Court* (1968) 68 C2d 547, 560, 68 CR 1, 440 P2d 65

Discussion:

See 23.04[4]

- ☐ Determine whether contemptuous act or omission is direct contempt (for which contemnor may be summarily adjudged and punished) or indirect contempt (for which contemnor may be punished only after hearing).
- ☐ Ascertain whether judge, in court or in chambers, witnessed act or omission and recognized it as contempt (direct contempt).
- ☐ Ascertain whether judge either did not witness act or omission or was unable to recognize it as contempt (indirect contempt).

Authority:

CCP § 1211; *Arthur v. Superior Court* (1965) 62 C2d 404, 407-408, 42 CR 441, 398 P2d 777; *In re Ringgold* (2006) 142CA4th 1001, 1011, 48 CR3d 507

Discussion:

See 23.05

- ☐ When attorney is charged with direct contempt, determine whether cited act or omission may be held to constitute contempt, such as:
- ☐ Misbehavior in court proceedings.
- ☐ Failure to conform to courtroom protocols.
- ☐ Noncompliance with court's directives.

Discussion:

See 23.06

- ☐ Determine whether person other than attorney may be cited for act or omission constituting contempt, such as:
- ☐ Party's disobedience of court order in pending litigation.
- ☐ Witness's unprivileged failure to testify in pending litigation.
- ☐ Having weapon in court.

Discussion:

See 23.07

- ☐ Determine whether cited act or omission would constitute criminal indirect contempt (therefore, appropriate procedural rights must be afforded to contemnor) because punishment will be unconditional.

Authority:

Hicks v. Feiock (1988) 485 US 624, 637, 108 S Ct 1423, 99 L Ed2d 721 ; *Shillitani v. United States* (1966) 384 US 364, 370 n5, 86 S Ct 1531, 16 L Ed2d 622 ; *Mitchell v. Superior Court* (1989) 49 C3d 1230, 1242 n8, 265 CR 144, 783 P2d 731

Discussion:

See 23.08[2]

Legal Topics:

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



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Chapter 23 Contempt
II. DETERMINING WHAT IS CONTEMPT OF COURT

2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.04

23.04 Contempt Is Affront to Court or Judge.

23.04[1] Court Has Inherent Power to Discern Contempt. An act or omission in derogation of the dignity or authority of the court may be treated as contempt [*Morelli v. Superior Court* (1969) 1 C3d 328, 333, 82 CR 375, 461 P2d 655] . The court--that is, a judge, when he or she is in or about the courtroom or in chambers--has inherent power to discern and suppress contempt [*In re San Francisco Chronicle* (1934) 1 C2d 630, 634, 36 P2d 369] .

23.04[2] Statute Delineates Contemptuous Acts and Omissions. The legislature has declared that the following kinds of acts and omissions constitute contempt:

- Behaving in a disorderly, contemptuous, or insolent way toward the judge while holding court, and so tending to interrupt the due course of a trial or other judicial proceeding [CCP § 1209(a), P 1];
- Behaving in a way that amounts to breach of the peace, boisterous conduct, or violent disturbance, and so tending to interrupt the due course of a trial or other judicial proceeding [CCP § 1209(a), P 2];
- Misbehaving in office, or otherwise willfully neglecting or violating duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service [CCP § 1209(a), P 3];
- Abusing the process or proceedings of the court, or falsely pretending to act under authority of an order or process of the court [CCP § 1209(a), P 4];
- Disobeying any lawful judgment, order, or process of the court [CCP § 1209(a), P 5];
- Rescuing any person or property in the custody of an officer by virtue of an order or process of the court [CCP § 1209(a), P 6];
- Unlawfully detaining a witness, or party to an action while going to, remaining at, or returning from the court where the action is on the calendar for trial [CCP § 1209(a), P 7];

- Otherwise unlawfully interfering with the proceedings of the court [CCP § 1209(a), P 8];
- Disobeying a subpoena duly served, or refusing to be sworn or answer as a witness [CCP § 1209(a), P 9];
- Neglecting, when summoned as a juror in the court, to attend or serve; or, when summoned as a juror in the court improperly conversing with a party to an action, to be tried at the court, or with any other person, in relation to the merits of the action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court [CCP § 1209(a), P 10]; and
- Disobeying, by an inferior tribunal, magistrate, or officer, the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after the action or special proceeding is removed from the jurisdiction of the inferior tribunal, magistrate, or officer [CCP § 1209(a), P 11].



Warning:

Courts insist that determining whether an act or omission amounts to contempt of court is inherently and exclusively a judicial function, not subject to being limited or controlled by legislation [e.g., *In re Michael G.* (1988) 44 C3d 283, 295 n10, 243 CR 224, 747 P2d 1152 ; *In re San Francisco Chronicle* (1934) 1 C2d 630, 634, 36 P2d 369] . A person cited for contempt should bear that in mind before relying on CCP § 1209(a) to support any kind of argument to the effect that the cited act or omission did not amount to contempt. However, a court need not hesitate to rely on the statute when it will support a citation for contempt [see, e.g., *In re Young* (1995) 9 C4th 1052, 1053, 40 CR2d 114, 892 P2d 148 ; *In re Hallinan* (1969) 71 C2d 1179, 1184-1185, 81 CR 1, 459 P2d 255] .

23.04[3] Only Regular or Temporary Judge May Exercise Contempt Power Directly. A judicial officer other than a judge, such as a commissioner or referee, who discerns a contemptuous act or omission, has no power to adjudicate contempt [*Marcus v. Workmen's Comp. Appeals Bd.* (1973) 35 CA3d 598, 603, 111 CR 101] and so must proceed, if at all, through an indirect-contempt proceeding [see CCP § 1211(a)].

Distinguish--Temporary Judge:

Any member of the State Bar who is acting as a temporary judge pursuant to the parties' stipulation [see generally *Cal Const*, art VI, § 21 (any State Bar member may be temporary judge)] has full judicial power, including the inherent power to punish a direct contempt, until the final determination of the cause [*Fine v. Superior Court* (2002) 97 CA4th 651, 662-665, 119 CR2d 376 (commissioner acting as temporary judge may punish for direct contempt)].

Consider:

It is not entirely clear whether a temporary judge can include arbitrators (typically by stipulation, but sometimes judicial arbitration compelled by motion). A particular arbitrator's own rules (such as JAMS or AAA rules) may provide for grounds for or proceedings for contempt that should be reviewed.

23.04[4] Freedom of Speech Must Be Accommodated. A statute has long provided that no speech or publication reflecting on or concerning the court or an officer of the court may be treated or punished as contempt unless made in the immediate presence of the court while in session and in such a manner as to actually interfere with its proceedings [CCP § 1209(b)]. California courts have persistently held that this is an unconstitutional infringement on the inherent power of courts to determine what constitutes contempt [e.g., *In re San Francisco Chronicle* (1934) 1 C2d 630, 634-635, 36 P2d 369] . Even so, judges are obliged to use the contempt power with great caution so as not to stifle the freedom of thought and speech so necessary to a fair trial under our adversary system [*Smith v. Superior Court* (1968) 68 C2d 547, 560, 68 CR 1, 440 P2d 65] .



Strategic Point--First Amendment Applies:

The U.S. Supreme Court, while respecting the California courts' holdings under the state constitution, has cited *CCP § 1209(b)* as evidence of a legislative policy that bears on the question of how to balance a court's use of the contempt power with an individual's First Amendment right of freedom of speech [*Bridges v. California (1941)* 314 US 252, 261 n3, 62 S Ct 190, 86 L Ed 192] . That balance must be struck so that the First Amendment's proscription against abridging freedom of speech is given "the broadest scope that could be countenanced in an orderly society" [see *Bridges v. California (1941)* 314 US 252, 265, 62 S Ct 190, 86 L Ed 192 (petitioners had been adjudged in contempt for disseminating out-of-court statements tending to disrupt then on-going trials; adjudications of contempt were reversed on ground of impermissibly infringing petitioners' First Amendment rights)].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil

ProcedureSanctionsContemptGeneral OverviewConstitutional LawThe JudiciaryGeneral Overview



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Chapter 23 Contempt
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23.05 Cases Distinguish Direct Contempt and Indirect (Constructive) Contempt.

When the contemptuous act or omission occurs in the immediate view and presence of the judge, it is called direct contempt. When occurring beyond the immediate view and presence of the judge, it is called indirect contempt (or sometimes called constructive contempt). The distinction matters because the court may summarily adjudicate the contempt and punish the contemnor in a case of direct contempt; but in a case of indirect contempt, the judge must hold a hearing to ascertain what the alleged contemnor did or omitted to do, and only then may the judge determine whether that should be treated as contempt [see *CCP § 1211*; *Arthur v. Superior Court* (1965) 62 C2d 404, 407-408, 42 CR 441, 398 P2d 777 ; see also *Chula v. Superior Court* (1962) 57 C2d 199, 208, 18 CR 507, 368 P2d 107 (Traynor, J., dissenting) ("The classification of contempts as direct and indirect is merely a semantic device for differentiating contempts that can be adjudicated summarily from those that can be adjudicated only after adequate notice and hearing")].

Consider--Hallmark of Direct Contempt Is Judge's Discernment, Not Location of Act:

Although direct contempt almost always occurs in (or near) a courtroom or a judge's chambers, that location for the contemptuous act or omission is not determinative. Direct contempt may be summarily adjudicated, not because it occurs in court or in chambers, but because it occurs when and where the judge both witnesses the act or omission (in the "immediate view and presence" of the judge) and also is able to correctly recognize it as contempt. For instance, an attorney's deliberate misrepresentation to the judge in court is a contemptuous act, if the judge knows that the attorney has lied. The judge might know it based on the judge's knowledge of the proceedings up to that point, or might realize it based on proceedings afterward--including, even, a deferred-adjudication hearing on a charge of contempt [see 23.06[1][d], 23.12[1]]. In that case, the contempt is direct and may be summarily adjudicated, since the judge knows all of the relevant facts first-hand [see 23.05]. But otherwise, the judge will have to be informed of the truth so as to discern the lie, and in that case, the contempt is indirect and may be adjudicated only after a hearing, since the judge cannot know all of the relevant facts until the hearing occurs [see 23.05].

➤ Cross References:

Direct contempt by attorneys, see 23.06.

Contempt by parties or witnesses, see 23.07.

Checklist for proceeding in case of indirect contempt, see *23.18*.

Legal Topics:

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



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23.06 Attorney Is Subject to Contempt for Improper Conduct.

23.06[1] Attorney Must Not Misbehave in Court Proceedings.

23.06[1][a] Disrespectful Remarks to Court May Be Contempt. An attorney may be held in contempt on the following grounds:

- Directing statements toward the court that are rude, hostile, and disrespectful [*see Boysaw v. Superior Court (2000) 23 C4th 215, 223, 96 CR2d 531, 999 P2d 748*] .
- Impugning the integrity of the court by statements made in open court [*In re Buckley (1973) 10 C3d 237, 248, 110 CR 121, 514 P2d 1201*] .

23.06[1][b] Insolent Examination of Witness or Argument May Be Contempt. An attorney may be held in contempt on the following grounds:

- Refusing to obey the court's directive to stop arguing a point on which the court has ruled [*see Boysaw v. Superior Court (2000) 23 C4th 215, 223, 96 CR2d 531, 999 P2d 748*] .
- Displaying insolence toward a witness during cross-examination [*Hawk v. Superior Court (1974) 42 CA3d 108, 125, 116 CR 713*] .
- Using a disrespectful tone of voice in making remarks (not otherwise contemptuous) addressed to the court or to witnesses [*see In re Hallinan (1969) 71 C2d 1179, 1180-1182, 81 CR 1, 459 P2d 255*] .
- Laughing derisively after the judge has sustained several objections on the ground of irrelevance to questions asked by the attorney in examining a witness [*DeGeorge v. Superior Court (1974) 40 CA3d 305, 310-311, 114 CR 860*] .

23.06[1][c] Filing of False Disqualification Affidavit May Be Contempt. An attorney may be held in contempt because of filing a judicial disqualification affidavit [*see CCP § 170.1*] containing false allegations [*Fine v. Superior*

Court (2002) 97 CA4th 651, 665-674, 119 CR2d 376 (attorney attempted to disqualify commissioner from acting as temporary judge)].

23.06[1][d] Lying to Judge May Be Contempt. An attorney may be held in contempt for making a deliberate misrepresentation to the judge [*Vaughn v. Municipal Court* (1967) 252 CA2d 348, 358, 60 CR 575] .

Distinguish--When Lying to Court Is Direct Contempt:

Lying to the judge can be direct contempt--it may be summarily adjudicated and punished--if the judge discerns the lie based on the judge's knowledge of proceedings in the court. This encompasses not only proceedings up to the time of the contemptuous lying but also later proceedings that complete the picture so that the lying is clearly exposed. For instance, a judge believed that an attorney lied in support of a request for a continuance and to excuse a failure to appear after the continuance, but the judge deferred adjudication of the contempt until the end of the trial. The judge's conclusion that the attorney had lied was properly based not only on what had happened in court up to the point of the lying but also on the attorney's statements during the deferred-adjudication hearing [*Vaughn v. Municipal Court* (1967) 252 CA2d 348, 357-366, 60 CR 575] . Realistically, it is not common for a judge to hold an attorney in contempt for lying, since there can such a grey area between outright dishonesty and being "economical" with the truth. Also, it may not be immediately apparent that a statement is a lie, thus probably rendering it indirect contempt.

23.06[2] Attorney Must Conform to Courtroom Protocols.

23.06[2][a] Inexcusable Absence From Court May Be Contempt. An attorney may be held in contempt on the following grounds:

- Failing, without sufficient cause, to be present in court at the time set for judicial proceedings in which the attorney is counsel [*In re Baroldi* (1987) 189 CA3d 101, 106, 234 CR 286 , *overruled on other issue*, *Boysaw v. Superior Court* (2000) 23 C4th 215, 221, 96 CR2d 531, 999 P2d 748 ; *In re Karpf* (1970) 10 CA3d 355, 363, 88 CR 895] .
- Leaving the courtroom abruptly, without explanation, and thus causing the due course of a trial or proceeding to be interrupted [*Thorne v. Municipal Court* (1965) 237 CA2d 249, 252, 46 CR 749] .

Exception--Invalid Order to Be Present:

A court's invalid order directing a deputy public defender to be present in the courtroom every day from 9:00 a.m. until 5:00 p.m. was not enforceable by the contempt power [see *Mowrer v. Superior Court* (1969) 3 CA3d 223, 231, 83 CR 125] .



Trap--Terminated Associate in Contempt for Firm's Nonappearance:

Termination of an attorney's employment with a law firm did not spare him from punishment for contempt because of his failure to appear at oral argument before the Supreme Court and failure to notify the court that he would not be appearing, even though the firm, rather than that attorney individually, was the client's attorney of record [*In re Aguilar* (2004) 34 C4th 386, 389-392, 18 CR 3d 874, 97 P3d 815 (court also considered fact that attorney misrepresented that he did not know that case was set for oral argument)].



Cross Reference:

Contemnor's absence obliges court to set hearing on notice, see 23.12[2].

23.06[2][b] Unprofessional Conduct Before Jury May Be Contempt. An attorney may be held in contempt

because of unprofessional conduct before a jury, such as the following:

- Stating, in argument to a criminal-trial jury, that the prosecutor's purpose was to misrepresent the facts [*Hanson v. Superior Court* (2001) 91 CA4th 75, 77-80, 109 CR2d 782] .
- Trying to inflame a criminal-trial jury by stating, in the presence of the jury, that the prosecutor had reasonable doubt as to the defendant's guilt [*Hawk v. Superior Court* (1974) 42 CA3d 108, 127-128, 116 CR 713] .
- Defying a court order to refrain from calling a client by his first name, and calling the client a friend, in front of the jury [*Hawk v. Superior Court* (1974) 42 CA3d 108, 122-124, 116 CR 713] .

23.06[3] Attorney Must Comply With Court's Directives.

23.06[3][a] Failure to Take Procedural Step As Directed May Be Contempt. An attorney may be held in contempt because of willfully failing to comply with a court order requiring the attorney to take some procedural step, such as filing a brief [*In re Rubin* (2001) 25 C4th 1176, 1178-1179, 108 CR2d 593, 25 P3d 1075 ; *In re Garland* (2001) 25 C4th 1172, 1174-1175, 108 CR2d 591, 25 P3d 1074] .

23.06[3][b] Failure to Abide by Judge's Warning May Be Contempt. An attorney may be held in contempt because of not abiding by the judge's warning to adhere to the no-comment rule in a criminal trial or to refrain from commenting on the defendant's failure to testify in the trial [see *People v. Haldeen* (1968) 267 CA2d 478, 482-483, 73 CR 102] .

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil
ProcedureSanctionsContemptGeneral OverviewEvidenceTestimonyLay WitnessesGeneral OverviewLegal
EthicsProfessional ConductTribunals



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23.07 Party, Witness, or Other Person May Be Held in Contempt.

23.07[1] Party May Be Punished for Disobeying Order. The most common example of indirect contempt is a party's disobedience of the court's order outside the immediate view and presence of the court. While this tends to occur more often after the trial (through noncompliance with a decree) than during it, there are cases to illustrate a party's out-of-court disobedience of a *pendente lite* order and the party's consequent punishment for contempt.

Example:

The court properly held the plaintiff and the plaintiff's attorney in contempt for disobeying a *pendente lite* order to return certain documents to the defendant, from whom the plaintiff had wrongfully taken them when the defendant terminated the plaintiff's employment [*Conn v. Superior Court* (1987) 196 CA3d 774, 777, 242 CR 148] .



Strategic Point--Contempt Proceeding Might Be Inadvisable:

When a party disobeys a court order relating to violations of discovery orders, orders relating to pretrial issues, and orders on motions in limine, the sanctions that may be imposed for contempt are limited by statute: a fine up to \$1,000 or confinement up to five days in jail, or both [CCP § 1218(a)]. The aggrieved party, in lieu of starting a contempt proceeding, should consider seeking an order for expenses under CCP § 128.5, which might turn out to be more effective, provided the other party's disobedience of the order can fairly be characterized as bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay [see *Conn v. Superior Court* (1987) 196 CA3d 774, 788, 242 CR 148] .



Strategic Point:

Because contempt is rare and might not fully compensate for the harm done by contemnor or opposing counsel, alternative sanctions should be explored beyond just money, including "issue sanctions" ranging from striking the answer or complaint, entry of judgment, to a determination of issues. Money tends to be the cost of bringing the motion rather than a fine. However, the threat of a finding of contempt can have

a strong effect on an opposing attorney.

Cross References:

Discussion of and forms for seeking expenses under *CCP* § 128.5, see Matthew Bender© Practice Guide: California Pretrial Civil Procedure, Ch. 35, Sanctions.

See also California Forms of Pleading and Practice, Ch. 510, Sanctions (Matthew Bender).

23.07[2] Witness May Be Punished for Unprivileged Failure to Testify.

23.07[2][a] Willful Noncompliance With Subpoena Is Contempt. A witness who fails to appear or makes a tardy appearance in court, whether pursuant to a subpoena or the court's order continuing proceedings to another day is not guilty of contempt in simply falling short of prompt compliance with the process or order of the court. The witness may not be adjudged in contempt without a fair judicial inquiry and decision as to the validity of any excuse he or she might offer. It is an essential element of contempt that the conduct of the accused must be willful in the sense that it is inexcusable. However, "willful" as it pertains to contempt not only means a deliberate intention to disregard a court order but also encompasses an indifferent disregard of the duty to obey it promptly [*see In re Burns (1958) 161 CA2d 137, 141, 326 P2d 617* (witness appeared pursuant to subpoena but subsequently failed to appear, as orally directed by court, on next day to which trial was continued)].

Distinguish--Discovery Proceedings Have Separate Sanctions:

When a witness fails to respond to a subpoena for discovery, sanctions are provided in the Civil Discovery Act [*see CCP* § 2023.010 *et seq.*]. That failure may be treated as contempt [*see CCP* § 2023.030(e)].

Cross References:

Discussion of and forms for seeking sanctions under Civil Discovery Act, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 3, Sanctions.

See also California Forms of Pleading and Practice, Ch. 192, Discovery: Sanctions for Discovery Misuse (Matthew Bender).

23.07[2][b] Disobedience of Court's Order to Testify Might Be Contempt. A witness may be held in contempt on refusing to obey the court's order to be sworn and give testimony, unless the witness is exercising a privilege not to testify. When that kind of refusal disrupts and frustrates ongoing judicial proceedings, as in a trial, the summary contempt power must be available to vindicate the court's authority as well as to provide the recalcitrant witness with some incentive to testify [*United States v. Wilson (1975) 421 US 309, 314-316, 95 S Ct 1802, 44 L Ed2d 186*] .



Strategic Point--Fifth Amendment Privilege May Be Neutralized by Grant of Immunity:

If the witness's refusal to testify is based on the *Fifth Amendment* privilege against self-incrimination, the court may grant immunity from prosecution. Then the witness's refusal to obey the court's order to give testimony would be contempt [*United States v. Wilson (1975) 421 US 309, 315-316, 95 S Ct 1802, 44 L Ed2d 186*] .

23.07[2][c] Person in News Reporting Has Special Immunity. A publisher, editor, reporter, or any other person, connected with or employed on a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, may not be adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine, or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared

in gathering, receiving or processing of information for communication to the public. Nor may a radio or television news reporter or other person connected with or employed by a radio or television station, or any person who has been so connected or employed, be so adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public [*Cal Const*, art I, § 2(b); *Evid Code* § 1070(a),(b)].

Distinguish--Unpublished Information:

In this context, unpublished information includes information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated, and includes, but is not limited to, all notes, out-takes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based on or related to such material has been disseminated [*Cal Const*, art I, § 2(b); *Evid Code* § 1070(c)].



Strategic Point--Statute Grants Immunity, Not Privilege:

The news-reporting shield law provides only an immunity from being held in contempt rather than a privilege not to testify. This is important because it affects the timing of a petition for an extraordinary writ by the person who claims the benefit of the statute. Whereas a person claiming a privilege not to testify may petition for a writ to prevent being forced to testify, a person claiming the immunity of the shield law must wait until the trial court has entered a contempt order, and only then may a petition be filed for a writ, to vacate the order [*New York Times Co. v. Superior Court* (1990) 51 C3d 453, 460 n7, 273 CR 98, 796 P2d 811] .



Cross References:

Court's duty to grant stay allowing for writ petition to be filed, see 23.17[2].

Discussion of news-reporting shield law, see California Forms of Pleading and Practice, Ch. 191, Discovery: Privileges and Other Discovery Limitations (Matthew Bender).

23.07[3] Any Person May Be Punished for Having Weapon in Court. Any person may be held in contempt because of carrying a weapon into a courtroom, whether with an offensive purpose or a defensive purpose [see *In re Jasper* (1973) 30 CA3d 985, 988, 106 CR 754 ; but see *In re Carvallo* (1973) 29 CA3d 983, 987, 105 CR 925 (mere possession of knife was not contempt, in absence of prior court order banning knives from courtroom, when no reasonable inference of intent to improperly use it in courtroom could be drawn)].

Legal Topics:

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

Civil ProcedureDiscoveryMotions to CompelCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeEvidencePrivilegesJournalist's PrivilegeGeneral Overview



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23.08 Contempt May Be Criminal or Civil.

23.08[1] Issue Does Not Arise in Case of Direct Contempt. It is not necessary to try to classify a direct contempt as criminal or civil. The requirements of due process are satisfied because the judge who adjudicates the contempt charge and imposes punishment witnessed the act or omission constituting the contempt [*Cooke v. United States* (1925) 267 US 517, 534, 45 S Ct 390, 69 L Ed 767 ; see 23.05].

23.08[2] Indirect Contempt Is Criminal When Punishment Is Unconditional.

23.08[2][a] Due-Process Test Looks at Actual Punishment. The reason for trying to distinguish between "criminal" contempt and "civil" contempt is that, in a case of indirect contempt, if the punishment is criminal in nature, it may not be imposed unless federal constitutional protections are applied in the contempt proceeding [*Hicks v. Feiock* (1988) 485 US 624, 637, 108 S Ct 1423, 99 L Ed2d 721] .

- A criminal contempt proceeding is one characterized by an unconditional sentence for punishment [see *Shillitani v. United States* (1966) 384 US 364, 370 n5, 86 S Ct 1531, 16 L Ed2d 622] , that is, the punishment is imposed for past acts and cannot be modified by the contemnor's future behavior [*Mitchell v. Superior Court* (1989) 49 C3d 1230, 1242 n8, 265 CR 144, 783 P2d 731] .

- A civil contempt proceeding is characterized by a conditional sentence, that is, by imposition of a punishment that the contemnor can avoid by taking some remedial step within the contemnor's power [see *Hicks v. Feiock* (1988) 485 US 624, 635 n7, 108 S Ct 1423, 99 L Ed2d 721] . In other words, the contemnor can "purge" a civil contempt.

23.08[2][b] Test Can Be Applied Prospectively. The *Hicks* approach has been called impractical to apply because it apparently makes the extent of the alleged contemnor's procedural rights during the adjudication proceeding depend on the punishment imposed, which cannot be determined until the adjudication is concluded [*In re Feiock* (1989) 215 CA3d 141, 145 n6, 263 CR 437 , overruled on other issue, *Moss v. Superior Court* (1998) 17 C4th 396, 428, 71 CR2d 215, 950 P2d 59] .

In practice a trial judge is able to foresee what kind of sentence will result from an adjudication of contempt in a

particular case, in view of the act or omission that is charged as contempt. Therefore, the judge usually knows, at the beginning of the proceeding, whether the contemnor will be strictly punished or will be able to purge the contempt. A court unsure of the sentence will probably err on the side of caution, imposing sanctions rather than finding contempt.

23.08[3] Some Contemptuous Acts Are Misdemeanors. In the Penal Code, certain acts are declared to be misdemeanors and are described as constituting contempt of court [*see Pen Code § 166*]. Any of those acts undoubtedly might be treated as contempt [*see 23.04[1]*], and the contemnor might be prosecuted for the misdemeanor as well [*see generally Pen Code §§ 11, 657* (Penal Code does not generally affect court's power to punish for contempt; criminal act is not less punishable because it is also punishable as contempt)]. Some of those acts are the same (or nearly the same) as acts listed in *CCP § 1209* and declared to constitute contempt [*see 23.04[2]*].

Legal Topics:

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

Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law
& ProcedureCriminal OffensesMiscellaneous OffensesContemptElementsCriminal Law & ProcedureCriminal
OffensesMiscellaneous OffensesContemptProceedingsDue Process



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III. ADJUDICATING AND PUNISHING DIRECT CONTEMPT

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23.09 CHECKLIST: Adjudicating and Punishing Direct Contempt.

- ☐ Determine that judge has observed act or omission and has recognized it as contempt (therefore contemnor may be summarily adjudged and punished).

Authority:

CCP § 1211(a)

Standard Procedure Checklist:

Determining what is contempt of court, see 23.03

Discussion:

See 23.10

- ☐ Judge must deliver warning, if necessary, before citation for contempt:

☐ Contemptuous tone of voice or demeanor usually requires warning.

☐ Inexcusable and unmistakable contempt ("contempt on its face") requires no warning.

Authority:

Boysaw v. Superior Court (2000) 23 C4th 215, 222, 96 CR2d 531, 999 P2d 748 ; In re Buckley (1973) 10 C3d 237, 250, 110 CR 121, 514 P2d 1201

Discussion:

See 23.11

- ☐ Judge must cite contemnor for contempt by making specific reference to act or omission being cited and stating

that contemnor is cited for contempt.

Authority:

CCP § 1211(a)

Discussion:

See 23.10[1]

- ☐ If contemnor is present, judge should state whether adjudication will proceed immediately or will be deferred to later time or date (preferably after jury has returned verdict).

Authority:

CCP § 1211(a); People v. Fusaro (1971) 18 CA3d 877, 888, 889, 96 CR 368, disapproved on other issue, People v. Brigham (1979) 25 C3d 283, 292, 157 CR 905, 599 P2d 100

Discussion:

See 23.10, 23.12[1]



Warning:

A judge who is "personally embroiled" in the matter is required, on due-process grounds, to have a different judge adjudicate the contempt and therefore should not proceed with summary adjudication [*Mayberry v. Pennsylvania (1971) 400 US 455, 466, 91 S Ct 499, 27 L Ed2d 532* ; *In re Buckley (1973) 10 C3d 237, 256, 110 CR 121, 514 P2d 1201* ; see 23.12[4]]. In some courts, the process is to file a separate motion with the supervising judge to commence an indirect-contempt proceeding [see 23.18]. Check the local rules.

- ☐ If contemnor is not present because contempt consists of failure to appear as ordered or failure to file paper as ordered, note that hearing must be held, on notice to contemnor, for adjudication of contempt.

Authority:

Chula v. Superior Court (1962) 57 C2d 199, 207, 18 CR 507, 368 P2d 107

Discussion:

See 23.12[2]

- ☐ If noticed hearing is necessary because adjudication was deferred or because contemnor was absent, judge should issue order to show cause setting adjudication hearing and have it served on contemnor.

Authority:

Chula v. Superior Court (1962) 57 C2d 199, 207, 18 CR 507, 368 P2d 107 ; *Hanson v. Superior Court (2001) 91 CA4th 75, 82, 109 CR2d 782*

Discussion:

See 23.12[1][c], [2][c]

- ☐ On proceeding with adjudication:



Judge must hear contemnor's explanation and must consider mitigating circumstances.

Authority:

Lyons v. Superior Court (1955) 43 C2d 755, 763, 278 P2d 681

Discussion:

See 23.13[1]

- ☐ Contemnor generally has no right to call witnesses or present evidence when contempt is in open court.

Authority:

Cooke v. United States (1925) 267 US 517, 535-537, 45 S Ct 390, 69 L Ed 767 ; *Ex parte Terry* (1888) 128 US 289, 309, 9 S Ct 77, 32 L Ed 405

Exception:

In a hearing held because the contemnor was absent when the contempt occurred (that is, the contempt consisted of failure to appear or failure to file a paper), the contemnor may be entitled to present evidence as well as offer an explanation [*Chula v. Superior Court* (1962) 57 C2d 199, 207, 18 CR 507, 368 P2d 107] .

Discussion:

See 23.13[2]

- ☐ Judge may independently investigate circumstances.

Authority:

In re Karpf (1970) 10 CA3d 355, 373, 88 CR 895

Discussion:

See 23.13[3]

- ☐ Judge must give weighty consideration to contemnor's apology.

Authority:

People v. Turner (1850) 1 C 152, 153

Discussion:

See 23.14

- ☐ On adjudging contemnor to be in contempt, determine whether punishment should be fine or jail or both:

- ☐ Judge should be guided by statutory limitation of \$1,000 fine and five days in jail.

Authority:

In re McKinney (1968) 70 C2d 8, 11-12, 73 CR 580, 447 P2d 972 ; CCP § 1218(a)

Discussion:

See 23.15[1][b]

- ☐ Judge may not impose punishment comparable to misdemeanor punishment.

Authority:

Mitchell v. Superior Court (1989) 49 C3d 1230, 1244, 265 CR 144, 783 P2d 731

Discussion:

See 23.15[1][c]

- ☐ Contemnor may be jailed indefinitely to coerce act that person remains able to perform.

Authority:

CCP § 1219(a)

Exceptions:

There is a specific exception for the case of a sexual-assault victim who refuses to testify, or a domestic-violence victim who refuses to testify, or a minor under 16 years old [CCP §§ 1219(b), 1219.5].

Discussion:

See 23.15[2] -[5]

- ☐ Judge must make contempt order that satisfies statutory requirements:

- ☐ Order must recite relevant facts.

Authority:

CCP § 1211(a); *Arthur v. Superior Court* (1965) 62 C2d 404, 407, 42 CR 441, 398 P2d 777

Discussion:

See 23.16[1]

**Warning:**

The order must be sufficient in all particulars to allow review without other recourse to the record of trial-court proceedings, and it must be entered in the record so as to permit review [*Boysaw v. Superior Court* (2000) 23 C4th 215, 223, 96 CR2d 531, 999 P2d 748 ; see 23.16[1][c]].

- ☐ Order must adjudge contemnor to be in contempt.

Authority:

CCP § 1211(a); *Arthur v. Superior Court* (1965) 62 C2d 404, 407, 42 CR 441, 398 P2d 777

Discussion:

See 23.16[2]

- ☐ Order must state punishment.

Authority:

CCP § 1211(a); *Arthur v. Superior Court* (1965) 62 C2d 404, 407, 42 CR 441, 398 P2d

777

Discussion:

See 23.16[3]

☐ Imposition of punishment might be stayed because either:

☐ Stay is automatic in specified cases involving attorney, law-enforcement officer, sexual-assault victim, or domestic-violence victim.

Authority:*CCP §§ 128(b)-(e), 1209(c), (d)***Discussion:**

See 23.17[1]

☐ Judge has discretion to stay execution of sentence in other cases.

Authority:*New York Times Co. v. Superior Court (1990) 51 C3d 453, 460, 273 CR 98, 796 P2d 811***Discussion:**

See 23.17[2]

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview



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Chapter 23 Contempt

III. ADJUDICATING AND PUNISHING DIRECT CONTEMPT

2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.10

23.10 Contemnor May Be Summarily Adjudged and Punished.

23.10[1] Court Enters Order of Contempt. In a case of direct contempt, the contemnor's act or omission has been witnessed by the judge [see 23.05], and the contemnor may be summarily adjudged in contempt and punished. The court need only make an order reciting the facts, showing that a contemptuous act or omission occurred in the immediate view and presence of the court or of the judge in chambers, adjudging that the contemnor is thereby guilty of contempt, and stating that he or she be punished as prescribed in the order [CCP § 1211(a)].



Warning--State Bar Must Be Notified of Attorney in Contempt:

Although it rarely occurs, the court must notify the State Bar whenever a final order of contempt is made against an attorney who is a member of the State Bar, if the contempt might involve grounds warranting discipline [B&P Code § 6086.7(a)(1); see B&P Code § 6086.7(a)(3) (State Bar also must be notified when court imposes "any judicial sanctions" against attorney, except monetary sanction of less than \$1,000 or sanction for failure to make discovery)].



Cross Reference:

Requirements for order of contempt, see 23.16.

23.10[2] Normal Due Process Is Not Required. To preserve order in the court room for the proper conduct of business, the court must suppress disturbance or violence or physical obstruction or disrespect to the court occurring in open court. There is no need of evidence or assistance of counsel before punishment is imposed for contempt, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary, and the punishment imposed is due process of law [*Cooke v. United States* (1925) 267 US 517, 534, 45 S Ct 390, 69 L Ed 767] .

23.10[3] Judge May Not Be Statutorily Disqualified. The statutory procedures for disqualification of judges [see CCP § 170 *et seq.*] have no application in direct-contempt proceedings [*Blodgett v. Superior Court* (1930) 210 C 1, 15, 290 P 293] .


Strategic Point--Hearing Before Another Judge Might Be Required:

If the contemptuous conduct is directed at the judge personally (rather than at the court as an institution), so that the judge has become "personally embroiled" in the matter, then the judge is constitutionally bound to defer adjudication of the contempt and to set the matter for hearing by a different judge [*Mayberry v. Pennsylvania* (1971) 400 US 455, 466, 91 S Ct 499, 27 L Ed2d 532 ; *In re Buckley* (1973) 10 C3d 237, 256, 110 CR 121, 514 P2d 1201] .


Cross Reference:

Hearing before different judge when affronted judge is personally embroiled in matter, see 23.12[4].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewLegal EthicsProfessional ConductGeneral Overview



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2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.11

23.11 Warning Might Be Required.

23.11[1] Contemptuous Tone of Voice or Demeanor Raises Special Concerns.

23.11[1][a] Contemnor May Not Be Held in Contempt Without Warning. When the contempt consists of using a contemptuous tone of voice or having a contemptuous demeanor, it may not be punished unless the court previously warned that the contemnor's tone of voice or demeanor was objectionable [*Boysaw v. Superior Court (2000)* 23 C4th 215, 222, 96 CR2d 531, 999 P2d 748 ; *In re Hallinan (1969)* 71 C2d 1179, 1185, 81 CR 1, 459 P2d 255] .



Timing:

When a warning is necessary, it must be given reasonably soon after the court discerns the contemptuous conduct [*McCann v. Municipal Court (1990)* 221 CA3d 527, 542, 270 CR 640] .

Example:

In a morning session, the court warned specifically against an attorney's contemptuous demeanor during the previous day's session. The subsequent contempt order cited another instance that occurred within hours after that warning. The warning was sufficient and timely [*McCann v. Municipal Court (1990)* 221 CA3d 527, 542, 270 CR 640] .

23.11[1][b] Repeated Warnings Are Not Necessary. The court need not give repeated warnings in the face of recurrent contemptuous misconduct, before eventually citing an instance of it as contempt [*Hawk v. Superior Court (1974)* 42 CA3d 108, 119, 116 CR 713] .

Example:

An attorney persistently interjected prejudicial comments into voir dire examination, after the court warned him to refrain from doing that, and the court eventually cited it as contempt. The warning was sufficient and timely [*Hawk v. Superior Court (1974)* 42 CA3d 108, 119 n11, 116 CR 713] .

23.11[1][c] Warning Must Be Carefully Worded. When a warning is required, it must specifically address the conduct that is eventually cited as contempt; otherwise, on review of the contempt order, the warning will held insufficient [*Boysaw v. Superior Court (2000)* 23 C4th 215, 223 n2, 96 CR2d 531, 999 P2d 748] .

Example:

A contempt order was based on an insolent tone of voice used for remarks directed at the judge, whereas the judge's warning addressed the contemnor's insolent tone of voice used toward a witness. Thus the admonition could not support the order [*Boysaw v. Superior Court (2000)* 23 C4th 215, 223 n2, 96 CR2d 531, 999 P2d 748] .

23.11[1][d] Focusing on Content of Remarks or on Disobedience of Order May Obviate Warning. The court need not give a warning (and so may avoid a possibly serious procedural faux pas) if the court bases the contempt order, not on the contemnor's insolent tone of voice or demeanor, but on either the contemnor's refusal to obey the court's order to desist from objectionable conduct (for instance, to stop arguing an evidentiary issue after the court's ruling on it) or on the rude, hostile, and disrespectful content of the contemnor's remarks [*Boysaw v. Superior Court (2000)* 23 C4th 215, 223, 96 CR2d 531, 999 P2d 748] .

23.11[2] Inexcusable and Unmistakable Misconduct May Be Punished Without Warning. When misconduct is of a kind that is unmistakable and for which no acceptable excuse could be offered ("contemptuous on its face"), the judge need not give a warning before citing the misconduct as contempt [*In re Buckley (1973)* 10 C3d 237, 250, 110 CR 121, 514 P2d 1201] .

Examples:

- An attorney refused in open court to obey an order of the judge [*In re Littlefield (1993)* 5 C4th 122, 138, 19 CR2d 248, 851 P 2d 42] .

- An attorney stated, "I will not move on until you haul me away" and "You are not my mother" [*McCann v. Municipal Court (1990)* 221 CA3d 527, 534, 270 CR 640] .

- An attorney made repeated, deliberate attempts to place inadmissible matter before a jury for the purpose of inflaming it or causing a mistrial [*DeGeorge v. Superior Court (1974)* 40 CA3d 305, 314-315, 114 CR 860] .

- An attorney stated, "This court obviously doesn't want to apply the law" [*In re Buckley (1973)* 10 C3d 237, 250, 110 CR 121, 514 P2d 1201] .

Legal Topics:

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



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23.12 Notice and Hearing Might Be Required.

23.12[1] Deferral of Adjudication Entails Notice and Hearing.

23.12[1][a] Immediate Adjudication Is Not Necessary. The term "summarily" as used in *CCP § 1211(a)* refers to the summary character, not the timing, of the adjudication of contempt leading to punishment; the statute does not mandate immediate adjudication and punishment. The judge may defer the contempt adjudication and imposition of punishment until later in the trial or after the trial, so as not to disrupt the current proceedings; and that is the preferred practice in a jury trial [*People v. Fusaro* (1971) 18 CA3d 877, 888, 889, 96 CR 368, *disapproved on other issue*, *People v. Brigham* (1979) 25 C3d 283, 292, 157 CR 905, 599 P2d 100] .



Strategic Point:

Deferral will require that the contemnor be given reasonable notice of the charges and an opportunity to respond at a hearing, before the contempt may be adjudicated [*Hanson v. Superior Court* (2001) 91 CA4th 75, 82, 109 CR2d 782] .

23.12[1][b] Contempt Will Still Be Summarily Adjudicated. The deferred adjudication will still be a proceeding for direct contempt, since the judge who witnessed the contemptuous behavior will be the judge imposing punishment for it [see *CCP § 1211(a)*]. Therefore, apart from providing notice and an opportunity for the contemnor to respond, the judge will proceed as in a normal summary adjudication [see 23.10]. If the matter were assigned to a different judge, however, then it would become a proceeding for indirect contempt [see 23.12[3]].

Distinguish--Due Process Requirement:

This notice-and-hearing procedure must be followed whenever the judge bypasses immediate adjudication, even though the judge cites each act of contempt as it occurs and even if the judge allows the contemnor to respond briefly after each citation [*Taylor v Hayes* (1974) 418 US 488, 496-498, 94 S Ct 2697, 41 L Ed2d 897 ; *In re Karagozian* (1975) 44 CA3d 516, 523, 118 CR 793] .

23.12[1][c] Hearing Is Set by Order to Show Cause. Normally, the court would set the deferred-adjudication hearing by orally ordering the contemnor to appear at the selected time. If the contemnor happens not to be present

when the judge sets the hearing, then the court should have an order to show cause served on the contemnor. A warrant of attachment should not be used unless the court has reason to believe that the contemnor will not voluntarily appear at the hearing [see *Cooke v. United States* (1925) 267 US 517, 537, 45 S Ct 390, 69 L Ed 767] .

23.12[2] Contemptuous Failure to Appear or File Paper Obliges Court to Set Hearing on Notice.

23.12[2][a] Contemnor Who Is Absent Is Not Able to Respond to Charge of Contempt. When the contemptuous act is disobedience of an order to appear before the court or an order to file a paper with the court, it is direct contempt because the judge knows by observation that the person subject to the order is not present at the specified time or knows by looking in the court's file that the required paper has not been filed. However, since the contemnor is always absent in the one case, or if the contemnor is absent in the other case, the court is obliged to set a hearing, on notice to the contemnor, for adjudicating the contempt. The reason is that there could be an acceptable excuse for the failure to appear or to file the paper. The rights of the contemnor will be fully protected by an order to show cause apprising him or her of the citation for contempt, followed by an opportunity to be heard. If the contemnor claims that his or her conduct is excusable, then he or she is entitled to offer supporting evidence [*Chula v. Superior Court* (1962) 57 C2d 199, 207, 18 CR 507, 368 P2d 107 ; see *Inniss v. Municipal Court* (1965) 62 C2d 487, 490-491, 42 CR 594, 399 P2d 50] .

23.12[2][b] So-Called Hybrid Contempt Is Case of Contemnor's Absence. The situation in the *Chula* case (an attorney's absence from court) was subsequently called hybrid contempt by some judges, in view of the Supreme Court's comment: "In the present case we have what might be termed a hybrid situation; the charge of contempt arose from events occurring in the presence of the court which it is claimed should be excused by matters taking place outside the courtroom" [*Chula v. Superior Court* (1962) 57 C2d 199, 207, 18 CR 507, 368 P2d 107] . However, that comment served merely to set the stage for the holding that a hearing is required for adjudication in the special cases in which the contemnor is absent when a direct contempt occurs. The Supreme Court was not trying to describe some new kind of contempt. Both trial judges and appellate courts have been confounded by the false notion of hybrid contempt [see, e.g., *In re Martin* (1977) 71 CA3d 472, 477 n3, 479 n4, 139 CR 451] .

23.12[2][c] Hearing Is Set by Order to Show Cause. When the contemnor is absent, obviously an oral order to appear at the hearing would not provide notice. The court should have an order to show cause served on the contemnor. A warrant of attachment should not be used unless the court has reason to believe that the contemnor will not voluntarily appear at the hearing [see *Cooke v. United States* (1925) 267 US 517, 537, 45 S Ct 390, 69 L Ed 767] .

23.12[3] Judge Might Treat Direct Contempt As Indirect Contempt. The judge who witnessed the contemptuous behavior may have a good reason to elect not to adjudicate the charge, especially if the contempt has, or appears to have, an element of personal attack on the judge. In that event, the adjudication can be assigned to another judge [see, e.g., *Cooke v. United States* (1925) 267 US 517, 539, 45 S Ct 390, 69 L Ed 767] . Necessarily, then, the proceeding before the other judge is for indirect contempt, since the other judge did not witness the contemptuous behavior [*Hanson v. Superior Court* (2001) 91 CA4th 75, 82, 109 CR2d 782] . Procedural requirements will be different. There can be no summary adjudication; instead, a hearing must be set, on notice, and the judge who witnessed the contempt will file a statement of the facts [see CCP § 1211(a)].



Cross Reference:

Proceeding in case of indirect contempt, see 23.18.

23.12[4] Judge Who Is Personally Embroiled in Matter Must Set Hearing by Different Judge. If the contemptuous conduct is directed at the judge personally (rather than at the court as an institution), so that the judge has become "personally embroiled" in the matter, then the judge is required to defer adjudication of the contempt and to set the matter for hearing by a different judge, typically a presiding or supervising judge [*Mayberry v. Pennsylvania* (1971) 400 US 455, 466, 91 S Ct 499, 27 L Ed2d 532 ; *In re Buckley* (1973) 10 C3d 237, 256, 110 CR 121, 514 P2d 1201] .

Examples:

- The judge was called a "tyrannical old dog" and a "dirty sonofabitch" [*Mayberry v. Pennsylvania* (1971) 400 US 455, 466, 91 S Ct 499, 27 L Ed2d 532] .

- The judge described satirical cartoons of himself, which were attached to an attorney's motion, as "obscenities" and "offensive in the extreme" [*Little v. Kern County Superior Court* (9th Cir 2002) 294 F3d 1075, 1079] .

**Strategic Point:**

Which judge will decide the matter is largely an issue for the person accused of contempt. The person making the charge of contempt likely wants it heard by the judge in question (especially if that judge is personally embroiled). A person accused of contempt who argues that the hearing must be heard by a different judge is in a difficult tactical position.

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview



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23.13 Court May Accept Explanation.

23.13[1] Court Usually Must Consider Mitigating Circumstances. When the court proceeds to adjudicate the contempt--whether the court proceeds forthwith or conducts a deferred-adjudication hearing--the court should allow the contemnor to offer an explanation, so that the cited conduct might be found not to constitute contempt [*see Lyons v. Superior Court (1955) 43 C2d 755, 763, 278 P2d 681 (dictum)*].

Exception:

This will not be required, however, if the court is satisfied that no acceptable explanation could be offered [*see Ex parte Terry (1888) 128 US 289, 309, 9 S Ct 77, 32 L Ed 405*].

23.13[2] Hearing Gives Contemnor Opportunity to Explain. If a hearing is held, either because the adjudication of contempt was deferred [*see 23.12[1]*] or because the contemnor was absent when the contempt occurred [*see 23.12[2]*], the purpose of the hearing is to allow the contemnor to explain the cited misconduct. The court is not required to present or receive evidence bearing on the contempt, since the court witnessed it; nor is the contemnor necessarily entitled to present exculpatory evidence along with the explanation [*see Cooke v. United States (1925) 267 US 517, 535-537, 45 S Ct 390, 69 L Ed 767 (drawing distinction between adjudication of direct contempt and adjudication of indirect contempt)*].

Exception:

If the hearing is necessary because the contemnor was absent when the contempt occurred, the California Supreme Court holds that the contemnor not only may offer an excuse but also may present supporting evidence [*Chula v. Superior Court (1962) 57 C2d 199, 207, 18 CR 507, 368 P2d 107*].

Examples--Unavoidable Scheduling Conflict Is Excuse for Attorney's Absence From Court:

- An attorney made a sincere and diligent effort to provide a substitute attorney in a San Francisco hearing when he had a conflicting commitment to appear in Alameda County at the same time. This was an adequate excuse in response to being cited for contempt after the substitute attorney failed to attend the San Francisco hearing [*Inniss v. Municipal Court (1965) 62 C2d 487, 491, 42 CR 594, 399 P2d*

50].

■ A deputy public defender preoccupied with a trailing matter in Department 105 of the Los Angeles County court, who was required to be present in Department 115 at the same time, notified the clerk that he would be late and then went immediately to Department 115 as soon as possible. This was an adequate excuse in response to being cited for contempt by the Department 115 judge [*Mowrer v. Superior Court* (1969) 3 CA3d 223, 232, 83 CR 125] .



Strategic Point:

Most judges are understanding in these situations. As soon as a conflict looms on the calendar, counsel should notify the judges' chambers, the courts' clerks, and the opposing sides, explain the reason, arrange for one of the matters to go at the end of the calendar if it cannot be moved to another day, and record this in confirmatory letters to the clerk and other side. This latter step is more to protect the record than as a means of assuring there would not be any contempt proceeding. If a judge is unreasonable, and consistently so, counsel should communicate that fact to a presiding judge. Judges are typically very accommodating when given advance warning. Last minute notification (e.g., the day of the hearing) of conflicts are less appreciated.

🔑 Judge's Perspective:

Even where counsel will be late only for a few minutes, the better practice is to telephone the clerk of the court to explain why counsel will be tardy and to estimate actual arrival time. Where counsel has scheduled two appearances on the same day and the first appearance is delayed by unforeseen events, you may ask the clerk in the first court to notify the second court. This carries greater weight with the second court.

Consider:

Counsel should carry the telephone numbers of all parties and court personnel associated with the case to facilitate the prompt notification to the court of unexpected conflicts. The use of cell phones and personal desk assistants (PDAs) is strongly recommended.

23.13[3] Court May Investigate Circumstances. In an appropriate case, and whether or not a hearing is required, the court may investigate the circumstances pertinent to the contemptuous conduct. For instance, when the contempt consists of an attorney's failure to appear at a scheduled hearing, the judge may look for the absent attorney in another courtroom and may call the attorney's office [*In re Karpf* (1970) 10 CA3d 355, 373, 88 CR 895] .

Legal Topics:

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



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23.14 Contemnor's Apology Merits Weighty Consideration.

The effect to be given to an apology as a mitigating factor lies in the sound discretion of the judge. However, courts rightly regard apologies with favor: the judge should "receive as satisfactory any reasonable apology for an offender's conduct" [*People v. Turner (1850) 1 C 152, 153*].



Strategic Point:

If the contemnor offers an apology that in form appears to be a sincere expression of regret for conduct that, in any way, was offensive, and the judge declines to accept it but makes no finding or comment on the record to the effect that the apology was insincere, then in an equivocal case--say, in the absence of clear evidence and precise findings of affront to the court or judge--a reviewing court could well conclude that the contempt order cannot be sustained [see *In re Carrow (1974) 40 CA3d 924, 933, 115 CR 601* ("To express regret was the only remedial thing left for petitioner to do, and this he did.")].

Legal Topics:

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

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2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.15

23.15 Contemnor May Be Fined and Jailed.

23.15[1] Court Imposes Punishment.

23.15[1][a] Order of Contempt Must Specify Punishment. The order adjudging that the contemnor is guilty of a contempt must state that he or she be punished as prescribed in the order [*CCP § 1211(a)*].

23.15[1][b] Punishment Is at Court's Discretion. The punishment to be imposed for a direct contempt is a matter for the court's discretion, which must be exercised judiciously. The court would wisely take as a guideline the statutory prescription in *CCP § 1218(a)*--a fine up to \$1,000 or five days in jail, or both--even though that statute is, in its context, apparently applicable only to indirect contempt [*see In re McKinney (1968) 70 C2d 8, 11-12, 73 CR580, 447 P2d 972*; *Inniss v. Municipal Court (1965) 62 C2d 487, 490, 42 CR 594, 399 P2d 50* (observing that trial court set fine at "maximum authorized by the Code of Civil Procedure" and meaning *CCP § 1218(a)*)].

23.15[1][c] Court's Discretion Has Constitutional Limitation. The court may not impose a punishment that is comparable to (or exceeds) the punishment for a misdemeanor--namely, a fine up to \$1,000 or six months in jail, or both [*see Pen Code § 19*]-since the court has summarily adjudicated the contempt, whereas the California Constitution grants the right of a jury trial for a misdemeanor [*see Cal Const, art I, § 16*; *Mitchell v. Superior Court (1989) 49 C3d 1230, 1244, 265 CR 144, 783 P2d 731*]. (*Pen Code § 166*, declaring that certain contemptuous acts and omissions are misdemeanors [*see 23.08[2]*], obviously does not apply unless the contemnor has been prosecuted under it [*see In re McKinney (1968) 70 C2d 8, 13, 73 CR 580, 447 P2d 972*].)

23.15[2] Contemnor May Be Jailed to Coerce Act.

23.15[2][a] Confinement in Jail May Be Indefinite. When the contempt consists of the omission to perform an act that is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it [*CCP § 1219(a)*].

23.15[2][b] Confinement Must End When Pending Proceedings End. If the contempt relates to pending proceedings before the court (such as a refusal to testify in a trial in progress), the sentence for conditional confinement in jail becomes a nullity, and the contemnor must be released from it, when the proceedings end [*In re Lifschutz (1970) 2 C3d 415, 439 n27, 85 CR 829, 467 P2d 557*], even though the act not performed remains unperformed [

McComb v. Superior Court (1977) 68 CA3d 89, 99, 137 CR 233] .

23.15[2][c] Court Must Determine When Confinement Is No Longer Coercive. A coercive incarceration to compel compliance with an order of court presents a special problem where disobedience of the order is based on an established articulated moral principle. In such a situation, if the contemnor makes an appropriate request to the court for release, it is necessary for the court to determine whether the point has been reached at which the confinement has ceased to serve its coercive purpose and has become punitive. The test of the distinction lies in the presence or absence of a substantial likelihood that continued confinement will accomplish the purpose of the order on which the confinement is based. This includes an inquiry as to whether the contemnor remains able to perform the required act [*In re Farr* (1974) 36 CA3d 577, 584, 111 CR 649] .

23.15[3] Sexual-Assault Victim May Not Be Jailed to Coerce Testimony. Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault for contempt when the contempt consists of refusing to testify concerning that sexual assault [CCP § 1219(b); see generally Pen Code §§ 261, 262, 264.1, 285, 286, 288, 288a, 289 (definition of sexual assault for this purpose)].

23.15[4] Witness Under 16 Years Old Requires Special Treatment.

23.15[4][a] Probation Officer's Report Is Required. In any case in which the contempt consists of the refusal of a minor under 16 years old to take the oath or to testify, before imposing any sanction for the contempt, the court must first refer the matter to the probation officer in charge of matters coming before the juvenile court, who must prepare a report and recommendation as to the appropriateness of the imposition of a sanction. The probation officer must file the report and recommendation within the time directed by the court. The court must consider the report and recommendation in imposing a sanction in the case. In making the report and recommendation, the probation officer must consider factors such as the following [CCP § 1219.5(a)]:

- The minor's maturity;
- The reasons for the minor's refusal to take the oath or to testify;
- The probability that available sanctions will affect the decision of the minor not to take the oath or not to testify;
- The potential impact on the minor of his or her testimony;
- The potential impact on the pending litigation of the minor's unavailability as a witness; and
- The appropriateness of the various available sanctions in the minor's case.

Exception--Minor Is Likely to Flee:

The court may impose a sanction for contempt prior to receipt of the report and recommendation if the court enters a finding, supported by specific facts stated on the record, that the minor would be likely to flee if released before the receipt of the report and recommendation [CCP § 1219.5(c)].

23.15[4][b] Minor's Confinement Outside Home Must Be Least Restrictive. In any such case in which the court orders the minor to be placed outside of his or her home, the placement must be in the least restrictive setting available. Generally, the court must not order the minor to be placed in a secure facility unless other placements have been made and the minor either has fled the custody and control of the person under whose control he or she was placed or has persistently refused to obey that person's reasonable and proper orders or directions [CCP § 1219.5(b)].

Exception--Minor Is Likely to Flee:

The court may order the minor placed in a secure facility without first attempting the prescribed nonsecure placement if the court enters a finding, supported by specific facts stated on the record, that the minor would be likely to flee if released to nonsecure placement as a prerequisite to secure confinement [*CCP* § 1219.5(d)].

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral OverviewCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesDomestic AssaultGeneral OverviewCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultGeneral OverviewCriminal Law & ProcedureJuvenile OffendersGeneral OverviewCriminal Law & ProcedureSentencingGeneral Overview



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Chapter 23 Contempt

III. ADJUDICATING AND PUNISHING DIRECT CONTEMPT

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23.16 Order of Contempt Must Meet Specific Criteria.

23.16[1] Order Must Recite Relevant Facts.

23.16[1][a] Validity Depends on Sufficient Recital. The order of contempt must recite the facts, showing that the contemptuous act or omission occurred in the immediate view and presence of the court or of the judge in chambers [CCP § 1211(a); *Arthur v. Superior Court* (1965) 62 C2d 404, 407, 42 CR 441, 398 P2d 777]. The recitation of facts requirement is jurisdictional [*In re Ringgold* (2006) 142 CA4th 1001, 1011, 48 CR3d 507].

23.16[1][b] Specificity Is Required. The order is valid only if it recites facts with sufficient particularity to demonstrate on its face that the contemnor's conduct constituted a legal contempt [*Arthur v. Superior Court* (1965) 62 C2d 404, 407, 42 CR 441, 398 P2d 777]. The recital-of-facts requirement is not met by a mere statement of the trial judge's conclusions regarding the nature of the conduct giving rise to the contempt. The order must demonstrate on its face, without aid of speculation or reference to any other document, that a contempt actually occurred [*In re Littlefield* (1993) 5 C4th 122, 138 n10, 19 CR2d 248, 851 P2d 42]. In other words, the order must contain a statement of facts equivalent to what must be contained in an affidavit for indirect contempt [see 23.21], and those facts must prove the contempt [*In re Wells* (1946) 29 C2d 200, 201, 173 P2d 811].



Strategic Point:

Making a contempt order stick is one of the hardest things for a court to do for several reasons: the need for specificity in the order as to law and facts; the intensive review accorded to such an order; the overall dislike of contempt orders; and the seriousness with which the State Bar views contempt. For that reason, an attorney seeking a contempt order should consider carefully, when appropriate, an attempt to obtain issue sanctions or issue determinations as a remedy for contempt. Attorneys opposing contempt orders should seek ways to mitigate the determination, suggesting lesser sanctions than a contempt order if appropriate.



Trap--Mistake As to Date Could Be Fatal Error:

A contempt order is subject to being annulled if it refers to a wrong date for an event that is relevant [

In re Littlefield (1993) 5 C4th 122, 139, 19 CR2d 248, 851 P2d 42 (contempt was disobedience of court's June 20th order, but contempt order mistakenly referred to different date)].

23.16[1][c] Order Must Be Sufficient for Review. When review is sought for a summary adjudication of contempt, the order might be the only record available to the reviewing court. Therefore, the order must be sufficiently complete to allow for review [*Boysaw v. Superior Court* (2000) 23 C4th 215, 223, 96 CR2d 531, 999 P2d 748] .

23.16[1][d] Occurrence in Court's Immediate View and Presence Must Be Shown. Since the jurisdictional basis for a summary adjudication is the judge's first-hand knowledge of the contempt, based on having witnessed it, the order must show (but need not recite formulaically) that the contemptuous act or omission occurred in the immediate view and presence of the court [*Boysaw v. Superior Court* (2000) 23 C4th 215, 221, 96 CR2d 531, 999 P2d 748] .

23.16[1][e] Contemptuous Voice or Demeanor Must Be Described in Detail. If the adjudication of contempt is based on the contemnor's voice--for instance, volume, accent, inflection, or tone of voice--or on manner, facial expression, or demeanor, then it must be described in detail in the order [*Boysaw v. Superior Court* (2000) 23 C4th 215, 222, 96 CR2d 531, 999 P2d 748] .

23.16[1][f] Attorney's Contemptuous Absence From Court Should Be Detailed. An order of contempt based on an attorney's failure to appear as ordered should show that the attorney was absent when ordered to appear, knew that he or she was required to appear, and had the ability to appear, and that he or she willfully neglected to appear [see *Arthur v. Superior Court* (1965) 62 C2d 404, 409, 42 CR 441, 398 P2d 777] .

23.16[1][g] Court's Warning Should Be Recited. Any admonition or rebuke that the court gave should be recited in the order [*Boysaw v. Superior Court* (2000) 23 C4th 215, 222, 96 CR2d 531, 999 P2d 748] .



Trap--Order Must Show Specific and Pertinent Warning:

Whenever a warning is a prerequisite, the contempt order will not be upheld unless it recites a warning that was reasonably specific as to the misconduct that the order cites as contempt. For instance, an order cited an attorney's tone of voice as "loud, insolent, aggressive, belligerent, boisterous, harsh, offensive and contemptuous," and cited a "sneering and contemptuous expression" on the attorney's face as well as a "threatening demeanor" and a "disorderly and insolent manner"--which, arguably, could have been a sufficient description of contemptuous conduct. Yet the order was annulled because it failed to show any warning more specific than an admonition not to participate in the court's investigation of a jury-tampering charge [*Gallagher v. Municipal Court* (1948) 31 C2d 784, 796-797, 192 P2d 905] .



Cross Reference:

Court might be obliged to give warning before citing for contempt, see 23.11.

23.16[2] Order Must Adjudge Contemnor's Guilt. The order of contempt must adjudge that the contemnor is guilty of a contempt [CCP § 1211(a); *Arthur v. Superior Court* (1965) 62 C2d 404, 407, 42 CR 441, 398 P2d 777] .

23.16[3] Order Must State Punishment. The order of contempt must state that the contemnor be punished as prescribed in the order [CCP § 1211(a); *Arthur v. Superior Court* (1965) 62 C2d 404, 407, 42 CR 441, 398 P2d 777] .



Strategic Point--Elaboration Is Required for Conditional Confinement to Coerce Act:

When the contempt consists of the omission to perform an act that is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it [see 23.15[2]], and in that case the act must be specified in the warrant of commitment [CCP § 1219(a)]. Therefore, the order of contempt (which is the warrant of commitment) not only must specify what act is to be performed but also must

state the court's finding that the contemnor is able to perform it [see *In re Wells* (1946) 29 C2d 200, 202, 173 P2d 811 (order should have specified that contemnor could purge contempt by restoring certain sum to bank account and that contemnor had power to do that)].

Example:

If a witness is held in contempt for refusing to give testimony [see 23.07[2]], then the order of contempt must specify the questions to be answered and must show that the answers would be both material and relevant [*In re Battelle* (1929) 207 C 227, 255-256, 277 P 725] .



Cross Reference:

Punishment for direct contempt, see 23.15.

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral OverviewCriminal Law & ProcedureSentencingGeneral Overview



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23.17 Imposition of Punishment Might Be Stayed.

23.17[1] Stay Is Automatic in Special Cases.

23.17[1][a] Attorney in Contempt Might Be Entitled to Automatic Stay. If an order of contempt is made affecting an attorney (or his or her agent or investigator, or any person acting under the attorney's direction) in the preparation and conduct of any action or proceeding, then the execution of any sentence is stayed pending the filing, within three judicial days after the date of the order of contempt, of a petition for extraordinary relief testing the lawfulness of the court's order, the violation of which is the basis of the contempt [*CCP* §§ 128(b), 1209(c); *see, e.g., In re Young* (1995) 9 C4th 1052, 1054, 40 CR2d 114, 892 P2d 148] .

Exception:

There is no automatic stay with respect to a contempt order based on conduct proscribed by *B&P Code* § 6068(b), relating to an attorney's duty to maintain respect due to the courts and judicial officers [*CCP* §§ 128(b), 1209(c)].

Distinguish--Contrary Case Law Antedating Statute:

In a criminal trial that occurred before the enactment of *CCP* § 1209(c), the judge held a defense attorney in contempt for disobeying the court's order to remove current newspapers from the counsel table. The punishment was three consecutive nights in jail (permitting the attorney to participate in the trial during the days), and the sentence was promptly carried out [*People v. Manson* (1976) 61 CA3d 102, 172-173, 132 CR 265 (no proof that attorney's nightly confinement deprived defendant of effective assistance of counsel, which was issue to be decided in appellate court)]. Now, an attorney could avoid that result by relying on the automatic stay under *CCP* § 1209(c) and then obtaining, on a petition for review, the reviewing court's extension of the stay.

23.17[1][b] Police Officer, Etc., in Contempt Might Be Entitled to Automatic Stay. If an order of contempt is made affecting a public safety employee--that is, any peace officer, firefighter, paramedic, or any other employee of a public law enforcement agency whose duty is either to maintain official records or to analyze or present evidence for investigative or prosecutorial purposes--acting within the scope of employment for reason of the employee's failure to comply with a duly issued subpoena or subpoena duces tecum, the execution of any sentence is stayed pending the

filing, within three judicial days after the date of the order of contempt [see *In re Young* (1995) 9 C4th 1052, 1054, 40 CR2d 114, 892 P2d 148 (stay period)], of a petition for extraordinary relief testing the lawfulness of the court's order, the violation of which is the basis of the contempt [CCP §§ 128(c), 1209(d)].

23.17[1][c] Sexual-Assault Victim in Contempt Might Be Entitled to Automatic Stay. If an order of contempt is made affecting the victim of a sexual assault, where the contempt consists of refusing to testify concerning that sexual assault, the execution of any sentence is stayed pending the filing, within three judicial days after the date of the order of contempt [see *In re Young* (1995) 9 C4th 1052, 1054, 40 CR2d 114, 892 P2d 148 (stay period)], of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt [CCP § 128(d); see generally *Pen Code* §§ 261, 262, 264.1, 285, 286, 288, 288a, 289 (definition of sexual assault for this purpose)].

 Cross Reference:

Sexual-assault victim may not be jailed to coerce testimony, see 23.15[3].

23.17[1][d] Domestic-Violence Victim in Contempt Might Be Entitled to Automatic Stay. If an order of contempt is made affecting the victim of domestic violence, where the contempt consists of refusing to testify concerning that domestic violence, the execution of any sentence is stayed pending the filing, within three judicial days after the date of the order of contempt [see *In re Young* (1995) 9 C4th 1052, 1054, 40 CR2d 114, 892 P2d 148 (stay period)], of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt [CCP § 128(e); see generally *Fam Code* § 6211 (definition of domestic violence for this purpose)].

 Cross Reference:

Domestic-violence victim must be given alternative before being jailed to coerce testimony, see 23.15[4].

23.17[2] Court May Elect to Stay Execution of Sentence. Whenever the case does not fall under a statutory provision for an automatic stay, the trial court has discretion to stay execution of the sentence in its order of contempt. The standard for exercising that discretion is the likelihood that the contempt order might be vacated. To prevent confinement under a judgment of contempt that may subsequently be set aside, a trial court should stay its judgment of contempt long enough to allow the contemnor to seek writ relief, if the trial court believes that there is any colorable argument to be made against the contempt adjudication [see *New York Times Co. v. Superior Court* (1990) 51 C3d 453, 460, 273 CR 98, 796 P2d 811 (contempt order was challenged under news-reporting shield law, *Cal Const*, art I, § 2(b))].

Legal Topics:

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

Civil Procedure Remedies Provisional Remedies General Overview Civil Procedure Sanctions Contempt General Overview Criminal Law & Procedure Criminal Offenses Crimes Against Persons Domestic Offenses Domestic Assault General Overview Criminal Law & Procedure Criminal Offenses Sex Crimes Sexual Assault General Overview Legal Ethics Professional Conduct General Overview



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2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.18

23.18 CHECKLIST: Adjudicating and Punishing Indirect Contempt.

☐ Determine that jurisdictional facts can be proved for enforcement of court order through indirect-contempt proceeding:

- ☐ Order must be clear.
- ☐ Disobedient party must have knowledge of it.
- ☐ Disobedient party must be able to comply with it.

Discussion:

See 23.20

☐ Commence proceeding by filing affidavit (or declaration under penalty of perjury) showing all relevant facts.

Authority:

CCP § 1211(a),(b); Lund v. Superior Court (1964) 61 C2d 698, 713, 39 CR 891, 394 P2d 707

Discussion:

See 23.21

Form:

See 23.38 (declaration)

Exception:

The proceeding may instead be commenced by filing an unsworn statement by a judge or some other judicial officer, who witnessed an act or omission amounting to direct contempt but who either is constitutionally foreclosed from adjudicating the contempt or elects not to adjudicate it [*CCP § 1211(a)*];

see 23.21[4].

- ☐ Obtain order to show cause, which sets hearing.

Authority:

Arthur v. Superior Court (1965) 62 C2d 404, 408, 42 CR 441, 398 P2d 777

Discussion:

See 23.22

Form:

See 23.39 (order to show cause)

Exception:

A bench warrant may be issued to arrest the alleged contemnor when an order to show cause would not be effective [CCP § 1212; *Lund v. Superior Court* (1964) 61 C2d 698, 713, 39 CR 891, 394 P2d 707 ; see 23.22[2]].

- ☐ Have papers served personally on alleged contemnor.

Authority:

Cedars-Sinai Imaging Med. Group v. Superior Court (2000) 83 CA4th 1281, 1286-1287, 100 CR2d 320

Discussion:

See 23.23

Exception:

Service on the alleged contemnor's attorney of record might be effective when the alleged contemnor is in hiding to avoid service [*Foley v. Foley* (1898) 120 C 33, 39, 52 P 122 , *overruled on other issue*, *Carney v. Simmonds* (1957) 49 C2d 84, 90-91, 315 P2d 305 ; see 23.23[2]].

- ☐ Alleged contemnor may file opposing affidavit.

Standard Procedure Checklist:

Opposing charge of indirect contempt, see 23.29

- ☐ Hearing will be duly held:

☐ Alleged contemnor must make appearance either personally or by counsel or by filing opposing affidavit.

Authority:

Farace v. Superior Court (1983) 148 CA3d 915, 917-918, 196 CR 297

Discussion:

See 23.24[1]

Exception:

The court may proceed without an appearance by the alleged contemnor if the alleged contemnor is willfully absent [*Farace v. Superior Court* (1983) 148 CA3d 915, 917-918, 196 CR 297] .

- ☐ Court may issue bench warrant to arrest alleged contemnor who fails to make appearance, and hearing may be continued.

Authority:

CCP §§ 1212-1216, 1220, 1221; *Morelli v. Superior Court* (1969) 1 C3d 328, 330, 82 CR 375, 461 P2d 655

Discussion:

See 23.24[2]

- ☐ Alleged contemnor is entitled to plenary hearing, with right to counsel and right to present witnesses and evidence.

Authority:

CCP § 1217; *Cooke v. United States* (1925) 267 US 517, 537, 45 S Ct 390, 69 L Ed 767 ; *Farace v. Superior Court* (1983) 148 CA3d 915, 917, 196 CR 297

Discussion:

See 23.24[3]

- ☐ Alleged contemnor usually is not entitled to jury trial.

Authority:

Codispoti v. Pennsylvania (1974) 418 US 506, 516-517, 94 S Ct 2687, 41 L Ed2d 912 ; *Mitchell v. Superior Court* (1989) 49 C3d 1230, 1244, 265 CR 144, 783 P2d 731

Discussion:

See 23.24[4]

- ☐ Judge who is personally involved should stand aside and allow different judge to preside.

Authority:

Cooke v. United States (1925) 267 US 517, 539, 45 S Ct 390, 69 L Ed 767 ; *Turkington v. Municipal Court* (1948) 85 CA2d 631, 637, 193 P2d 795

Discussion:

See 23.24[5]

- ☐ On adjudging alleged contemnor to be in contempt:

- ☐ Court may impose punishment up to statutory maximum of \$1,000 fine and five days in jail.

Authority:

CCP § 1218(a)

Discussion:

See 23.25[1]

- ☐ Court may separately punish multiple acts of contempt.

Authority:

Mitchell v. Superior Court (1989) 49 C3d 1230, 1246, 265 CR 144, 783 P2d 731

Discussion:

See 23.25[2]

- ☐ Court may sentence contemnor to be jailed indefinitely, to coerce act that person remains able to perform.

Authority:

CCP § 1219(a)

Discussion:

See 23.26

- ☐ Court may adjudge contemnor liable for other party's attorney's fees and costs.

Authority:

CCP § 1218(a)

Discussion:

See 23.27

- ☐ Court will make and enter order of contempt:

☐ Order should recite findings (but need not, if findings can be inferred from whole record).

Authority:

Moss v. Superior Court (1998) 17 C4th 396, 404 n3, 71 CR2d 215, 950 P2d 59

Discussion:

See 23.28[1]

Form:

See 23.40 (order)

- ☐ Order should state four specific findings in case of disobedience of court order.

Authority:

In re Hinman (1966) 239 CA2d 845, 850, 49 CR 162

Discussion:

See 23.28[2]

- ☐ Order should state two specific findings in case of indefinite jail time to coerce act.

Authority:

In re Wells (1946) 29 C2d 200, 202, 173 P2d 811

Discussion:

See 23.28[3]

Legal Topics:

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



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23.19 Jurisdictional Prerequisites Must Be Established.

23.19[1] Requirements Are Strictly Applied. The jurisdictional requirements for an indirect-contempt proceeding must be scrupulously followed, since an appellate court reviewing a contempt order will not indulge any presumption in favor of the regularity of the proceedings insofar as jurisdictional defects are concerned. The existence of jurisdiction must be affirmatively shown [*Kroneberger v. Superior Court* (1961) 196 CA2d 206, 209, 16 CR 339] . An indirect-contempt proceeding must be commenced, in most cases, as follows:

- An affidavit (or declaration under penalty of perjury) by a person with knowledge of the facts is filed in the appropriate court [see 23.21].
- The court issues an order to show cause at the request of the person who filed the affidavit [see 23.22].
- Those papers are personally served on the alleged contemnor [see 23.23].

Distinguish--Proceeding Commenced by Judge or Other Judicial Officer:

A judge who has witnessed direct contempt is not required to deal with it immediately and personally; and a judge who is "personally embroiled" in the matter is constitutionally bound not to adjudicate the contempt. Instead, in either case, the matter is handled in the same way as indirect contempt [see 23.12[3], [4]]. A judicial officer other than a judge, such as a commissioner or referee, who discerns a contemptuous act or omission, generally has no power to adjudicate contempt [*Marcus v. Workmen's Comp. Appeals Bd.* (1973) 35 CA3d 598, 603, 111 CR 101] and so must proceed, if at all, through an indirect-contempt proceeding. In all of these kinds of cases, the indirect-contempt proceeding is normally commenced as follows [see 23.21[4], 23.22[1], 23.23]:

- The judge or other judicial officer files an unsworn statement of facts, in lieu of an affidavit.
- The court issues an order to show cause.

- The sheriff or another appropriate officer serves the order to show cause and the statement of facts on the alleged contemnor.

Exception--Temporary Judge May Exercise Contempt Power:

A person acting as a temporary judge pursuant to the parties' stipulation generally has full judicial power, including inherent power to punish direct contempt [*Burkle v. Burkle* (2006) 144 CA4th 387, 401-402, 50 CR3d 436] .

23.19[2] Writ of Prohibition May Foreclose Unlawful Contempt Proceedings. In the rare event that indirect-contempt proceedings are commenced in excess of jurisdiction, the alleged contemnor's remedy is a petition for a writ of prohibition [*e.g.*, *Silvagni v. Superior Court* (1958) 157 CA2d 287, 288, 321 P2d 15 (issuance of bench warrant to commence contempt proceeding was, in view of facts, act in excess of jurisdiction, and peremptory writ of prohibition was issued)].

 Cross Reference:

Discussion and form of petition for writ of prohibition to foreclose contempt proceedings, 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 ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureSanctionsContemptGeneral OverviewEvidenceInferences & PresumptionsPresumption of RegularityGovernmentsCourtsSpecial Judges



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23.20 Court's Order May Be Enforced Through Indirect-Contempt Proceeding.

23.20[1] Order Must Be Clear. An order, to be enforceable by the contempt power, must be definitive and certain [*Ketscher v. Superior Court* (1970) 9 CA3d 601, 604-605, 88 CR 357] but not overbroad [*Younger v. Smith* (1973) 30 CA3d 138, 150, 106 CR 225] . Punishment for indirect contempt may rest only on a clear, intentional violation of a specific, narrowly drawn order. Whether it is sufficiently specific is determined by the terms of the order as issued, without regard to any explanation or reasons given by the court for issuing it [*Board of Supervisors v. Superior Court* (1995) 33 CA4th 1724, 1737, 39 CR2d 906] .

Counsel must protect against the other side's violation of carefully won rulings, or of confidentiality and privilege by making sure that the order previously entered, regardless of type, was actually signed and entered by the judge and was clear enough to be enforceable in an indirect-contempt proceeding.

23.20[2] Disobedient Party Must Have Knowledge of Order. A party may not be punished for contempt based on disobeying the court's order, unless the party had knowledge of it [*Freeman v. Superior Court* (1955) 44 C2d 533, 537, 282 P2d 857] .



Strategic Point:

The court must find, and the contempt order must recite, that the party in contempt had knowledge of the order [see, e.g., *In re Young* (1995) 9 C4th 1052, 1053, 40 CR2d 114, 892 P2d 148] , since that is a jurisdictional prerequisite to the validity of the contempt order [*Freeman v. Superior Court* (1955) 44 C2d 533, 537, 282 P2d 857] .

Distinguish:

If the party's counsel was present in court when the order was made, and counsel was thereafter served with the written order, the court may infer that the party had notice of it. This is apparently a rebuttable presumption [*Freeman v. Superior Court* (1955) 44 C2d 533, 537-538, 282 P2d 857] , but perhaps it is merely a permitted inference [*In re Ivey* (2000) 85 CA4th 793, 804-805, 102 CR2d 447] .

23.20[3] Disobedient Party Must Be Able to Comply. A party may not be punished for contempt based on disobeying the court's order, if the party was not able to comply with it [*In re Cassil* (1995) 37 CA4th 1081, 1087, 44 CR2d 267] .

Example:

A party was not in contempt for disobeying an order requiring the party to turn over certain funds to a receiver, because there was no evidence of the existence of any funds that could have been paid to the receiver and hence no evidence of ability to comply with the order [see *In re Cassil* (1995) 37 CA4th 1081, 1088-1089, 44 CR2d 267] .



Strategic Point:

The court must find, and the contempt order should recite, that the party in contempt had the ability to comply with the order [see, e.g., *In re Young* (1995) 9 C4th 1052, 1053, 40 CR2d 114, 892 P2d 148 ; *Koehler v. Superior Court* (2010) 181 CA4th 1153, 1169-1170, 104 CR3d 877 (ability to pay is element of contempt, not affirmative defense)].

Legal Topics:

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



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23.21 Affidavit (or Statement of Facts) Is Filed.

23.21[1] Affidavit Must Show All Relevant Facts. An indirect contempt proceeding is commenced, in most cases, by the filing of an affidavit (or declaration under penalty of perjury) stating the pertinent facts so as to show the contempt [*CCP § 1211(a), (b)*; *Koehler v. Superior Court (2010) 181 CA4th 1153, 1169, 104 CR3d 877* (no affidavit filed)]. The affidavit must set forth the full facts of the alleged contempt [*Lund v. Superior Court (1964) 61 C2d 698, 713, 39 CR 891, 394 P2d 707*].

Exception--Judicial Officer May File Unsworn Statement:

The proceeding may be commenced by the filing of an unsworn statement of facts by a judge or another judicial officer (such as a commissioner or referee), in lieu of an affidavit [*CCP § 1211(a)*].

► **Cross References:**

Relevant facts for enforcing court order through contempt proceeding, see 23.20.

Commencement of proceeding by filing of judicial officer's unsworn statement, see 23.21[4].

Form of declaration under penalty of perjury, see 23.38.

23.21[2] Several Affidavits May Together Be Sufficient. There is nothing in the language of *CCP § 1211(a)* mandating a construction to the effect that one affiant must alone have all of the essential facts within his or her own knowledge in order to supply the required "affidavit ... of the facts constituting the contempt"; on the contrary, the statute is clearly susceptible to an interpretation that permits the grouping of several affidavits, if necessary to embrace all essential facts, into one document, something like a master affidavit, that will constitute the required affidavit of the facts.



Strategic Point:

A statement of facts from a judicial officer also could be combined with an affidavit so as to create one charging document [*In re Morelli (1970) 11 CA3d 819, 828-829, 91 CR 72* (court reporter at deposition

hearing is judicial officer for this purpose), *overruled on other ground*, *Cedars-Sinai Imaging Med. Group v. Superior Court* (2000) 83 CA4th 1281, 1287 n6, 100 CR2d 320] .

23.21[3] Information and Belief Is Sufficient. An affidavit containing statements made on information and belief is sufficient to confer jurisdiction--even if the entire affidavit is made on that basis [*Bridges v. Superior Court* (1939) 14 C2d 464, 479, 94 P2d 983 , *rev'd on other issue sub nom. Bridges v. California* (1941) 314 US 252, 62 S Ct 190, 86 L Ed 192 ; *Golden Gate Consol. Hydraulic Min. Co. v. Superior Court* (1884) 65 C 187, 190-191, 3 P 628 ; *In re Simoniello* (1935) 6 CA2d 425, 427-428, 44 P2d 402] .



Strategic Point--Not Sufficient for Adjudication:

While the initiating affidavit may contain statements made on information and belief, such evidence would not be sufficient to support an adjudication of contempt [see *Golden Gate Consol. Hydraulic Min. Co. v. Superior Court* (1884) 65 C 187, 190-191, 3 P 628 ; *Freeman v. Superior Court* (1955) 44 C2d 533, 537, 282 P2d 857 (affidavit on information and belief would be hearsay)].

23.21[4] Judge or Other Judicial Officer May File Statement of Facts to Commence Proceeding. An indirect-contempt proceeding may be commenced by the filing of an unsworn statement of facts by a judge or another judicial officer, in lieu of an affidavit [CCP § 1211(a)]. Like an affidavit, this statement must set forth the full facts of the alleged contempt [*Lund v. Superior Court* (1964) 61 C2d 698, 713, 39 CR 891, 394 P2d 707] .

Distinguish--Judicial Officer Other Than Judge May Not Punish for Contempt:

A judicial officer other than a judge--such as a commissioner, a referee, a master, or an arbitrator--has no power to punish for contempt occurring in the officer's presence [*Marcus v. Workmen's Comp. Appeals Bd.* (1973) 35 CA3d 598, 603, 111 CR 101] and so must proceed, if at all, through an indirect-contempt proceeding.

Exception--Temporary Judge May Exercise Contempt Power:

A person acting as a temporary judge pursuant to the parties' stipulation generally has full judicial power, including inherent power to punish direct contempt [*Fine v. Superior Court* (2002) 97 CA4th 651, 662-665, 119 CR2d 376] .

Consider:

It is not entirely clear whether a temporary judge can include arbitrators (typically by stipulation, but sometimes judicial arbitration compelled by motion). A particular arbitrator's own rules (such as JAMS or AAA rules) may provide for grounds for or proceedings for contempt that should be reviewed.



Cross Reference:

Requirements for commencement of indirect-contempt proceedings, see 23.19.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewGovernmentsCourtsSpecial Judges



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23.22 Court Sets Hearing.

23.22[1] Party Normally Obtains Order to Show Cause. The person filing the affidavit requests the issuance of an order to show cause. On the filing of a sufficient affidavit, and after notice to the opposing party's lawyer, the court (being satisfied with the sufficiency of the affidavit) must sign an order to show cause in which the date and time for a hearing are set forth [*Arthur v. Superior Court* (1965) 62 C2d 404, 408, 42 CR 441, 398 P2d 777 ; *see CCP § 1212* (no warrant of commitment may be issued without order to show cause or other notice)].

Distinguish--Proceeding Commenced by Judge or Other Judicial Officer:

If the proceeding has been commenced by the filing of an unsworn statement of facts by a judge or another judicial officer, in lieu of an affidavit [*see 23.21[4]*], then the court should likewise issue an order to show cause, not a warrant of attachment. A warrant of attachment should not be used unless the court has reason to believe that the contemnor will not voluntarily appear at the hearing [*see Cooke v. United States* (1925) 267 US 517, 537, 45 S Ct 390, 69 L Ed 767] .

➡ **Cross Reference:**

Form of order to show cause, *see 23.39.*

23.22[2] Bench Warrant May Be Issued When Order to Show Cause Will Not Be Effective. If the court has reason to believe, based on the affidavit, that the alleged contemnor will not voluntarily appear at the hearing if served with an order to show cause, or that the alleged contemnor is in hiding to avoid service, then the court may instead issue a warrant of attachment [*see CCP § 1212; Lund v. Superior Court* (1964) 61 C2d 698, 713, 39 CR 891, 394 P2d 707 ; *see also Cooke v. United States* (1925) 267 US 517, 537, 45 S Ct 390, 69 L Ed 767 (implying that warrant of attachment would be appropriate when court has reason to believe that alleged contemnor could not otherwise be brought to hearing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptGeneral OverviewGovernmentsCourtsSpecial Judges



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23.23 Papers Are Served.

23.23[1] Personal Service Normally Is Required. The affidavit (or unsworn statement of facts) and the order to show cause must be personally served on the alleged contemnor; otherwise, the court lacks jurisdiction to proceed [*Cedars-Sinai Imaging Med. Group v. Superior Court* (2000) 83 CA4th 1281, 1286-1287, 100 CR2d 320] . Due process of law requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation [*Cooke v. United States* (1925) 267 US 517, 537, 45 S Ct 390, 69 L Ed 767] .



Warning--Service on Contemnor's Attorney Is Not Effective:

If the alleged contemnor is already before the court as a party represented by an attorney in the action or proceeding in which the order to show cause is issued, the usual practice of serving a party's attorney (so-called notice serving) will not be effective service of the order to show cause and supporting affidavit (or statement of facts) [see CCP §§ 1015, 1016 (requirement for notice serving on party's attorney does not apply to "papers to bring [a party] into contempt"); *Johnson v. Superior Court* (1883) 63 C 578, 580 ; *Koehler v. Superior Court* (2010) 181 CA4th 1153, 1169, 104 CR3d 877] .

23.23[2] Willful Concealment Obviates Personal Service. There is case authority that service on the alleged contemnor's attorney of record might be effective when the alleged contemnor is in hiding to avoid service, provided the initiating affidavit (or statement of facts) states that fact, and the court orders that service be made on the attorney for that reason [*Foley v. Foley* (1898) 120 C 33, 39, 52 P 122 , *overruled on other ground*, *Carney v. Simmonds* (1957) 49 C2d 84, 90-91, 315 P2d 305] .



Strategic Point:

However, in view of the clear statutory proscription of that kind of service [see CCP §§ 1015, 1016] and in view of more recent cases emphasizing that personal service is required [e.g., *Cedars-Sinai Imaging Med. Group v. Superior Court* (2000) 83 CA4th 1281, 1286-1287, 100 CR2d 320] , the better practice is to have the court issue a warrant of attachment [see 23.24[2]].

23.23[3] Objection to Jurisdiction Based on Defective Service May Be Waived. When the alleged contemnor

would have a sustainable objection to jurisdiction based on defective service, the objection will be deemed waived if the alleged contemnor appears, in person or by an attorney, and makes any kind of response on the merits to the order to show cause [see, e.g., *Foley v. Foley* (1898) 120 C 33, 39, 52 P 122 , *overruled on other ground*, *Carney v. Simmonds* (1957) 49 C2d 84, 90-91, 315 P2d 305] .

Legal Topics:

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

Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil
ProcedureSanctionsContemptGeneral Overview



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23.24 Hearing Is Duly Held.

23.24[1] Alleged Contemnor Must Appear. On the day set for hearing, if the alleged contemnor does not appear personally, the hearing may not proceed unless there is an appearance by the alleged contemnor's counsel or the alleged contemnor has filed an affidavit in opposition [*Farace v. Superior Court (1983) 148 CA3d 915, 917-918, 196 CR 297*] .

Exception--Willful Absence:

If the court has reason to believe that the alleged contemnor willfully failed to appear (with knowledge of the time and place of the hearing), then the hearing may proceed [*Farace v. Superior Court (1983) 148 CA3d 915, 917-918, 196 CR 297*] .



Strategic Point--Court May Order Continuance and Issue Bench Warrant:

If the court is not able to proceed with the hearing because the alleged contemnor failed to appear, then the court may order a continuance and also may issue a bench warrant for the arrest of the alleged contemnor [*Farace v. Superior Court (1983) 148 CA3d 915, 917-918, 196 CR 297*] .

23.24[2] Alleged Contemnor May Be Arrested on Failing to Appear.

23.24[2][a] Court May Issue Warrant. On the day set for hearing, if the alleged contemnor does not appear, the court may issue an arrest warrant, called a warrant of attachment (or bench warrant), to bring the alleged contemnor before the court [*CCP §§ 1212, 1220; see Morelli v. Superior Court (1969) 1 C3d 328, 330, 82 CR 375, 461 P2d 655 ; Lund v. Superior Court (1964) 61 C2d 698, 713, 39 CR 891, 394 P2d 707*] .

23.24[2][b] Sheriff or Other Officer Executes Warrant. The warrant commands the sheriff or other officer executing the warrant to take the alleged contemnor into custody, bring him or her before the court, and detain him or her until a final order is made in the matter, unless the alleged contemnor provides the specified undertaking to appear [*CCP § 1214*].

Exception--Absence of Alleged Contemnor Already in Custody May Be Excused:

If the alleged contemnor is already in custody under a warrant of attachment previously issued in lieu of an order to show cause, then the alleged contemnor's inability, from illness or otherwise, to attend is a sufficient excuse for not bringing him or her up on the return day [CCP § 1221].

23.24[2][c] Custody Must Be Least That Is Necessary. The officer must not confine the person arrested on the warrant in a prison, or otherwise restrain him or her of personal liberty, except as far as may be necessary to secure his or her personal attendance [CCP § 1221].

23.24[2][d] Custody May Be Avoided With Undertaking. The alleged contemnor is not subject to being taken into custody, or must be discharged from custody, on executing and delivering to the officer, at any time before the return day of the warrant, an undertaking to the effect that the alleged contemnor will appear on the return of the warrant and abide the order of the court [CCP § 1215].



Strategic Point--Undertaking Might Be Forfeited:

If a warrant of attachment was previously issued in lieu of an order to show cause, and the alleged contemnor gave an undertaking to avoid being kept in custody until the hearing date, then when the undertaking is enforced, the measure of damages is the extent of the loss or injury sustained by the aggrieved party by reason of the misconduct for which the warrant was issued [CCP § 1220].

23.24[2][e] Officer Makes Return on Hearing Day. The officer must return the warrant, along with the undertaking, if any, received from the alleged contemnor, by the return day specified in the warrant [CCP § 1216].

23.24[3] Plenary Hearing Is Required.

23.24[3][a] Court Must Hear Any Answer to Charge. When the alleged contemnor has appeared, the court must proceed to investigate the charge, and must hear any answer that the alleged contemnor may make to the charge, and may examine witnesses for or against the alleged contemnor, for which an adjournment may be had from time to time if necessary [CCP § 1217].



Strategic Point--Burden of Proof:

The parties should make their cases with the expectation that the judge will require the contempt to be proved beyond a reasonable doubt, since that is the legal standard. However, in practice the judge can apply the preponderance-of-the-evidence test because an appellate court, on reviewing the sufficiency of the evidence to support an adjudication of contempt, will sustain the judgment if it is based on any substantial evidence [see *In re Coleman* (1974) 12 C3d 568, 572, 116 CR 381, 526 P2d 533] .

23.24[3][b] Due Process Requirements Must Be Satisfied. Due process of law requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. This includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed [*Cooke v. United States* (1925) 267 US 517, 537, 45 S Ct 390, 69 L Ed 767 ; *Farace v. Superior Court* (1983) 148 CA3d 915, 917, 196 CR 297 ; see *County of Santa Clara v. Superior Court* (1992) 2 CA4th 1686, 1693-1694, 5 CR2d 7 (alleged contemnor who is indigent might be entitled to have counsel appointed)].

23.24[3][c] Evidence in Mitigation of Punishment Must Be Received. When the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court may not exclude evidence in mitigation [*Cooke v. United States* (1925) 267 US 517, 538, 45 S Ct 390, 69 L Ed 767] .

23.24[4] Jury Trial Is Rarely Appropriate.

23.24[4][a] Sixth Amendment Is Implicated When Actual Punishment Exceeds Six Months in Jail. The alleged contemnor has no *Sixth Amendment* right to a jury trial even when it is possible that he or she might be sentenced, on being convicted of multiple contempts, to an aggregate term exceeding six months. (Under the *Sixth Amendment* as construed by the Supreme Court, a crime carrying more than a six-month sentence is triable by jury.) However, if the actual punishment imposed turns out to be imprisonment for more than six months--which could happen by imposition of consecutive sentences for multiple contempts--and the contemnor was deprived of a jury trial, then on review, the judgment must be vacated under the *Sixth Amendment* [*Codispoti v. Pennsylvania* (1974) 418 US 506, 516-517, 94 S Ct 2687, 41 L Ed2d 912] .

23.24[4][b] California Rule Depends on Maximum Possible Punishment. Under the California Constitution, the alleged contemnor has no right to a jury trial unless the maximum possible punishment is comparable to the punishment for a misdemeanor, since the constitution entitles a misdemeanor defendant to have a jury trial [*Cal Const, art I, § 16*; *Mitchell v. Superior Court* (1989) 49 C3d 1230, 1244, 265 CR 144, 783 P2d 731] . The punishment for a misdemeanor is a fine of not more than \$1,000 or confinement in the county jail for not more than six months, or both [*Pen Code § 19*]. When this misdemeanor aspect is not implicated in the contempt proceedings, there is neither a constitutional right nor a statutory right to a jury trial, under California law [*Mitchell v. Superior Court* (1989) 49 C3d 1230, 1240, 265 CR 144, 783 P2d 731] .

Distinguish--Normal Maximum Punishment:

Normally the maximum possible punishment for indirect contempt would be a fine of \$1,000 and five days in jail [see *CCP § 1218(a)*].

**Cross Reference:**

Contemptuous acts that are declared to be misdemeanors, see 23.08[3].

23.24[4][c] Court Has No Discretion to Allow Jury Trial. When there is no right to a jury trial, the court has no discretion to grant a request for a jury trial, and a reviewing court may issue a writ of prohibition to prevent the trial court from allowing a jury trial [*Pacific Tel. & Tel. Co. v. Superior Court* (1968) 265 CA2d 370, 375, 72 CR 177] .

23.24[5] Judge Should Stand Aside When Personally Involved. It might be possible for an indirect contempt to have an element of personal attack on the judge who ordinarily would conduct the adjudication hearing. In that event, the judge could, nevertheless, lawfully proceed with the hearing, unless the judge were so "personally embroiled" in the contempt as to be constitutionally disqualified to adjudicate it [see *Mayberry v. Pennsylvania* (1971) 400 US 455, 466, 91 S Ct 499, 27 L Ed2d 532 ; see also 23.12[4]]. However, the better practice would be for the judge to stand aside, "where conditions do not make [that] impracticable, or where the delay may not injure [a] public or private right" [*Cooke v. United States* (1925) 267 US 517, 539, 45 S Ct 390, 69 L Ed 767] . The judge should arrange for a different judge to conduct the hearing [see *Turkington v. Municipal Court* (1948) 85 CA2d 631, 637, 193 P2d 795 (dictum)].

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Sanctions Contempt General Overview Civil Procedure Appeals Standards of Review Substantial Evidence General Overview Constitutional Law Bill of Rights Fundamental Rights Procedural Due Process General Overview Evidence Procedural Considerations Burdens of Proof General Overview



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23.25 Contemnor May Be Fined and Jailed.

23.25[1] Statute Sets Maximum Punishment. On the answer and evidence taken, the court must determine whether the alleged contemnor is guilty of the contempt charged. If it be adjudged that he or she is guilty of the contempt, a fine may be imposed on him or her not exceeding \$1,000, or he or she may be imprisoned not exceeding five days, or both [CCP § 1218(a); see CCP § 1212 (no warrant of commitment may be issued without previous attachment to answer or order to show cause)].



Cross Reference:

Contemnor may be liable for attorney's fees and costs, see 23.27.

23.25[2] Multiple Acts May Be Separately Punished. The preclusion of multiple punishments embodied in *Pen Code § 654* is applicable to punishments for contempt under *CCP § 1218(a)*. However, before the impact of the Penal Code provision can be determined, the court must ascertain how many separate contemptuous acts have occurred [*Mitchell v. Superior Court* (1989) 49 C3d 1230, 1246, 265 CR 144, 783 P2d 731 (violation of injunction under Red Light Abatement Law, *Pen Code § 11225 et seq.*, could entail only one count of contempt for each day of violation); *Koehler v. Superior Court* (2010) 181 CA4th 1153, 1169-1170, 104 CR3d 877 (overruling holding that each day petitioner had not paid sanction was separate contempt)].

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral OverviewCriminal Law & ProcedureSentencingGeneral OverviewCriminal Law & ProcedureSentencingFines



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23.26 Contemnor May Be Jailed to Coerce Act.

23.26[1] Confinement in Jail May Be Indefinite. When the contempt consists of the omission to perform an act that is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it [*CCP* § 1219(a)].

23.26[2] Confinement Must End When Pending Proceedings End. If the contempt relates to pending proceedings before the court--for example, disobedience of an order to turn over assets to a receiver--the sentence for conditional confinement in jail becomes a nullity, and the contemnor must be released from it, when the proceedings end [*In re Lifschutz* (1970) 2 C3d 415, 439 n27, 85 CR 829, 467 P2d 557] , even though the act not performed remains unperformed [see *McComb v. Superior Court* (1977) 68 CA3d 89, 99, 137 CR 233 (refusal to testify)].

23.26[3] Court Must Determine When Confinement Is No Longer Coercive. A coercive incarceration to compel compliance with an order of court presents a special problem where disobedience of the order is based on an established articulated moral principle. In such a situation, if the contemnor makes an appropriate request to the court for release, it is necessary for the court to determine whether the point has been reached at which the confinement has ceased to serve its coercive purpose and has become punitive. The test of the distinction lies in the presence or absence of a substantial likelihood that continued confinement will accomplish the purpose of the order on which the confinement is based. This includes an inquiry as to whether the contemnor remains able to perform the required act [*In re Farr* (1974) 36 CA3d 577, 584, 111 CR 649] .

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral OverviewCriminal Law & ProcedureSentencingGeneral Overview



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23.27 Contemnor May Be Liable for Attorney's Fees and Costs.

In addition to being fined and jailed, if the contemnor is subject to a court order as a party to the action or as an agent of a party, and is adjudged guilty of contempt for violating that court order, then the contemnor may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by the initiating party in connection with the contempt proceeding [*CCP § 1218(a)*].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil

Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Sanctions Contempt General Overview



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23.28 Order of Contempt Should Meet Specific Criteria.

23.28[1] Findings of Fact Should Be Recited. Although an indirect contempt judgment need not recite the court's factual findings as a jurisdictional prerequisite, those findings should be specifically recited either orally or in the judgment to assist a reviewing court in determining whether the evidence is sufficient to support the judgment of contempt [*Moss v. Superior Court* (1998) 17 C4th 396, 404 n3, 71 CR2d 215, 950 P2d 59] .



Strategic Point:

Counsel must ensure that the order that is the basis of the contempt, regardless of type, was actually signed and entered by the judge and was clear enough to be enforceable in an indirect-contempt proceeding.

23.28[2] Four Findings Are Necessary in Case of Disobeying Court's Order. A party may be adjudged in contempt for disobeying the court's order [see 23.20] if the court finds four facts: (1) the court made a valid and sufficient order; (2) the party had knowledge of the order; (3) the party was able to obey the order; and (4) the party willfully disobeyed the order [*Koehler v. Superior Court* (2010) 181 CA4th 1153, 1169, 104 CR3d 877 ; *In re Hinman* (1966) 239 CA2d 845, 850, 49 CR 162] .

23.28[3] Elaboration Is Required for Conditional Confinement to Coerce Act. When the contempt consists of the omission to perform an act that is still in the power of the person to perform, he or she may be imprisoned until he or she has performed it [see 23.26], and in that case the act must be specified in the warrant of commitment [CCP § 1219(a)]. Therefore, the order of contempt (which is the warrant of commitment) not only must specify what act is to be performed but also must state the court's finding that the contemnor is able to perform it [*In re Wells* (1946) 29 C2d 200, 202, 173 P2d 811 (order should have specified that contemnor could purge contempt by restoring certain sum to bank account and that contemnor had power to do that)].

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral Overview



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23.29 CHECKLIST: Opposing Charge of Indirect Contempt.

- ☐ Prepare and file affidavit in opposition, if desired.

Authority:

Freeman v. Superior Court (1955) 44 C2d 533, 536, 282 P2d 857

Discussion:

See 23.30

- ☐ In opposing affidavit:

- ☐ Controvert statements in initiating affidavit (or statement of facts).

Authority:

Crittenden v. Superior Court (1964) 225 CA2d 101, 107, 36 CR 903

Discussion:

See 23.30[2]



Warning:

If an opposing affidavit is filed, then any uncontroverted statements in the initiating affidavit (or statement of facts) will be deemed admitted [see 23.30[2][b]].

- ☐ Raise issues of same kind as might be stated in demurrer to complaint.

Authority:

Morelli v. Superior Court (1968) 262 CA2d 262, 266, 68 CR 572

Discussion:

See 23.30[3]

☐ At hearing, whether or not opposing affidavit was filed:

☐ Attack sufficiency of initiating affidavit (or statement of facts).

Authority:*Mitchell v. Superior Court (1912) 163 C 423, 425, 125 P 1061***Discussion:**

See 23.31[1]

☐ Avoid relying on technical defects in initiating affidavit (or statement of facts), since those can be cured by amendment or disregarded.

Authority:*CCP § 1211.5***Discussion:**

See 23.31[2] -[5]

☐ Contest charge of disobeying court order by showing:

☐ Lack of knowledge of order or inability to comply with it, both of which must be proved before disobedient party may be held in contempt.

☐ Excuse for disobeying court order.

☐ Invalidity of order that was disobeyed.

Discussion:

See 23.32

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil
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23.30 Alleged Contemnor May File Affidavit in Opposition.

23.30[1] Practice Is Allowed by Cases. While there is no rule or statute authorizing the practice, courts allow the alleged contemnor to file an affidavit in opposition to the initiating affidavit (or statement of facts) [see *Freeman v. Superior Court* (1955) 44 C2d 533, 536, 282 P2d 857] .



Strategic Point--Opposing Affidavit Is Not Required:

At the hearing, the alleged contemnor may present evidence and argument against the charge of contempt [see 23.24[3]], without having filed an affidavit in opposition. The governing statute provides that when the alleged contemnor has appeared, the court must proceed to investigate the charge, and must "hear any answer" that the alleged contemnor may make to the charge, and may examine witnesses for or against the alleged contemnor, for which an adjournment may be had from time to time if necessary [CCP § 1217].

23.30[2] Opposing Affidavit Is Like Answer to Complaint.

23.30[2][a] Affidavits Together Frame Issues. In an indirect-contempt proceeding, the affidavit (or statement of facts) on which the proceeding is based is like a complaint; an opposing affidavit, if one is filed, is like an answer; and the issues of fact are thus framed by the respective affidavits serving in lieu of pleadings [*Freeman v. Superior Court* (1955) 44 C2d 533, 536, 282 P2d 857] .

23.30[2][b] Uncontroverted Statements Are Deemed Admitted. If the alleged contemnor files an affidavit in opposition, it will have the effect of an answer to a complaint, so that statements in the initiating affidavit (or statement of facts) that are not controverted in the opposing affidavit will be deemed admitted, and the hearing will be limited to the issues framed by the controverted statements (if any) [see *Crittenden v. Superior Court* (1964) 225 CA2d 101, 107, 36 CR 903] .



Warning--Initiating Affidavit (or Statement of Facts) Must Be Controverted:

If the alleged contemnor does not file an affidavit in opposition and also does not counter the initiating

affidavit with evidence at the hearing [see 23.24[3]], then the initiating affidavit alone--being sufficient to initiate the proceeding [see 23.21]--will support an adjudication of contempt [see *In re Larrabee* (1938) 29 CA2d 240, 242, 84 P2d 224] .

23.30[3] Opposing Affidavit May Include Demurrer-Like Plea. Unless the initiating affidavit states facts constituting a contempt, the court is without jurisdiction to proceed [*Mitchell v. Superior Court* (1912) 163 C 423, 424, 125 P 1061] . Therefore, since the practice in cases of indirect contempt does not include anything like a demurrer, an opposing affidavit may be used to raise an objection in the nature of a demurrer [see *Morelli v. Superior Court* (1968) 262 CA2d 262, 266, 68 CR 572] .

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureSanctionsContemptGeneral Overview



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Chapter 23 Contempt
V. OPPOSING CHARGE OF INDIRECT CONTEMPT

2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.31

23.31 Sufficiency of Initiating Affidavit (or Statement of Facts) Is at Issue.

23.31[1] Alleged Contemnor May Attack Sufficiency. At the hearing, the alleged contemnor may pursue a challenge to the sufficiency of the affidavit (or statement of facts) on which the hearing is based, since there will have been no previous opportunity for the court to consider and rule on such a challenge. Unless the initiating affidavit states facts constituting a contempt, the court is without jurisdiction to proceed [*Mitchell v. Superior Court* (1912) 163 C 423, 424, 125 P 1061 ; *Koehler v. Superior Court* (2010) 181 CA4th 1153, 1169, 104 CR3d 877] .



Strategic Point--Opposing Affidavit Is Not Required:

While the alleged contemnor is allowed to file an opposing affidavit in which the sufficiency of the initiating affidavit may be challenged [see 23.30[2]], that is not a prerequisite to pursuing such a challenge at the hearing [see, e.g., *Mitchell v. Superior Court* (1912) 163 C 423, 425, 125 P 1061] .



Warning--Attack on Technical Defects Will Not Succeed:

In CCP § 1211.5 [see 23.31[2] -[5]], the legislature has shown an intent that contempt proceedings should be concluded on the merits and not be derailed because of technical defects in the initiating affidavit [see *Reliable Enters., Inc. v. Superior Court* (1984) 158 CA3d 604, 617, 204 CR 786 , overruled on other ground, *Mitchell v. Superior Court* (1989) 49 C3d 1230, 1248, 265 CR 144, 783 P2d 731] .



Cross Reference:

Requirements for initiating affidavit (or statement of facts), see 23.21.

23.31[2] Insufficiencies May Be Cured by Amendment. The court may order or permit amendment of the affidavit (or statement) for any defect or insufficiency at any stage of the proceedings [CCP § 1211.5(b)].



Strategic Point--No Postponement After Amendment:

The hearing must continue as if the affidavit (or statement) had been originally filed as amended, unless substantial rights of the alleged contemnor would be prejudiced, in which event a reasonable postponement, not longer than the ends of justice require, may be granted [CCP § 1211.5(b)].

23.31[3] Jurisdictional Defect May Be Cured by Amendment to Conform to Proof. Whether or not the alleged contemnor objects to the sufficiency of the affidavit (or statement) during the hearing, the court's subject-matter jurisdiction will not depend on the averments of the affidavit (or statement) but may be established by the facts found by the court to have been proved at the hearing, and the court must cause the affidavit (or statement) to be amended to conform to proof [CCP § 1211.5(a)].

23.31[4] Nonprejudicial Defects of Form Will Be Disregarded. The affidavit (or statement) is not insufficient, nor will the proceedings or final order be affected, by reason of any defect or imperfection in matter of form that does not prejudice a substantial right of the alleged contemnor on the merits [CCP § 1211.5(c)].

23.31[5] No Relief From Irregularities Except to Prevent Miscarriage of Justice. A final order of contempt will not be set aside, nor will a new hearing be granted, for any error as to any matter of pleading in the affidavit (or statement) unless, after an examination of the entire cause, including the evidence, the court is of the opinion that the error complained of has resulted in a miscarriage of justice [CCP § 1211.5(c)].

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedureSanctionsContemptGeneral Overview



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23.32 Charge of Disobeying Court Order May Be Contested.

23.32[1] Lack of Knowledge or Inability to Comply May Be Proved. Since disobedience of a court order cannot be contempt unless the person charged had knowledge of the order [*see* 23.20[2]] and was able to comply with it [*see* 23.20[3]], it follows that proof to the contrary as to either of those facts is a complete defense.

23.32[2] Disobedience of Order May Be Excused.

23.32[2][a] Superseding Court Order May Provide Excuse. A party may not be punished for contempt based on disobeying the court's order, if it was superseded by another court's order [*see* *Gates v. Municipal Court* (1992) 9 CA4th 45, 53-55, 11 CR2d 439 (sheriff complying with federal court's order to limit jail population had complete defense to charge of contempt based on his failure to enforce conflicting state law)].

23.32[2][b] Later-Enacted Law May Provide Excuse. A party may not be punished for contempt based on disobeying the court's order, if compliance was precluded by legislation enacted after the order was issued [*Anderson v. Superior Court* (1998) 68 CA4th 1240, 1243, 1250, 80 CR2d 891] .

23.32[3] Validity of Disobeyed Order May Be Attacked. A party may not be punished for contempt based on disobeying the court's order, if it was void for lack of jurisdiction [*In re Berry* (1968) 68 C2d 137, 149, 65 CR 273, 436 P2d 273] or otherwise invalid [*cf.* *Davidson v. Superior Court* (1999) 70 CA4th 514, 517-518, 82 CR2d 739 (party was not in contempt for disobeying decree based on settlement agreement, because party had not personally signed settlement agreement as required by CCP § 664.6, and decree confirming settlement agreement was therefore void and unenforceable)].

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewCriminal Law & ProcedureHabeas CorpusGeneral Overview



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VI. REVIEW OF CONTEMPT ORDERS

2-23 MB Practice Guide: Trial & Post-Trial Civil Proc 23.33

23.33 CHECKLIST: Review of Contempt Orders.

- ☐ Determine that court has made order of contempt, which is final and not appealable.

Authority:

CCP §§ 904.1(a)(1), 904.2(a), 1222

Discussion:

See 23.34

- ☐ Move in trial court for relief from any unexecuted part of sentence.

Authority:

City of Vernon v. Superior Court (1952) 38 C2d 509, 520, 241 P2d 243

Discussion:

See 23.35

- ☐ Determine whether to petition appellate court for writ of certiorari to review and annul contempt order.

Authority:

John Breuner Co. v. Bryant (1951) 36 C2d 877, 878, 229 P2d 356

Discussion:

See 23.36[1]

- ☐ Determine whether to petition appellate court for writ of habeas corpus to be released from jail under invalid contempt order.

Authority:

In re De Silva (1948) 33 C2d 76, 79, 199 P2d 6

Discussion:

See 23.36[2]

- ☐ Focus in writ petition on jurisdictional errors in trial court and lack of substantial evidence.

Authority:

In re Karpf (1970) 10 CA3d 355, 364, 88 CR 895

Discussion:

See 23.36[3], [4]

- ☐ Include request for appellate court's order that petitioner be released from jail pending disposition of writ petition.

Authority:

In re Karpf (1970) 10 CA3d 355, 362-363, 88 CR 895

Discussion:

See 23.36[5]

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment
RuleCivil ProcedureAppealsAppellate JurisdictionState Court Review



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23.34 Order of Contempt Is Final and Not Appealable.

The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive [CCP § 1222]. No appeal may be taken from a final judgment of contempt [CCP §§ 904.1(a)(1), 904.2(a)].



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23.35 Contemnor May Move in Trial Court for Relief From Punishment.

As long as the sentence remains to any extent unexecuted, if facts not known by the court when it imposed punishment would warrant remitting the unexecuted sentence--that is, if the punishment appears too harsh in view of circumstances that the court should now consider--then the contemnor may move in the trial court for that relief (or the trial court, if aware of those circumstances, may grant that relief without a motion) [*City of Vernon v. Superior Court* (1952) 38 C2d 509, 520, 241 P2d 243] .



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23.36 Review Is by Petition for Extraordinary Writ.

23.36[1] Petition for Writ of Certiorari Is Appropriate. A final order or judgment in a contempt matter may be reviewed by a writ of certiorari [*John Breuner Co. v. Bryant* (1951) 36 C2d 877, 878, 229 P2d 356] .

➤ **Cross Reference:**

Discussion and form of petition for writ of certiorari to review contempt proceedings, see California Forms of Pleading and Practice, Ch. 135, Contempt (Matthew Bender).

23.36[2] Petition for Writ of Habeas Corpus Is Proper in Case of Confinement. Habeas corpus is an appropriate remedy to obtain release from confinement pursuant to a conviction of contempt [*In re De Silva* (1948) 33 C2d 76, 79, 199 P2d 6 (indirect contempt consisting of disobedience of injunction, which contemnor claimed was void)].



Strategic Point--Petition May Be in Alternative:

When the contemnor is subject to a jail term but not yet actually in jail (because of a stay of execution), review of the contempt order may be had by a petition for a writ of certiorari or, in the alternative, a writ of habeas corpus. The reviewing court will choose how to consider the petition [*In re Buckley* (1973) 10 C3d 237, 240 n1, 110 CR 121, 514 P2d 1201 (treated as habeas corpus petition); *McComb v. Superior Court* (1977) 68 CA3d 89, 92 n1, 137 CR 233 (treated as certiorari petition)].

➤ **Cross Reference:**

Discussion and form of petition for writ of habeas corpus, see California Forms of Pleading and Practice, Ch. 292, Habeas Corpus (Matthew Bender).

23.36[3] Scope of Review Is Same for Either Writ. The scope of review on an application for a writ of habeas corpus is identical to that by way of a writ of certiorari (writ of review), namely, whether the act or omission charged against the contemnor confers jurisdiction to adjudicate the contempt (in short, was it contempt?) and whether the jurisdictional act or omission is supported by the evidence [*In re Karpf* (1970) 10 CA3d 355, 364, 88 CR 895] .



Strategic Point--No Presumptions Are Indulged:

The reviewing court will not indulge any presumptions as to the validity of the contempt order. If the record of the proceedings fails to demonstrate on its face the existence of all necessary facts on which jurisdiction depended, the contempt order cannot be sustained [*Koehler v. Superior Court* (2010) 181 CA4th 1153, 1166-1167, 104 CR3d 877] .

23.36[4] Reviewing Court Does Not Reconsider Evidence. The review of the evidence is limited to determining whether there was any substantial evidence before the trial court to sustain its jurisdiction. The power to weigh the evidence rests with the trial court [*In re Karpf* (1970) 10 CA3d 355, 364, 88 CR 895] .

23.36[5] Contemnor in Jail May Be Released. If the contemnor is in jail when the petition for review is filed, the contemnor may include, and the reviewing court may grant, a request to be released pending the reviewing court's decision [see *In re Karpf* (1970) 10 CA3d 355, 362-363, 88 CR 895] .

Legal Topics:

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

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23.37 Invalid Contempt Order Is Annulled.

If the order of contempt cannot be upheld, the reviewing court must simply annul it [*see Koehler v. Superior Court (2010) 181 CA4th 1153, 1172, 104 CR3d 877*]. The reviewing court may not modify the contempt order, and the case may not be remanded for further proceedings [*In re Ringgold (2006) 142 CA4th 1001, 1011, 48 CR3d 507*].

✚ Judge's Perspective:

Contempt orders are subject to a high degree of review, and compliance with all technical requirements is required. Judges considering issuing a contempt order should review that all necessary steps have been taken, and any documents supporting the order are carefully drafted and with sufficiently detailed facts to support the order.

Distinguish--Remand for Reconsideration of Punishment:

As long as the sentence remains to any extent unexecuted, if facts not known by the trial court when it imposed punishment would warrant remitting the unexecuted sentence--that is, if the punishment appears too harsh in view of circumstances that the court should now consider--the contemnor may move in the trial court for that relief (or the trial court, if aware of those circumstances, may grant that relief without a motion). The reviewing court may remand the case to allow for that procedure [*e.g., City of Vernon v. Superior Court (1952) 38 C2d 509, 520, 241 P2d 243*].

Legal Topics:

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

Civil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRemands



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23.38 Declaration in Support of Order to Show Cause for Contempt--Disobedience of Court Order.

Declaration in Support of Order to Show Cause for Contempt--Disobedience of Court Order.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION IN
Mary Jones,	)	SUPPORT OF ORDER
Defendant.	)	TO SHOW CAUSE FOR
	)	CONTEMPT
	)	Judge: _____
	)	Department: _____
	)	

I, Tom Doe, say:

I am the attorney for the plaintiff in the above-entitled action. The following facts are within my personal knowledge, and I could competently testify thereto if called as a witness.

On _____ [date] this court ordered that _____ [describe order]. Mary Jones (hereafter Defendant) had knowledge of this order because _____ [describe how contemnor had knowledge, e.g., she and her attorney were present in court when the order was made].

On _____ [date] Defendant willfully disobeyed this court's order in that _____ [describe conduct in violation of court's order].

Defendant had the ability to obey the court's order at the time she violated it _____ [add, if applicable:
and continues to have the ability to comply with the court's order but refuses to do so].

Because of Defendant's willful disobedience of this court's order, Defendant should be ordered to appear before the court to show cause why she should not be adjudged guilty of contempt and punished pursuant to the provisions of *Code of Civil Procedure section 1209 et seq.*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____[signature]
Tom Doe

NOTES.

Authority:

CCP § 1211(a)

Drafting Affidavit/Declaration:

See 23.21

Related Form of Order to Show Cause:

See 23.39

Related Forms of Points and Authorities:

See California Points and Authorities, Ch. 47, Contempt (Matthew Bender)



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23.39 Order to Show Cause for Contempt--Disobedience of Court Order.

Order to Show Cause for Contempt--Disobedience of Court Order.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER TO SHOW
Mary Jones,	)	CAUSE FOR CONTEMPT
Defendant.	)	
	)	
	)	
	)	
	)	

To: Mary Jones:

YOU ARE HEREBY ORDERED to appear before the above-named court in Department 1 thereof, located at 1 North Main Street, Farallon City, California 90000, on _____[*date*] at _____[*time*] to show cause, if any you have, why you should not be adjudged guilty of contempt and punished accordingly for _____[*describe contemptuous conduct, e.g., willful disobedience of this court's order of* _____(*date*)] as provided in *Code of Civil Procedure section 1209 et seq.* and as more fully described in the declaration attached hereto.

Dated: _____

_____ [*signature*]

Judge of the Superior Court

NOTES.

Authority:

CCP § 1212

Indirect-Contempt Hearing Set by Order to Show Cause:

See 23.22

Related Form of Declaration:

See 23.38

Related Forms of Points and Authorities:

See California Points and Authorities, Ch. 47, Contempt (Matthew Bender)



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23.40 Order Adjudging Contempt--Disobedience of Court Order.

Order Adjudging Contempt--Disobedience of Court Order.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	
vs. Mary Jones,	)	NO. _____
Defendant.	)	ORDER RE: CONTEMPT
	)	
	)	
	)	

The contempt proceedings against Mary Jones, Defendant herein, came on regularly for hearing by the court on this date pursuant to the order to show cause issued by this court on _____[*date*]. Plaintiff appeared by his counsel, Tom Doe, and Defendant appeared by her counsel, Jane Lee. Evidence, both oral and documentary, having been received and considered, the matter having been argued and submitted, it appearing that Defendant has the present ability to comply with the order violated as made by this court on _____[*date*], and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Mary Jones, Defendant herein, is guilty of contempt of court for failure to obey the order of this court made on _____[*date*], wherein the court ordered that _____[*describe acts that defendant was directed to perform or was restrained from performing*]. The court finds that Defendant knew of the foregoing order, had [and still has] the ability to comply with the foregoing order, and willfully disobeyed [and continues to disobey] the foregoing order.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Mary Jones, Defendant herein, be

_____ [punished for the foregoing contempt by a fine of \$_____ and confinement in the county jail for a period of _____ (*number*) days or imprisoned at _____ (*specify jail*) until she has performed the following acts: _____ (*describe acts to be performed*)].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Mary Jones, Defendant herein, pay the sum of \$_____, as reasonable attorney's fees and costs incurred in connection with this proceeding, to Plaintiff John Smith by _____ [*date*].

Dated: _____

_____ [*signature*]

Judge of the Superior Court

NOTES.

Authority:

CCP §§ 1218, 1219

Order Adjudging Indirect Contempt:

See 23.28

Related Forms of Points and Authorities:

See California Points and Authorities, Ch. 47, Contempt (Matthew Bender)



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Chapter 24 Costs

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§ 24.syn Synopsis to Chapter 24: Costs

24.01 Scope.

24.02 Objective and Strategy.

24.03 CHECKLIST: Seeking Recovery of Costs.

24.04 Options and Strategies.

24.05 "Costs" Include Fees and Charges Paid to Courts or Recoverable by Law, and May Include Attorney's Fees.

24.06 Costs Are Allowed Only Pursuant to Statute.

24.07 Prevailing Party May Recover Costs.

24.07[1] Unless Otherwise Provided by Statute, Prevailing Party Can Generally Recover Costs.

24.07[2] "Prevailing Party" Defined.

24.07[3] Plaintiff Is Prevailing Party When It Obtains Primary Relief Sought.

24.07[4] Prevailing Party in Small Claims Court Is Entitled to Costs.

24.07[5] If Party Recovers Relief Other Than Money, Court May Allow or Apportion Costs.

24.07[6] Court May Allow or Deny Costs to Defendant That Presents Unified Defense With Co-Defendants.

24.08 Agreement Between Parties Can Affect Allocation of Costs.

24.09 Seeking Prejudgment Costs.

24.09[1] Prevailing Party Must File Memorandum of Costs Within 15 Days of Mailing of Notice of Entry of Judgment

or Dismissal or Other Specified Date.

24.09[2] Party Requesting Default Judgment Must Request Costs When Applying for Judgment.

24.10 Allowable Costs Include Filing Fees and Cost of Service of Process.

24.11 Costs Allowed Only When Expressly Authorized.

24.11[1] Costs Must Be Expressly Authorized.

24.11[2] Recovering Expert Fees.

24.11[3] Recovering Investigation Expenses.

24.11[4] Recovering Postage, Telephone, and Photocopying Charges.

24.11[5] Recovering Costs of Jury Preparation.

24.11[6] Recovering Transcript Costs.

24.12 Defendant May Require Plaintiff to File Undertaking As Security for Costs in Certain Types of Actions.

24.13 Architect or Design Professional Sued in Professional Capacity May Require Undertaking in Certain Actions.

24.13[1] Architect or Design Professional May Move for Undertaking in Actions for Error, Omission, or Professional Negligence.

24.13[2] Undertaking Required If Defendant Shows Frivolous Suit and Lack of Hardship.

24.13[3] Determination Not Including All Defendants Does Not Affect Issues or Merits of Case.

24.13[4] Case Will Be Dismissed Unless Plaintiff Files Required Undertaking in Timely Manner.

24.13[5] Plaintiff Must Pay Costs Following Dismissal or Judgment for Defendant.

24.13[6] Order Is Not Appealable.

24.14 Health Care Professional Sued in Professional Capacity May Require Undertaking in Certain Actions.

24.14[1] Health Care Professional May Move for Undertaking in Personal Injury Action.

24.14[2] Defendant Must Bring Motion Within Six Months After Service of Summons.

24.14[3] Undertaking Required If Defendant Shows Frivolous Suit and Lack of Hardship.

24.14[4] Determination Not Including All Defendants Does Not Affect Issues or Merits of Case.

24.14[5] Case Will Be Dismissed Unless Plaintiff Files Required Undertaking in Timely Manner.

24.14[6] Plaintiff Must Pay Defendant's Costs Following Dismissal or Judgment for Defendant.

24.14[7] Defendant Must Pay Plaintiff's Costs in Defending Dismissal Motion Following Judgment for Plaintiff.

24.15 Defendant Sued by Out of State Plaintiff or Foreign Corporation May Require Undertaking.

24.15[1] Defendant Must File Noticed Motion for Undertaking on Ground of Reasonable Possibility of Successful Judgment.

24.15[2] If Motion for Undertaking Is Filed 30 Days or Earlier After Service of Summons, Defendant May Move for Temporary Stay of Further Proceedings.

24.15[3] Court Must Require Undertaking to Secure Costs and Fees After Hearing.

24.15[4] Action Will Be Dismissed If Plaintiff Does Not File Required Undertaking in Timely Manner.

24.15[5] Court Determinations Regarding Undertaking Do Not Affect Merits of Case, and May Not Be Used in Evidence.

24.15[6] Order Is Not Appealable.

24.15[7] Court May Waive Bond.

24.16 Plaintiff in Unlawful Detainer Action May Recover Eviction Costs.

24.17 Plaintiff in Inverse Condemnation Action May Recover Costs and Fees.

24.18 Defendant in Action Under Torts Claims Act, or for Indemnity or Contribution, May Recover Costs If Case Was Filed in Bad Faith.

24.18[1] On Defendant's Motion, Court Must Determine Defense Costs If Plaintiff Acted in Bad Faith.

24.18[2] Defendant Must Have Successfully Moved for Judgment, Summary Judgment, Directed Verdict, or Nonsuit.

24.19 Court May Set Reasonable Referee Fee Unless Parties Agree to Fee in Writing.

24.20 Any Party May be Required to Pay Costs in Probate Proceeding.

24.21 Court May Impose Costs for Trial Postponement.

24.22 Court May Require Plaintiff to Pay Defense Costs in Action for Money If Defendant Offered Full Amount Before Trial.

24.23 Plaintiff May Recover Treble Damages and Costs in Action Against Certain Unlicensed Persons.

24.24 Personal Representative or Trustee May Recover Costs Allowable to Person in Own Right.

24.25 State or Public Agency Is Generally Liable for Same Costs As Any Other Party.

24.26 Attorney General Is Entitled to Investigation and Prosecution Costs in Certain Statutory Actions.

24.27 Small Business Is Entitled to Additional Costs in Action Involving State Regulatory Agency.

24.28 Local Court Rules May Provide for Costs.

24.29 Recovering Costs After Rejection of Settlement Offer Under CCP § 998.

24.29[1] Rejection of More Favorable Settlement Offer May Affect Parties' Rights to Recover Costs.

24.29[2] Plaintiff That Failed to Obtain More Favorable Judgment Cannot Recover Its Post-Offer Costs and Must Pay Defendant's Costs.

24.29[3] If Plaintiff Fails to Obtain More Favorable Judgment, Damages Award Is Offset by Defendant's Costs.

24.29[4] Defendant That Failed to Obtain More Favorable Judgment May Be Required to Pay Plaintiff's Costs and Expert Fees.

24.29[5] Offer Made to Multiple Parties Is Valid Only If Expressly Apportioned Among Them and Not Conditioned on Acceptance by All of Them.

24.29[6] Offeror May Revoke CCP § 998 Offer.

24.30 Court May Award Costs If Allowed by Statute.

24.30[1] Costs Are Allowable If Incurred, Whether or Not Paid.

24.30[2] Costs Must Be Reasonably Necessary to Litigation, Not Merely Convenient.

24.30[3] Amount Must Be Reasonable.

24.30[4] Costs Not Expressly Allowed or Denied Are Subject to Court's Discretion.

24.30[5] Statutory Reference to "Costs and Attorney's Fees" Includes Fees As Costs.

24.31 Calculating Costs.

24.32 Clerk Enters Costs After Time for Motions or Determination Has Passed.

24.33 Parties May Stipulate to Alternative Procedures for Awarding Costs.

24.34 Local Court Rules May Provide for Inclusion of Costs in Judgment.

24.35 Recovery by Judgment Creditor.

24.35[1] Reasonable and Necessary Costs of Enforcing Judgment.

24.35[2] Costs and Interest to Satisfy Writ to Enforce Judgment.

24.35[3] Statutory Costs and Fees.

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24.43 If Items Appear Proper, Burden Is on Moving Party to Show Costs Were Not Reasonable or Necessary.

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24.45[2] Court Cannot Reduce Costs Beyond Statutory Limits.

24.46 Opposing Recovery of Costs for Enforcement of Judgment.

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24.48 Judicial Council Form MC-011--Memorandum of Costs (Worksheet).

24.49 Notice of Motion and Motion to Tax Costs.

24.50 Order Taxing Costs.

24.51 Notice of Motion and Motion to Strike Costs.

24.52 Order Striking Costs.



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Chapter 24 Costs
I. STRATEGY

2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.01

24.01 Scope.

This chapter covers:

- Seeking an undertaking from the opposing party [*see* 24.12 -24.15].
- Seeking costs as a prevailing party [*see* 24.07 -24.19; Form: *see* 24.48].
- Seeking recovery of costs in certain circumstances [*see* 24.20 -24.27].
- Local court rules providing for recovery of costs [*see* 24.28].
- Seeking recovery of costs based a party's rejection of a more favorable settlement offer under *CCP* § 998 [*see* 24.29].
- Court's determination of costs and entry of costs [*see* 24.30 -24.34]
- Seeking recovery of costs for enforcement of judgment [*see* 24.35; Form: *see* 24.47].
- Opposing recovery of costs after rejection of a more favorable settlement offer under *CCP* § 998 [*see* 24.38].
- Opposing recovery of costs when case should have been brought as limited civil case or in small claims court, and when defendants not properly joined [*see* 24.39, 24.40].
- Motions to strike and tax costs [*see* 24.41 -24.45; Forms: *see* 24.49 -24.52].
- Opposing recovery of enforcement costs [*see* 24.46].

Core Statutes:

CCP §§ 1032-1038

 Cross Reference:

Discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureSettlementsSettlement
AgreementsGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesCosts &
Attorney FeesCostsGeneral OverviewGovernmentsCourtsSmall Claims Courts



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Chapter 24 Costs
I. STRATEGY

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24.02 Objective and Strategy.

Counsel should begin planning before trial for the avoidance of liability for costs, and for the potential recovery of costs from the opposing party. At settlement negotiations, counsel should bear in mind the effects of *CCP* § 998, which sets forth a procedure that encourages the offer and acceptance of a reasonable settlement. Parties that do not attempt to settle a case for a reasonable sum are subject under *CCP* § 998 to payment of costs for which they might not otherwise be liable, and are precluded from recovering costs to which they might otherwise be entitled.

► Cross Reference:

Discussion of recovering costs after settlement negotiations, see 24.29, 24.38.

During the discovery phase of litigation, costs may be "recoverable" for items such as court ordered referees in discovery, attendance of referees at depositions, or the requirement of videotaping depositions in the case of aged and infirm witnesses, or otherwise unavailable third party witnesses (out of state). Careful attention to the requisite local rules and to *CCP* § 1033.5 will provide an indication of what steps need to be taken to preserve a record of the necessity for the expenses.

► Cross Reference:

Discussion of *CCP* § 1033.5, see 24.10.

During trial, counsel should keep a record of all costs of litigation, keeping in mind that only reasonable and necessary costs will be recoverable if the client is the prevailing party [see *CCP* § 1033.5(c)(2), (3)]. If an item of cost is not expressly allowed by statute [see *CCP* § 1033.5], counsel should take care in documenting the need for that item, for example, for using a messenger service as opposed to cheaper methods of transportation [see *Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 776, 23 CR2d 810]. In certain cases, counsel hoping to recover costs can obtain a court order for certain requirements, such as demonstrative evidence prepared by graphic artist trial support vendors, or daily transcripts, permitting them or, for transcripts, requiring them.

► Cross Reference:

Discussion of allowable costs, see 24.10, 24.11, 24.30.

If the case is one in which particular types of costs are allowed that are not generally available, counsel should become familiar with the relevant statute or statutes and follow any requirements for recovery of or opposition to those items of costs. For example, if the client is a plaintiff in an action for damages or injury against a person who should have been, but was not, professionally licensed under the laws of California, counsel should seek treble damages and costs available in that type of case [see *CCP* § 1029.8].

➡ **Cross Reference:**

Discussion of treble damages, see 24.23.

Counsel should always consult local rules and trial court preferences regarding allowable costs and additional procedures [see, e.g., Alameda Super Ct Rules, Rule 4.17].

➡ **Cross Reference:**

Discussion of local rules, see 24.28.

After trial, the prevailing party should itemize all the costs of litigation (including attorney's fees under *CCP* § 1033.5(a)(10)) and file and serve a cost memorandum in a timely manner [see *Cal Rules Ct, Rule 3.1700(a)*].

Record Keeping:

If counsel has carefully described all costs and expenses incurred throughout the litigation, computerized records of expenses will facilitate preparation of a cost memorandum in a timely manner. Recreating the descriptions of expense items after trial, to make sure the items fit within *CCP* § 1033.5 and cases interpreting it, may take too long and thwart timely presentation of a cost memorandum.

➡ **Cross References:**

Discussion of seeking costs, see 24.09, 24.28.

Discussion of attorney's fees, see Ch. 25, Attorney's Fees.

The opposing party should analyze the cost memorandum and note any generalized and questionable costs, inflated costs, items expressly disallowed by statute [see *CCP* § 1033.5(b)], and items that were unnecessary or unreasonable [see *CCP* § 1033.5(c)(2), (3)]. Counsel should then draft a particularized motion to tax or strike costs, and file and serve it in a timely manner [see *Cal Rules Ct, Rule 3.1700(b)*].

➡ **Cross References:**

See 24.41 -24.45.

Form, see 24.49 -24.52.

If enforcement of a judgment is necessary, counsel for the judgment creditor should keep careful track of the expenses of enforcement and be aware of the deadlines for seeking costs. Reasonable and necessary costs are recoverable [see *CCP* § 685.040], and specific items of costs are also allowable [see *CCP* § 685.070(a)]. Counsel for the judgment creditor must file and serve a memorandum of costs before the judgment is fully satisfied but not later than two years after the costs have been incurred [see *CCP* § 685.070(f)]. If counsel wants to file a noticed motion to recover reasonable and necessary enforcement costs [see *CCP* § 685.040], counsel must file the motion before the judgment is satisfied in full, but not later than two years after the costs have been incurred [see *CCP* § 685.080(a)].

➡ **Cross References:**

Discussion of costs for enforcing judgment, see 24.35.

Form, see 24.47.

By contrast, counsel for the judgment debtor should carefully analyze the cost memorandum, and note the items that are not expressly allowable by statute [see *CCP* § 685.070(a)] or items that are unreasonable or unnecessary [see *CCP* § 685.040]. Counsel for the judgment debtor should file and serve a particularized noticed motion to tax costs within 10 days after service of cost memorandum [*CCP* § 685.070(c)].

Strategic Point:



A typical strategy for the preparation of a cost bill by a defendant, particularly when those costs have been substantial, is to offer to waive such costs in exchange for the losing plaintiff waiving rights to appeal.



Cross Reference:

Discussion of opposing costs of recovery, see 24.46.



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 Civil Procedure Judgments Entry of Judgments Enforcement & Execution General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Governments Courts Rule Application & Interpretation



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Chapter 24 Costs
II. SEEKING RECOVERY OF COSTS

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24.03 CHECKLIST: Seeking Recovery of Costs.

☐ If client is defendant, determine whether plaintiff may be required to file an undertaking to secure the costs of suit:

☐ If client is licensed architect, landscape architect, engineer, building designer, or land surveyor, determine if following criteria are met:

☐ The client is sued in professional capacity for error, omission, or negligence.

☐ The suit is frivolous.

☐ Filing undertaking will not cause plaintiff undue economic hardship.

☐ There is no reasonable possibility that plaintiff has cause of action against each named defendant as to whom plaintiff would otherwise be required to file undertaking.

Authority:

CCP § 1029.5(a)

Discussion:

See 24.13

☐ If client is physician or other specified health care professional, determine whether the following criteria are met:

☐ The client is sued in professional capacity in personal injury action for error, omission, or negligence in performance of professional services, or performance of professional services without

consent.

- ☐ Suit is frivolous.
- ☐ Filing undertaking will not cause plaintiff undue economic hardship.
- ☐ There is no reasonable possibility that plaintiff has cause of action against each named defendant as to whom plaintiff would otherwise be required to file undertaking.

Authority:

CCP § 1029.6

Discussion:

See 24.14



Warning:

If undertaking is filed, but plaintiff prevails, defendant must pay costs incurred in plaintiff's defense of motion for dismissal.

Authority:

CCP § 1029.6(d)

Discussion:

See 24.14[6]

- ☐ If plaintiff is individual residing outside California or foreign corporation, determine whether there is reasonable possibility that client will obtain judgment in action or special proceeding.

Authority:

CCP § 1030

Discussion:

See 24.15

- ☐ If appropriate, file motion for undertaking.



File within these time periods:



- Architects and related professionals must file noticed motion within 30 days after service of summons.

Authority:

CCP § 1029.5(a)

Discussion:

See 24.13

- ☐ Physicians and related health-care professionals must file noticed motion within six months after service of summons.

Authority:

CCP § 1029.6

Discussion:

See 24.14

- ☐ Defendants being sued by plaintiffs outside California may file noticed motion at any time.

Authority:

CCP § 1030

Discussion:

See 24.15

- ☐ If client is prevailing party, itemize and calculate costs based on following allowable items:

- ☐ Filing, motion, and jury fees.
- ☐ Juror food and lodging.
- ☐ Taking, video recording, and transcribing necessary depositions.
- ☐ Attachment expenses; premiums on necessary surety bonds.
- ☐ Ordinary witness fees under *Gov Code § 68093*.
- ☐ Fees of court-ordered experts; court-ordered transcripts.
- ☐ Statutory reporter fees.
- ☐ Models and copies of exhibits that were reasonably helpful.
- ☐ Computer graphics and other programs.
- ☐ Other items allowable by statute.

Authority:

CCP § 1033.5(a)

Discussion:

See 24.10

- ☐ Consult local rules for allowable costs and required procedure.

Authority:

See, e.g., Sacramento Super Ct Rules, Rule 9.16(C)

Discussion:

See 24.28



Serve and file a verified memorandum of costs by the earlier of the following dates:

- ☐ Within 15 days after date of mailing of notice of entry of judgment or dismissal by clerk; or
- ☐ Within 180 days after entry of judgment.

Authority:

Cal Rules Ct, Rule 3.1700(a)(1); CCP § 1034(a)

Discussion:

See 24.09

Form:

See 24.48

- ☐ If client is defendant who made a pretrial settlement offer that was rejected and plaintiff failed to obtain a more favorable judgment or award, the following costs may be recoverable:

- ☐ Reasonable expert fees incurred and reasonably necessary.

Authority:

CCP § 998(c)(1)

Discussion:

See 24.29[2]

- ☐ If plaintiff is awarded damages and defense costs chargeable to plaintiff exceed damages award, net amount is awarded to defendant, and plaintiff must pay balance as a judgment in defendant's favor.

Authority:

CCP § 998(e)

Discussion:

See 24.29[3]

- ☐ If client is plaintiff who made a pretrial settlement offer that was rejected and defendant failed to obtain a more favorable judgment or award, plaintiff may be allowed to recover its costs, including.

- ☐ Reasonable expert fees incurred and reasonably necessary.

Authority:*CCP § 998(d)***Discussion:**

See 24.29[4]



If enforcement is necessary and client is judgment creditor, file and serve memorandum of costs for costs claimed under *CCP § 685.070*:

- ☐ Before the judgment is fully satisfied.
- ☐ Not later than two years after the costs have been incurred.

Authority:*CCP § 685.070(f)***Discussion:**

See 24.35

Form:

See 24.47



If enforcement is necessary and client is judgment creditor, bring motion for costs under *CCP § 685.040*:

- ☐ Before the judgment is satisfied in full.
- ☐ Not later than two years after the costs have been incurred.

Authority:*CCP § 685.080(a)***Discussion:**

See 24.35

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Costs & Attorney Fees Costs Depositions & Transcripts Civil Procedure Remedies Costs & Attorney Fees Costs Witnesses Civil Procedure Sanctions Baseless Filings Frivolous Lawsuits Governments Courts Rule Application & Interpretation



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Chapter 24 Costs
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24.04 Options and Strategies.

Counsel for the prevailing party will be better prepared to file a cost memorandum to recover costs of litigation by keeping careful record of the costs and expenses of litigation, including attorney's fees if appropriate, before and during trial [see *Cal Rules Ct, Rule 3.1700(a)*]. Counsel must realize that some costs, such as most expert fees, are generally not recoverable [see *CCP § 1033.5(b)*], and that recoverable costs are limited to those that are reasonable and necessary [see *CCP § 1033.5(c)(2), (3)*]. Allowable costs include such items as filing fees [see *CCP § 1033.5*]. Keep in mind that attorney's fees are allowable as costs only when authorized by contract, statute, or an equitable provision [see *CCP § 1033.5(a)(10)*].

Record Keeping:

Counsel should keep track of the litigation expenses with the above factors in mind. Therefore, if a certain item is discretionary, counsel should document the specific reason for including that item in the cost memorandum, in preparation for defending it in a motion to tax costs. Careful descriptions of the costs when they are entered into accounting records, computer tracking systems, or even in checkbooks will aid counsel after trial when there is little time available before a cost memorandum or motion to tax costs needs to be filed.

➡ Cross References:

Discussion of allowable costs, see 24.09 -24.11, 24.41.

Discussion of attorney's fees, see Ch. 25, Attorney's Fees.

Counsel should always consult local rules and trial court preferences regarding allowable costs and additional procedures [see, e.g., *Alameda Super Ct Rules, Rule 4.17*].

➡ Cross Reference:

Discussion of local rules, see 24.28.

If the judgment requires enforcement, counsel for the judgment creditor should also keep track of the expenses of enforcement. The judgment creditor may recover costs for items that are expressly allowed by statute, for example, fees for an abstract of judgment [see *CCP § 685.070(a)*], but, in general, allowable costs do not include enforcement fees,

unless there is some other basis for an award of attorney's fees [*see CCP § 685.040*].

Cross Reference:

Discussion of recovery for judgment creditor, see 24.35.

Counsel for the judgment creditor must be aware of the deadlines for seeking recovery of enforcement costs. Counsel must file a memorandum of costs for enforcement costs allowed by statute under *CCP § 685.070*, before the judgment is fully satisfied but not later than two years after the costs have been incurred [*see CCP § 685.070*]. Counsel may file a noticed motion to recover reasonable and necessary enforcement costs [*see CCP § 685.040*], which must be filed before the judgment is satisfied in full, but not later than two years after the costs have been incurred [*see CCP § 685.080(a)*].

Cross Reference:

Discussion of statutory fees for judgment creditor, see 24.35.

Counsel for the judgment creditor should also consider including the costs for enforcement as part of the judgment [*see CCP § 685.090(a)*].



Strategic Points:

- Including enforcement costs as part of the judgment is highly advisable. That way the fees can be collected as part of enforcing the judgment, such as attaching a bank account or garnishing wages.
- By including the costs for enforcement as part of the judgment, the judgment creditor can continue to impress on the judgment debtor that all significant costs related to the collection of the debt will be the judgment debtor's responsibility. This might be weighed by the losing party in its settlement considerations.

Cross References:

Discussion of costs for enforcement, see 24.35.

Discussion of costs generally, 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 ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses



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24.05 "Costs" Include Fees and Charges Paid to Courts or Recoverable by Law, and May Include Attorney's Fees.

Although there is no statutory definition of "costs" in California [see CCP §§ 1032, 1033], the term has been held to encompass fees and charges required by law to be paid to the courts or their officers, or amounts specifically fixed by law as recoverable [*Rabinowitch v. California W. Gas Co. (1967) 257 CA2d 150, 161, 65 CR 1*].

► **Cross Reference:**

Discussion of allowable costs, see 24.10, 24.11.

In limited circumstances, costs may include attorney's fees. Generally though, without statutory authority or contractual obligations between parties in the event of disputes arising under the contract, attorney's fees are not available [see CCP § 1033.5(a)(10)].

► **Cross References:**

List of allowable costs, see 24.10.

Discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Costs & Attorney
Fees Costs Court & Marshal Fees



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Chapter 24 Costs
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24.06 Costs Are Allowed Only Pursuant to Statute.

The right to recover costs exists solely by virtue of statute [*Murillo v. Fleetwood Enter., Inc. (1998) 17 C4th 985, 989, 73 CR2d 682, 953 P2d 858*] .



Cross Reference:

Discussion of costs generally, 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 Procedure Remedies Costs & Attorney Fees Costs General Overview



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Chapter 24 Costs
II. SEEKING RECOVERY OF COSTS

2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.07

24.07 Prevailing Party May Recover Costs.

24.07[1] Unless Otherwise Provided by Statute, Prevailing Party Can Generally Recover Costs. 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)].

Example:

A prevailing party in a suit brought under the Song-Beverly Consumer Warranty Act [*see CC* § 1790 *et seq.*] is entitled to costs. *CCP* § 1032(b) does not conflict with *CC* § 1794(d) in that regard [*Murillo v. Fleetwood Enter., Inc.* (1998) 17 C4th 985, 989-990, 73 CR2d 682, 953 P2d 858] .

Example:

Costs are available to parties conducting arbitration pursuant to *Ins Code* § 11580.2 even if those costs added to the arbitration award exceed the policy limit. These costs may include expert witness fees and costs related to depositions and exhibit preparation [*Pilimai v. Farmers Insurance Exchange Company* (2006) 39 C4th 133, 150-152, 45 CR3d 760, 137 P3d 939].

➡ Cross Reference:

Discussion of allowable costs, see 24.10.

A party that successfully seeks a writ of mandate or prohibition may recover the appropriate costs [*see CCP* §§ 1095, 1105].

24.07[2] "Prevailing Party" Defined. The term "prevailing party" includes the following [*CCP* § 1032(a)(4)]:

- The party with a net monetary recovery.
- A defendant in whose favor a dismissal is entered.
- A defendant when neither plaintiff nor defendant obtains any relief.

- A defendant as against plaintiffs who do not recover any relief against that defendant.

► **Cross Reference:**

Discussion of net damages, see 24.07[3].

"Plaintiff" includes a cross-complainant or a party who files a complaint in intervention [CCP § 1032(a)(3)].

"Complaint" includes a cross-complaint [CCP § 1032(a)(1)] and a complaint in intervention [*Garcia v. Hyster Co.* (1994) 28 CA4th 724, 732, 34 CR2d 283] .

"Defendant" includes a cross-defendant or a person against whom a complaint is filed [CCP § 1032(a)(2); *Great W. Bank v. Converse Consultants, Inc.* (1997) 58 CA4th 609, 612-614, 68 CR2d 224] . This is so even if the dismissal of the cross-complaint is the result of a good-faith settlement determination of the trial court pursuant to CCP § 877.6 (determination of good-faith settlement). A cross-defendant who obtains the dismissal of the cross-complaint after a good-faith settlement with the plaintiff is the prevailing party for purposes of a cost award. The term "prevailing party" does not include a plaintiff who prevails on the issue of a defendant's liability but recovers nothing from the defendant because the judgment against the defendant is offset by the amount of plaintiff's settlement with codefendants before trial [*Goodman v. Lozano* (2010) 47 C4th 1327, 1333-1338, 104 CR3d 219, 223 P3d 77] . When a cross-complaint is dismissed as moot, the cross-defendant is one in whose favor the cross-complaint was dismissed and is therefore a prevailing party under CCP § 1032 [*City of Long Beach v. Stevedoring Services of America* (2007) 157 CA4th 672, 680, 68 CR3d 779] .

► **Cross References:**

Discussion of settlement, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 37, Settlement and Release.

Detailed discussion of settlement, see California Forms of Pleading and Practice, Ch. 520, Settlement and Release (Matthew Bender).

Example--Defendant Not Prevailing Party:

In a suit by a homeowner against a residential real estate developer for construction defects, the developer cross-complained for breach of contract and indemnity against the subcontractors. Both the complaint and the cross-complaint were settled. The developer was not entitled to recover attorney's fees [see CCP §§ 1032(b), 1033.5(a)(10), (c)(1)] from the subcontractors as a cost of litigation on the ground that they were incurred when it was subjected to the litigation by the homeowner. Although no liability was admitted, the developer and the subcontractors paid the homeowner \$1.2 million in exchange for mutual releases of liability, with the exception of the developer's claim for indemnity against the subcontractors. The developer was not the prevailing party; rather, its action against the subcontractors was for breach of contract and indemnity [see *Bramalea Cal., Inc. v. Reliable Interiors, Inc.* (2004) 119 CA4th 468, 472, 14 CR3d 302] .

24.07[3] Plaintiff Is Prevailing Party When It Obtains Primary Relief Sought. A plaintiff is a prevailing party when the lawsuit yields the primary relief sought in the case [*Zamora v. Shell Oil Co.* (1997) 55 CA4th 204, 214, 63 CR2d 762 (plaintiff was prevailing party despite net damages of \$0 after offset)].

The party with the net monetary recovery is determined by comparing the competing damage claims. If both sides have claims, whichever party obtains the most money from the other is generally the prevailing party. If only one party has damage claims, any success in pressing those claims against the losing party results in a net award [*Wakefield v. Bohlin* (2006) 145 CA4th 963, 980-981, 52 CR3d 400] .

24.07[4] Prevailing Party in Small Claims Court Is Entitled to Costs. The prevailing party in a small claims case is entitled to the costs of the action, including the costs of serving the order for the appearance of the defendant [CCP § 116.610(g); see CCP § 116.820(c) (prevailing party is entitled to costs of enforcing judgment and accrued interest)].

24.07[5] If Party Recovers Relief Other Than Money, Court May Allow or Apportion Costs. When a party recovers other than monetary relief and in situations other than as specified, the prevailing party is determined by the court. In those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under CCP § 1034 (prejudgment costs and costs on appeal) [CCP § 1032(a)(4); *Textron Fin. Corp. v. National Union Fire Ins. Co.* (2004) 118 CA4th 1061, 1075, 13 CR3d 586 ; see, e.g., *Friends of the Trails v. Blasius* (2000) 78 CA4th 810, 839, 93 CR2d 193 (party's recovery of other than monetary relief)].



Strategic Point--Multiple Parties Seeking to Recover Costs:

If apportionment of costs is available, the parties seeking to recover costs should submit a cost memorandum that differentiates among costs for the parties among whom apportionment is appropriate. It should specify which costs pertain to which party [*Fundamental Inv. Growth Shelter Realty Fund v. Gradow* (1994) 28 CA4th 966, 974-975, 33 CR2d 812] . Often, in cases for declaratory relief, for example, the result may be unclear, or plaintiff obtains partial relief, and the issue is what costs were allocable to which portion of the relief. Careful description in accounting records during discovery and trial can help to substantiate which costs are allocable to the "prevailing" issues. This is true for both sides. A losing defendant may still "prevail" on certain issues, and costs for those issues might be used to offset costs on issues as to which plaintiff prevails. This is not the case in a situation in which a plaintiff prevails on the primary relief sought, and obtains costs on that theory [see 24.07[3]].



Cross References:

Discussion of prejudgment costs, see 24.09.

Discussion of cost memorandum, see 24.09[1].

24.07[6] Court May Allow or Deny Costs to Defendant That Presents Unified Defense With Co-Defendants. When one of multiple, jointly represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party [*Benson v. Kwikset Corporation* (2007) 152 CA4th 1254, 1278, 62 CR3d 284] .

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionGovernmentsCourtsSmall Claims Courts



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24.08 Agreement Between Parties Can Affect Allocation of Costs.

The parties may contract for the allocation of costs and attorney's fees [*see, e.g., CC § 1717; CCP § 1021; Carver v. Chevron U.S.A., Inc. (2002) 97 CA4th 132, 151, 118 CR2d 569*], which may affect the court's determination.



Strategic Point:

When a statute permits the parties to contract for the payment of attorney's fees and costs, depending on the terms of the contract and the relevant law, the court may allow costs not otherwise recoverable by statute. For example, pursuant to *CCP § 1033.5(b)(1)*, expert witness fees may not be recovered as costs except when expressly authorized by law. One court has held that when attorney's fees are provided by contract and awarded pursuant to *CC § 1717*, counsel's disbursements for expert witness fees are allowable as part of the attorney's fee award [*see, e.g., Bussey v. Affleck (1990) 225 CA3d 1162, 1164-1166, 275 CR 646; but see, e.g., Steiny & Co., Inc. v. California Elec. Supply Co. (2000) 79 CA4th 285, 293-294, 93 CR2d 920; Robert L. Cloud & Assoc., Inc. v. Mikesell (1999) 69 CA4th 1141, 82 CR2d 143; Ripley v. Pappadopoulos (1994) 23 CA4th 1616, 1624-1627, 28 CR2d 878* (attorney's fees and expenses of litigation, whether termed costs or disbursements, are mutually exclusive; attorney's fees do not include expenses; because expert witness fees are disallowed by statute, they are not recoverable as costs)]. Note that there may be implications for such contracts with regard to a defendant thereafter seeking insurance coverage for the loss, including costs, when the applicable insurance policies exclude recovery for losses that are the result of contractual undertakings.

Consider:

A party seeking to recover costs otherwise not allowable by statute but arguably recoverable by contract can still raise that issue in a district that has rejected the possibility. There is no harm in asking in order to preserve the issue for appeal, although the party seeking costs is obliged to advise the court of contrary authority in the district.



Cross Reference:

Discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil
Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Costs & Attorney
Fees Costs Witnesses Contracts Law Contract Conditions & Provisions General Overview



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24.09 Seeking Prejudgment Costs.

24.09[1] Prevailing Party Must File Memorandum of Costs Within 15 Days of Mailing of Notice of Entry of Judgment or Dismissal or Other Specified Date. A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under *CCP* § 664.5, or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first [*Cal Rules Ct, Rule 3.1700(a)(1)*; see *CCP* § 1034(a) (prejudgment costs allowable under *CCP* § 1021 et seq. must be claimed and contested in accordance with rules adopted by Judicial Council); *CCP* § 1034(b) (Judicial Council must establish allowable costs on appeal and procedure for claiming those costs)].



Warning:

The time provisions relating to the filing of a memorandum of costs, while not jurisdictional, are mandatory [*Sanabria v. Embrey* (2001) 92 CA4th 422, 425-426, 111 CR2d 837] . However, the time provision in *Cal Rules Ct, Rule 3.1300(a)(1)* applies only to the items "allowable as costs" listed in *CCP* § 1033.5(a) [*Anthony v. City of Los Angeles* (2008) 166 CA4th 1011, 1015-1016, 83 CR3d 306] . In addition, Rule 3.1300(a)(1) applies only to notices of entry of judgment or dismissal; it does not apply to unsigned minute orders [*Daniels v. Robbins* (2010) 182 CA4th 204, 229, 105 CR3d 683] .

Example:

A memorandum of costs by the prevailing party is appropriate in an arbitration proceeding, even if the arbitration award did not include costs [*Guevara v. Brand* (1992) 8 CA4th 995, 997-998, 10 CR2d 780] .



Strategic Point--Party Seeking to Recover Costs:

Counsel should provide a detailed and itemized description of costs, and a declaration explaining the need and reason for the costs [see *Thon v. Thompson* (1994) 29 CA4th 1546, 1548-1549, 35 CR2d 346] .

The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case [*Cal Rules Ct, Rule 3.1700(a)(1)*].

A dismissed defendant seeking costs pursuant to *Cal Rules Ct, Rule 3.1700* is not required to file a proposed judgment along with its memorandum of costs [*Fries v. Rite Aid Corp. (2009) 173 CA4th 182, 185-188, 92 CR3d 523*] .

The party seeking to recover costs and the party contesting costs may agree to extend the time for serving and filing the cost memorandum and a motion to strike or tax costs. This agreement must be confirmed in writing, specify the extended date for service, and be filed with the clerk. In the absence of an agreement, the court may extend the time for serving and filing the cost memorandum or the notice of motion to strike or tax costs for a period not to exceed 30 days [*Cal Rules Ct, Rule 3.1700(b)(3)*].



Cross References:

Discussion of contesting costs, see 24.31 et seq.

Form, see 24.48.

24.09[2] Party Requesting Default Judgment Must Request Costs When Applying for Judgment. A party seeking a default judgment who claims costs must request costs on the request to enter default form at the time of applying for the judgment [*Cal Rules Ct, Rule 3.1700(a)(2)*].



Cross Reference:

Discussion of requesting costs, see *California Forms of Pleading and Practice*, § 174.32 (Matthew Bender).

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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24.10 Allowable Costs Include Filing Fees and Cost of Service of Process.

The following items are allowable as costs under *CCP* § 1032 [*CCP* § 1033.5(a)]:

- Filing, motion, and jury fees [*CCP* § 1033.5(a)(1)].
- Juror food and lodging while they are kept together during trial and after the jury retires for deliberation [*CCP* § 1033.5(a)(2)].
- Taking, video recording, and transcribing necessary depositions, including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend depositions [*CCP* § 1033.5(a)(3); *Seever v. Copley Press, Inc.* (2006) 141 CA4th 1550, 1557, 47 CR3d 206; *see* *Thon v. Thompson* (1994) 29 CA4th 1546, 1548, 35 CR2d 346 (no limitation on reimbursement for deposition travel to travel by attorneys practicing in court's jurisdiction; recoverable costs incurred by Bakersfield attorneys to attend depositions in San Diego)].
- Expenses of attachment, including keeper's fees [*CCP* § 1033.5(a)(5)].
- Premiums on necessary surety bonds [*CCP* § 1033.5(a)(6)].
- Ordinary witness fees pursuant to *Gov Code* § 68093 [*CCP* § 1033.5(a)(7)].
- Expert witnesses fees ordered by the court [*CCP* § 1033.5(a)(8); *see Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 CA4th 592, 601, 3 CR3d 593 (that expert is necessary to present party's case does not mean that expert has been "ordered by court" for purposes of recovery of expert witness fees as costs)].
- Transcripts of court proceedings ordered by the court [*CCP* § 1033.5(a)(9)].
- Court reporters fees as established by statute [*CCP* § 1033.5(a)(11)].

- Models and blowups of exhibits and photocopies of exhibits, if they were reasonably helpful to aid the trier of fact [CCP § 1033.5(a)(12)]. Costs of unused exhibits are not recoverable [Seever v. Copley Press, Inc. (2006) 141 CA4th 1550, 1557-1559, 47 CR3d 206].

- Any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal [CCP § 1033.5(a)(13)].

Example:

Because the only travel expenses allowable are those related to a deposition, \$1,500 for a defendant's "local travel expenses" unrelated to depositions, including parking fees, cab fares, and mileage/parking fees for attorneys and paralegals were not recoverable. The court noted that routine expenses for local travel by attorneys or other employees are not reasonably necessary to the conduct of litigation. The defense attorney's declaration failed to demonstrate how any of these charges were necessary to conduct the litigation, as opposed to being merely convenient. The expenses should not have been allowed [*Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 775-776, 23 CR2d 810 (dismissed after three-day hearing)].

**Strategic Point:**

The prevailing party should document and claim for the costs of any technological aids, such as computer graphics programs, audio-visual equipment, specialists to prepare and present the graphics, and similar costs.

The costs of service of process by a public officer, registered process server, or other means, are allowable as follows [CCP § 1033.5(a)(4)]:

- When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service [CCP § 1033.5(a)(4)(A)].

- If service is by a process server registered pursuant to *B&P Code § 22350 et seq.*, the recoverable cost is the amount actually incurred in effecting service, including, but not limited to, a stake out or other means employed in locating the person to be served, unless those charges are successfully challenged by a party to the action [CCP § 1033.5(a)(4)(B)].

- When service is by publication, the recoverable cost is the sum actually incurred in effecting service [CCP § 1033.5(a)(4)(C)].

- When service is by a means other than that set forth above, the recoverable cost is the lesser of the sum actually incurred, or the amount allowed to a public officer in California for that service, except that the court may allow the sum actually incurred in effecting service on application pursuant to CCP § 1033.5(c)(4) (items allowed on court's discretion) [CCP § 1033.5(a)(4)(D)].

**Cross Reference:**

Discussion of items allowed under CCP § 1033.5(c)(4), see 24.07[6].

Attorney's fees are allowable when authorized by any of the following [CCP § 1033.5(a)(10)]:

- Contract [CCP § 1033.5(a)(10)(A)].

- Statute [*CCP* § 1033.5(a)(10)(B)].

- Law [*CCP* § 1033.5(a)(10)(C)].

Example:

A city ordinance is a "statute" within by *CCP* § 1033.5(a)(10)(C) when it permits recovery of attorney's fees [*City of Santa Paula v. Narula* (2003) 114 CA4th 485, 487-488, n1, 8 CR3d 75] .

**Cross Reference:**

Discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

**Strategic Point:**

CCP § 1033.5 specifies the items allowable and not allowable as costs. Case law may augment this statute, but beyond the specifics, what is most helpful in obtaining costs is how well the item was described when incurred.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs Court & Marshal Fees Civil Procedure Remedies Costs & Attorney Fees Costs Depositions & Transcripts Civil Procedure Remedies Costs & Attorney Fees Costs Reproduction Costs Civil Procedure Remedies Costs & Attorney Fees Costs Witnesses



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24.11 Costs Allowed Only When Expressly Authorized.

24.11[1] Costs Must Be Expressly Authorized. The items set forth in *CCP* § 1033.5(b) are not allowable as costs except when expressly authorized by law [*see CCP* § 1033.5(b)].

24.11[2] Recovering Expert Fees. Fees of experts not ordered by the court are not allowable as costs, except when expressly authorized by law [*CCP* § 1033.5(b)(1); *see, e.g., Olson v. Automobile Club of Southern California* (2008) 42 *CA4th* 1142, 1143-1156, 74 *CR3d* 81, 179 *P3d* 882 (applying *CCP* § 1021.5); *Benson v. Kwikset Corporation* (2007) 152 *CA4th* 1254, 1281-1282, 62 *CR3d* 284] .

That expert witness fees were required to be paid under *CCP* §§ 2034.430, 2034.450 for depositions of the treating physicians does not mean that those fees are necessarily recoverable costs [*Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 *CA4th* 592, 601, 3 *CR3d* 593 (fees also not ordinary witness fees under *CCP* § 1033.5(a)(7))].

Exception:

Expert witness fees are recoverable against an unsuccessful party who refused an offer to compromise [*see CCP* § 998(c), (d), discussed in 24.29[2], [4]].

24.11[3] Recovering Investigation Expenses. Investigation expenses in preparing a case for trial are not allowable as costs except when expressly authorized by law [*CCP* § 1033.5(b)(2)].

Example:

A claim of \$5,700 for "computer legal research" was not recoverable. *CCP* § 1033.5(b)(2) precludes recovery of investigation expenses, and attorney's fees are not compensable as costs absent an agreement of the parties or statutory authority [*see CCP* § 1021]. Fees for legal research may not be recovered under *CCP* § 1033.5 [*Ladas v. California State Auto. Ass'n* (1993) 19 *CA4th* 761, 776, 23 *CR2d* 810] .

24.11[4] Recovering Postage, Telephone, and Photocopying Charges. Postage, telephone, and photocopying charges, except for exhibits, are not allowable as costs, except when expressly authorized by law [*CCP* § 1033.5(b)(3); *see, e.g., Fairchild v. Park* (2001) 90 *CA4th* 919, 928-929, 109 *CR2d* 442] . "Exhibits" are those that are actually used at trial, and not merely for depositions or other purposes.

Example:

Because postage and photocopying charges are not recoverable, fax costs may not be recoverable either [see, e.g., *Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 775, 23 CR2d 810] .

24.11[5] Recovering Costs of Jury Preparation. Costs in investigation of jurors or in preparation for voir dire are not allowable as costs, except when expressly authorized by law [CCP § 1033.5(b)(4)].

**Strategic Point:**

Counsel hoping to obtain certain expenses can seek a court order. For example, in a complex, potentially lengthy trial, the court can order jury questionnaires as a means of avoiding potential juror issues such as a hung jury and retrial. Further, the same rationale that would allow costs for court ordered transcripts could apply to court ordered costs for jury selection such as some aspects of professional jury consultants.

24.11[6] Recovering Transcript Costs. Transcripts of court proceedings not ordered by the court are not allowable as costs, except when expressly authorized by law [CCP § 1033.5(b)(5)].

**Cross Reference:**

Discussion of transcript costs, see *California Forms of Pleading and Practice*, § 174.26 (Matthew Bender).

Legal Topics:

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

Civil Procedure Settlements Offers of Judgment General Overview Civil Procedure Remedies Costs & Attorney Fees Costs Depositions & Transcripts Civil Procedure Remedies Costs & Attorney Fees Costs Reproduction Costs Civil Procedure Remedies Costs & Attorney Fees Costs Witnesses



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24.12 Defendant May Require Plaintiff to File Undertaking As Security for Costs in Certain Types of Actions.

In some circumstances, a defendant may require the plaintiff to file an undertaking to secure costs, generally by filing a motion within a certain time after service of the summons [*see, e.g., CCP § 1029.5*]. The plaintiff's failure to file the undertaking may result in dismissal of the case [*see CCP § 1029.5(a)*].



Cross Reference:

Discussion of undertaking, see 24.13 -24.15.

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview



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24.13 Architect or Design Professional Sued in Professional Capacity May Require Undertaking in Certain Actions.

24.13[1] Architect or Design Professional May Move for Undertaking in Actions for Error, Omission, or Professional Negligence. When a complaint for damages is filed against an architect, landscape architect, engineer, building designer, or land surveyor licensed under the laws of California in certain actions, the defendant may, within 30 days after service of summons, move the court for an order, on notice and hearing, requiring the plaintiff to file an undertaking in a sum not to exceed \$500 as security for the costs of defense [*see CCP § 1029.5(d)*], which may be awarded against the plaintiff [*CCP § 1029.5(a)*].

This procedure applies to an action for error, omission, or professional negligence in the creation and preparation of plans, specifications, designs, reports or surveys that are the basis for work performed or agreed to be performed on real property [*CCP § 1029.5(a)*].

Exception:

CCP § 1029.5 does not apply to a complaint for bodily injury or for wrongful death or to an action commenced in small claims court [*CCP § 1029.5(b)*].

The motion must be supported by affidavit showing that the claim against the defendant is frivolous [*CCP § 1029.5(a)*].

24.13[2] Undertaking Required If Defendant Shows Frivolous Suit and Lack of Hardship. At the hearing on the motion, the court must order the plaintiff to file the undertaking if the defendant shows to the satisfaction of the court that [*CCP § 1029.5(a)*]:

1. The plaintiff would not suffer undue economic hardship in filing the undertaking; and
2. There is no reasonable possibility that the plaintiff has a cause of action against each named defendant as to whom the plaintiff would otherwise be required to file the undertaking.

When more than one defendant is named, the undertaking is increased to an amount not in excess of \$500 for each additional defendant in whose favor the undertaking is ordered, subject to a maximum of \$3,000 [*CCP § 1029.5(c)*].

24.13[3] Determination Not Including All Defendants Does Not Affect Issues or Merits of Case. A court determination requiring or not requiring the undertaking as to one or more defendants and not as to others is not deemed a determination of any issues in the action or of the merits [CCP § 1029.5(a)].

24.13[4] Case Will Be Dismissed Unless Plaintiff Files Required Undertaking in Timely Manner. If the court requires that an undertaking be filed by the plaintiff as to any one or more defendants, the action must be dismissed as to the defendant or defendants unless the plaintiff files the undertaking within a reasonable time fixed by the court [CCP § 1029.5(a)].



Timing:

CCP § 1029.5 is silent on the time frame for filing an undertaking, and also does not address to whom the undertaking should be tendered. Generally, the bond is filed with the court, although the court could order that it be held in trust by one of the attorneys. The "reasonable time fixed by the court" is usually on the order of two weeks.



Strategic Point:

California has an unusual procedure permitting a plaintiff to obtain a "pre-answer bond" covering the amount of the potential judgment in actions against an out-of-state insurer [see *Ins Code* §§ 1616-1620]. The procedure is not automatic, and the court has wide discretion, with express statutory exceptions to the availability of the procedure, to require or deny an application for a "pre-answer bond" [*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 CA4th 592, 610-612, 98 CR2d 277] .

24.13[5] Plaintiff Must Pay Costs Following Dismissal or Judgment for Defendant. On dismissal of the action or the award of judgment to the defendant, the court must require the plaintiff to pay the defendant's costs of defense authorized by law. Any sureties are liable for costs in an amount not in excess of \$500, or the amount of the undertaking, whichever is less, for each defendant as to whom the sureties have executed an undertaking [CCP § 1029.5(d)].

24.13[6] Order Is Not Appealable. No appeal may be taken from any order made pursuant to CCP § 1029.5(a) to file or not to file the undertaking [CCP § 1029.5(a)].



Cross Reference:

Discussion of no appeal of order, see *California Forms of Pleading and Practice*, § 174.34 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Sanctions Baseless Filings Frivolous Lawsuits Torts Malpractice & Professional Liability Professional Services



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24.14 Health Care Professional Sued in Professional Capacity May Require Undertaking in Certain Actions.

24.14[1] Health Care Professional May Move for Undertaking in Personal Injury Action. Physicians and other health care professionals may move to require the plaintiff to file an undertaking to secure their costs in personal injury actions for error, omission, or negligence in the performance of professional services, or performance of professional services without consent [*CCP* § 1029.6(a)].

Health care professionals to whom this procedure is available include the following professionals licensed under California law [*CCP* § 1029.6(a)]:

- Physicians and surgeons.
- Dentists.
- Registered nurses.
- Dispensing opticians.
- Optometrists.
- Pharmacists.
- Registered physical therapists.
- Podiatrists.
- Licensed psychologists.
- Osteopathic physicians and surgeons.

- Chiropractors.
- Clinical laboratory bioanalysts.
- Clinical laboratory technologists.
- Veterinarians.

This procedure also applies to a licensed hospital as the employer of any of these professionals [CCP § 1029.6(a)].

Exception:

CCP § 1029.6 does not apply to a complaint in an action commenced in small claims court [CCP § 1029.6(b)].



Strategic Point--Defendant:

A defendant filing a motion under CCP § 1029.6 or joining with a moving party under CCP § 1029.6 may not subsequently file a motion for summary judgment [CCP § 1029.6(e)]. Furthermore, a defendant filing a motion for summary judgment may not subsequently file a motion, or join with a moving party, under CCP § 1029.6 [CCP § 1029.6(f)]. Thus, in balance, you should almost never file a CCP § 1029.6 motion because it is limited to \$500 but then precludes you from seeking summary judgment. If a defendant is convinced, and that should be a high standard, that he or she will prevail *as a matter of law*, such that a motion for summary judgment is viable, the defendant should be reluctant to file a CCP § 1029.6 motion. However, note that in most cases summary judgment is not a viable option. Therefore, given the significant burden a defendant has to prevail on a motion for summary judgment, and the propensity of many courts to deny them, defendants may choose to pursue a § 1029.6 undertaking to provide further assurance it will recover its costs if it prevails at trial.



Warning:

If an undertaking is filed but the plaintiff prevails, the defendant must pay the costs incurred in the plaintiff's defense of a motion for dismissal [CCP § 1029.6(d)].



Cross Reference:

Discussion of paying plaintiff's costs, see 24.14[7].

24.14[2] Defendant Must Bring Motion Within Six Months After Service of Summons. The defendant may, within six months after service of summons, move the court for an order, on notice to plaintiff and all defendants having appeared in the action, and hearing, requiring the plaintiff to file an undertaking in a sum not to exceed \$500 as security for the costs of defense as provided in CCP § 1029.6(d), which may be awarded against the plaintiff [CCP § 1029.6(a)].

The motion must be supported by affidavit showing that the claim against the defendant is frivolous [CCP § 1029.6(a)].



Strategic Point--Co-Defendants:

A defendant who has appeared in the action, within 30 days after receipt of notice, may join with the moving party requesting an order under CCP § 1029.6 as to the additional defendant. Failure to join with the moving party precludes that defendant from subsequently requesting this order [CCP § 1029.6(a)].

24.14[3] Undertaking Required If Defendant Shows Frivolous Suit and Lack of Hardship. At the hearing on the motion, the court must order the plaintiff to file the undertaking if the defendant shows to the court's satisfaction that [CCP § 1029.6(a)]:

- The plaintiff would not suffer undue economic hardship in filing the undertaking; and
- There is no reasonable possibility that the plaintiff has a cause of action against each named defendant as to whom the plaintiff would otherwise be required to file the undertaking.



Strategic Point:

If an undertaking is sought in a case when that party should prevail on a motion for summary judgment, the alternative, a motion for summary judgment, if precluded by making a motion for an undertaking, is the better course. One would, it seems, rarely seek an undertaking. Alternatively, one could supposedly argue that the undertaking, together with a court ruling that the action is "frivolous," could prompt a dismissal of the case before the order is entered. This would be a gutsy move on the defendants' part.

Whenever more than one defendant is named, the undertaking must be increased to an amount not to exceed \$500 for each additional defendant in whose favor the undertaking is ordered, subject to a maximum of \$1,000 [CCP § 1029.6(c)].

24.14[4] Determination Not Including All Defendants Does Not Affect Issues or Merits of Case. A court determination requiring or not requiring the undertaking as to one or more defendants and not as to others is not deemed a determination of any issues in the action or of the merits [CCP § 1029.6(a)].

24.14[5] Case Will Be Dismissed Unless Plaintiff Files Required Undertaking in Timely Manner. If the court determines that an undertaking be filed by the plaintiff as to any one or more defendants, the action must be dismissed as to that defendant or defendants unless the undertaking required by the court was filed within a reasonable time fixed by the court [CCP § 1029.6(a)].

24.14[6] Plaintiff Must Pay Defendant's Costs Following Dismissal or Judgment for Defendant. In any action requiring an undertaking under CCP § 1029.6, on the dismissal of the action or the award of judgment to the defendant, the court must require the plaintiff to pay the defendant's court costs [CCP § 1029.6(d)]. Any sureties are liable for those costs in an amount not to exceed \$500 or the amount of the undertaking, whichever is less, for each defendant as to whom the sureties have executed an undertaking [CCP § 1029.6(d)].



Strategic Point:

However, note that the absence of a motion for summary judgment, when CCP § 1029.6 is invoked, means that the case is going to trial, before judgment can be entered.

24.14[7] Defendant Must Pay Plaintiff's Costs in Defending Dismissal Motion Following Judgment for Plaintiff. If the plaintiff prevails in the action against any defendant as to whom an undertaking has been filed, the defendant must pay the costs to plaintiff incurred in defending the motion for dismissal under authorized by CCP § 1029.6 [CCP § 1029.6(d)].



Cross Reference:

Discussion of paying plaintiff's 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 Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Sanctions Baseless Filings Frivolous Lawsuits Torts Malpractice & Professional Liability Healthcare Providers



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24.15 Defendant Sued by Out of State Plaintiff or Foreign Corporation May Require Undertaking.

24.15[1] Defendant Must File Noticed Motion for Undertaking on Ground of Reasonable Possibility of Successful Judgment. When the plaintiff in an action or special proceeding resides outside California, or is a foreign corporation, the defendant may at any time apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney's fees that may be awarded in the action or special proceeding. "Attorney's fees" means the reasonable attorney's fees a party may be authorized to recover by a statute apart from *CCP* § 1030 or by contract [*CCP* § 1030(a)].



Strategic Point:

This is more than just a motion for potential attorney's fees, but also can result in a bond for the amount of the potential judgment. However, a defendant can avoid the necessity of a pre-answer bond on a showing of sufficient assets within the jurisdiction, or accessible to a prevailing plaintiff. Assets deposited in a domestic bank, for example, can avoid a pre-answer bond for defendants located in other countries. This is different from an undertaking for "costs." As such, this issue may not be applicable here.



Cross Reference:

Discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

The motion must be made on the grounds that the plaintiff resides outside California or is a foreign corporation, and that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding. The motion must be accompanied by an affidavit in support of the grounds for the motion, and by a memorandum of points and authorities. The affidavit must set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding [*CCP* § 1030(b)].

24.15[2] If Motion for Undertaking Is Filed 30 Days or Earlier After Service of Summons, Defendant May Move for Temporary Stay of Further Proceedings. If the defendant's motion for an order requiring an undertaking is filed not later than 30 days after service of summons on the defendant, further proceedings may be stayed in the

discretion of the court on application to the court by the defendant by noticed motion for the stay until ten days after the motion for the undertaking is denied or, if granted, until 10 days after the required undertaking has been filed and the defendant has been served with a copy of the undertaking [CCP § 1030(e)].

The hearing on the application for the stay must be held not later than 60 days after service of the summons. If the defendant files a motion for an order requiring an undertaking that is granted, but the defendant objects to the undertaking, the court may in its discretion stay the proceedings not longer than 10 days after a sufficient undertaking has been filed and the defendant has been served with a copy of the undertaking [CCP § 1030(e)].

24.15[3] Court Must Require Undertaking to Secure Costs and Fees After Hearing. If the court, after a hearing, determines that the grounds for the motion have been established, the court must order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs and attorney's fees [CCP § 1030(c)].

24.15[4] Action Will Be Dismissed If Plaintiff Does Not File Required Undertaking in Timely Manner. The plaintiff must file the undertaking not later than 30 days after service of the court's order requiring it, or within a greater time allowed by the court. If the plaintiff fails to file the undertaking within the time allowed, the plaintiff's action or special proceeding must be dismissed as to the defendant in whose favor the order requiring the undertaking was made [CCP § 1030(d)].

24.15[5] Court Determinations Regarding Undertaking Do Not Affect Merits of Case, and May Not Be Used in Evidence. The determinations of the court under CCP § 1030 have no effect on the determination of any issues on the merits of the action or special proceeding, and may not be given in evidence nor referred to in the trial of the action or proceeding [CCP § 1030(f)].

24.15[6] Order Is Not Appealable. An order granting or denying a motion for an undertaking under CCP § 1030 is not appealable [CCP § 1030(g)].



Cross Reference:

Discussion of no appeal of order, see *California Forms of Pleading and Practice*, § 174.34 (Matthew Bender).

24.15[7] Court May Waive Bond. The court may, in its discretion, waive a provision for a bond in an action or proceeding and make such orders as may be appropriate as if the bond were given, if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties, whether personal or admitted surety insurers [CCP § 995.240; see *Alshafie v. Lallande* (2009) 171 CA4th 421, 425-426, 89 CR3d 788] .

Legal Topics:

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

Business & Corporate Law Foreign Businesses General Overview Civil Procedure Jurisdiction Personal Jurisdiction & In Rem Actions In Personam Actions Challenges Civil Procedure Pleading & Practice Motion Practice General Overview Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview



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24.16 Plaintiff in Unlawful Detainer Action May Recover Eviction Costs.

In unlawful detainer proceedings, a plaintiff who recovers judgment for possession of premises, and who advances or pays to the sheriff or marshal the expenses required for the eviction of a person in possession or occupancy of the premises and the personal property of that person, must, after being advised by the sheriff or marshal of the exact amount necessarily used and expended to effect the eviction, be allowed to file a request for that amount [*CCP* § 1034.5].

In unlawful detainer proceedings, a plaintiff who has complied with *CCP* § 1034.5 may, no later than 10 days after being advised by the sheriff or marshal of the exact amount necessarily used and expended to effect the eviction, file a supplemental cost memorandum claiming the additional costs and specifying the items paid and the amount [*Cal Rules Ct, Rule 3.2000(a)*]. The defendant may move to tax those costs within 10 days after service of the supplemental cost memorandum. After costs have been fixed by the court, or on failure of the defendant to file a timely notice of motion to tax costs, the clerk must enter judgment for the costs. The judgment may be enforced in the same manner as a money judgment [*Cal Rules Ct, Rule 3.2000(b)*].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Costs & Attorney Fees Costs Court & Marshal Fees Real Property Law Title Quality Adverse Claim Actions Unlawful Detainer



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24.17 Plaintiff in Inverse Condemnation Action May Recover Costs and Fees.

In an inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation (or the attorney representing the public entity who effects a settlement of the proceeding) must determine and award to the plaintiff, as a part of that judgment or settlement, a sum that will reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney's, appraisal, and engineering fees, actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding [CCP § 1036]. Litigation costs are therefore recoverable by prevailing plaintiffs in any inverse condemnation proceeding [see Advisory Committee Comment (1995) to CCP § 1036].

➡ **Cross Reference:**

Discussion of fees in inverse condemnation proceedings, 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 Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Costs & Attorney Fees Costs Witnesses Real Property Law Inverse Condemnation General Overview



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24.18 Defendant in Action Under Torts Claims Act, or for Indemnity or Contribution, May Recover Costs If Case Was Filed in Bad Faith.

24.18[1] On Defendant's Motion, Court Must Determine Defense Costs If Plaintiff Acted in Bad Faith. In a civil proceeding under the Tort Claims Act, for express or implied indemnity, or for contribution in a civil action, the court, on motion of the defendant (or cross-defendant) must, at the time of the granting of summary judgment, motion for directed verdict, motion for judgment, or nonsuit dismissing the moving party other than the plaintiff, petitioner, cross-complainant, or intervenor, or at a later time set forth by Judicial Council rule [see *CCP § 1034*] determine whether the plaintiff (or petitioner, cross-complainant, or intervenor) brought the proceeding with reasonable cause and in the good-faith belief that there was a justifiable controversy under the facts and law that warranted the filing of the complaint (or petition, cross-complaint, or complaint in intervention) [*CCP § 1038(a)*].

If the court determines that the proceeding was not brought in good faith and with reasonable cause, an additional issue must be decided as to the defense costs reasonably and necessarily incurred by the party opposing the proceeding. The court must render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party. An award of defense costs may not be made except on notice contained in a party's papers and an opportunity to be heard [*CCP § 1038(a)*].

"Defense costs" include reasonable attorney's fees, expert witness fees, and the expense of services of experts, advisers, and consultants in defense of the proceeding, when reasonably and necessarily incurred in defending the proceeding [*CCP § 1038(b)*].

24.18[2] Defendant Must Have Successfully Moved for Judgment, Summary Judgment, Directed Verdict, or Nonsuit. *CCP § 1038* applies only if the defendant (or cross-defendant) has moved for summary judgment, motion for judgment, directed verdict, or nonsuit, and the motion is granted [*CCP § 1038(d)*].

CCP § 1038 applies only on motion made before the discharge of the jury or entry of judgment [*CCP § 1038(c)*].

Strategic Point--Moving Party:



A party requesting relief under *CCP* § 1038 waives the right to seek damages for malicious prosecution. Failure to make the motion is not deemed a waiver of the right to pursue a malicious prosecution action [*CCP* § 1038(c)]. The question not answered here is whether the recovery of "damages" versus "costs" is greater under either alternative.



Cross References:

Discussion of recovering fees for bad faith, see *California Forms of Pleading and Practice*, § 174.14 (Matthew Bender).

Discussion of and forms for malicious prosecution actions, see *California Forms of Pleading and Practice*, Ch. 357, Malicious Prosecution and Abuse of Process (Matthew Bender).

Legal Topics:

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

Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview



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24.19 Court May Set Reasonable Referee Fee Unless Parties Agree to Fee in Writing.

The fees of referees are a reasonable sum that the court may fix for the time spent in the business of the reference. However, the parties may agree in writing on any other rate of compensation; and those rates must be allowed [CCP § 1023].

Legal Topics:

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

Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureRemediesCosts & Attorney
FeesCostsGeneral Overview



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24.20 Any Party May be Required to Pay Costs in Probate Proceeding.

Unless otherwise provided by the Probate Code or by California Rules of Court, the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to probate proceedings, or out of the assets of the estate, as justice requires [*Prob Code § 1002*].



Cross Reference:

Discussion of probate costs, see *California Probate Practice*, § 3.14 (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral
OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust
LawProbateProcedures in ProbateCosts & Expenses



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24.21 Court May Impose Costs for Trial Postponement.

When an application is made to the court or referee to postpone a trial, the payment of the expenses occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the postponement [CCP § 1024].

➡ **Cross Reference:**

Discussion of trial postponement 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 ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudicial OfficersRefereesGeneral OverviewCivil
ProcedurePretrial MattersContinuancesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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24.22 Court May Require Plaintiff to Pay Defense Costs in Action for Money If Defendant Offered Full Amount Before Trial.

In an action for the recovery of money, if the defendant alleges in the answer that before the commencement of the action the defendant tendered to the plaintiff the full amount to which the plaintiff was entitled and then deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant [*CCP* § 1025].



Cross Reference:

Discussion of paying defense costs, see *California Forms of Pleading and Practice*, § 174.17 (Matthew Bender).

Legal Topics:

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

Civil Procedure Settlements General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview



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24.23 Plaintiff May Recover Treble Damages and Costs in Action Against Certain Unlicensed Persons.

In actions for injury or damage against certain persons who should have been, but were not, professionally licensed, a successful plaintiff may recover treble damages up to \$10,000 and all costs and attorney's fees from the defendant [see *CCP § 1029.8(a), (c)*]. The defendants to which this provision pertains includes persons required to be licensed in the following areas [see *CCP § 1029.8(a)*]:

- Healing arts [see *B&P Code § 500 et seq.*].
- Accountants [see *B&P Code § 5000 et seq.*].
- Boxing and wrestling [see *B&P Code § 18600 et seq.*].
- Home furnishings [see *B&P Code § 19000 et seq.*].
- Corporation licensed as broker-dealer [see *Corp Code § 25210 et seq.*].
- Investment advisers [see *Corp Code § 25230 et seq.*].

CCP § 1029.8 does not confer an additional cause of action or affect or limit any other remedy, including, but not limited to, a claim for exemplary damages [see *CCP § 1029.8(b)*].

The term "unlicensed person" does not apply to any of the following [see *CCP § 1029.8(d)*]:

- Any person, partnership, corporation, or other entity providing goods or services under the good-faith belief that they are properly licensed and acting within the proper scope of that license.
- Any person, partnership, corporation, or other entity whose license has expired for nonpayment of license renewal fees, but who is eligible to renew that license without the necessity of applying and qualifying for an original license.
- Any person, partnership, or corporation licensed under *B&P Code § 2700 et seq.* who provides

professional nursing services under an existing license, if the action arises from a claim that the licensee exceeded the scope of practice authorized by his or her license.

CCP § 1029.8 does not apply to any action for unfair trade practices brought against an unlicensed person under *B&P Code § 17000 et seq.* by a person who holds a license that is required, or closely related to the license that is required, to engage in those activities performed by the unlicensed person [*CCP § 1029.8(e)*].



Cross Reference:

Discussion of licensing, see California Forms of Pleading and Practice, Ch. 471B, Licensing by Public Agencies (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Governments State & Territorial Governments Licenses



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24.24 Personal Representative or Trustee May Recover Costs Allowable to Person in Own Right.

In an action prosecuted or defended by a personal representative, trustee of an express trust, guardian, conservator, or a person expressly authorized by statute, costs may be recovered as in an action by or against a person prosecuting or defending in the person's own right [CCP § 1026(a)].

These costs must, by the judgment, be made chargeable only on the estate, fund, or party represented, unless the court directs the costs to be paid by the fiduciary personally for mismanagement or bad faith in the action or defense [CCP § 1026(b)].



Cross Reference:

Discussion of recovery of costs by personal representative, see *California Forms of Pleading and Practice*, § 174.21 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Estate, Gift & Trust Law Conservators & Guardians Conservators General Overview Estate, Gift & Trust Law Conservators & Guardians Guardians for Minors Estate, Gift & Trust Law Probate Personal Representatives General Overview Estate, Gift & Trust Law Trusts Trustees General Overview



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24.25 State or Public Agency Is Generally Liable for Same Costs As Any Other Party.

Notwithstanding any other provisions of law, when the State is a party, costs must be awarded against it on the same basis as against any other party. Those costs must be paid out of the appropriation for the support of the agency on whose behalf the State appeared [CCP § 1028].

When a county, city, district, or other public agency or entity, or any officer in an official capacity, is a party, costs must be awarded against it on the same basis as against any other party. The costs are paid out of the entity or agency's treasury [CCP § 1029].



Cross Reference:

Discussion of public entity liability for costs, see *California Forms of Pleading and Practice*, § 174.21 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Torts Public Entity Liability Liability General Overview



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24.26 Attorney General Is Entitled to Investigation and Prosecution Costs in Certain Statutory Actions.

When the attorney general prevails in a civil action to enforce certain statutes, the court must award the attorney general all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs. The awards must be paid to a specified fund [*CCP* § 1021.8(a); see *Gov Code* § 12530]. These statutory actions include discrimination cases brought under *CC* § 52 [see *CCP* § 1021.8(a)].



Cross Reference:

Discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
Procedure Remedies Costs & Attorney Fees Costs General Overview Civil Procedure Remedies Costs & Attorney
Fees Costs Witnesses Governments State & Territorial Governments Employees & Officials



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24.27 Small Business Is Entitled to Additional Costs in Action Involving State Regulatory Agency.

In a civil action between a small business or licensee and a state regulatory agency involving the regulatory functions of a state agency as applied to the business or licensee, if the small business or licensee prevails, and if the court determines that the action of the agency was undertaken without any substantial justification, the small business or licensee may, in the discretion of the court, be awarded reasonable litigation expenses in addition to other costs [*CCP* § 1028.5(a); see *CCP* § 1028.5(b)-(d) (definitions)]. Funds for these expenses and costs must be paid from funds in the regular operating budget of the state regulatory agency where the appropriation encompasses the payment of costs and expenses [*CCP* § 1028.5(a)].



Cross Reference:

Discussion of costs to small business, see *California Forms of Pleading and Practice*, § 174.21 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Governments State & Territorial Governments Licenses



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24.28 Local Court Rules May Provide for Costs.

Local court rules may provide for the payment of costs, such as the following:

- In limited jurisdiction civil cases in Alameda County, court reporter fees must be posted by the requesting party. Reporter fees are shared equally among the requesting parties, and may be recovered as taxable costs at the conclusion of the trial [*see Alameda Super Ct Rules, Rule 4.17*].
- In Sacramento County, the cost of a telephonic appearance is borne by the lead party who ultimately places the phone call, unless the parties agree otherwise [*Sacramento Super Ct Rules, Rule 9.10(G)*].

Counsel should consult the appropriate trial court for additional procedures.

Legal Topics:

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

Civil Procedure
Judicial Officers
Court Reporters
Fees
Civil Procedure Remedies
Costs & Attorney Fees
Costs
General Overview
Civil Procedure Remedies
Costs & Attorney Fees
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24.29 Recovering Costs After Rejection of Settlement Offer Under CCP § 998.

24.29[1] Rejection of More Favorable Settlement Offer May Affect Parties' Rights to Recover Costs. A party that rejects a settlement offer properly tendered pursuant to *CCP* § 998 may be precluded from obtaining otherwise allowable costs after failing to obtain a more favorable judgment or award, and may be required to pay some of the opposing party's costs for which it would otherwise not be responsible [see *CCP* § 998].

Exceptions:

This provision does not apply to offers made by a plaintiff in an eminent domain action [*CCP* § 998(g)(1)] or an enforcement action brought by the attorney general or other prosecutor on behalf of the state [*CCP* § 998(g)(2)].

In cases involving the recovery of damages for personal injury, *CC* § 3291 provides for the recovery of prejudgment interest, which runs from the date of the first *CCP* § 998 offer in the case of multiple offers [*Ray v. Goodman* (2006) 142 CA4th 83, 90-91, 47 CR3d 659] .

In a proper case, an unsuccessful party may therefore assert that the prevailing party is not entitled to costs to which it would otherwise be entitled because of its rejection of an offer under *CCP* § 998.

➡ **Cross Reference:**

Discussion of costs recoverable after settlement offer, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 37, Settlement and Release.

To determine whether the plaintiff obtained a judgment more favorable than defendant's offer, pre-offer costs, including statutory attorney fees, are added to the award of damages [*Duale v. Mercedes-Benz USA, LLC* (2007) 147 CA4th 880, 887 n3, 54 CR3d 711] .

To shift the payment of costs, a *CCP* § 998 offer must be strictly construed and may not dispose of any claims beyond the claims at issue in the pending lawsuit [*Linthicum v. Butterfield* (2009) 175 CA4th 259, 272, 95 CR3d 538 ; *Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 CA4th 117, 121-122, 78 CR3d 755] .

24.29[2] Plaintiff That Failed to Obtain More Favorable Judgment Cannot Recover Its Post-Offer Costs and Must Pay Defendant's Costs. If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff cannot recover post-offer costs and must pay the defendant's costs from the time of the offer [CCP § 998(c)(1)].

In an action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses who are not regular employees of any party actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant [CCP § 998(c)(1)]. CCP § 998(c)(1) authorizes compensation for expert witness fees incurred both before and after a compromise offer is extended [*Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 C4th 507, 531-533, 46 CR3d 742, 139 P3d 119] .

Example:

In a suit by minority shareholders of a closely held corporation against the majority shareholder, when a defendant's rejected offer was in a reasonable sum and the defendant prevailed, the plaintiff should have been required under CCP § 998(c)(1) to pay the defendant's expert fees as requested. The trial court abused its discretion by denying recovery of the fees on the ground that the defendant's offer was unreasonably high [see *Thompson v. Miller* (2003) 112 CA4th 327, 339-340, 4 CR3d 905] .

 Cross Reference:

Discussion of CCP § 998 offers, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 37.12.

24.29[3] If Plaintiff Fails to Obtain More Favorable Judgment, Damages Award Is Offset by Defendant's Costs. If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under CCP § 998, from the time of the offer, are 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 is awarded to the defendant; judgment or award must be entered accordingly [CCP § 998(e)].

 Cross Reference:

Discussion of CCP § 998 offers, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 37.12.

24.29[4] Defendant That Failed to Obtain More Favorable Judgment May Be Required to Pay Plaintiff's Costs and Expert Fees. If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in an action or proceeding other than an eminent domain action, the court, in its discretion, may require the defendant to pay a reasonable sum to cover post-offer costs of the services of expert witnesses who are not regular employees of any party actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs [CCP § 998(d)].

 Cross Reference:

Discussion of CCP § 998 offers, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 37.13.

24.29[5] Offer Made to Multiple Parties Is Valid Only If Expressly Apportioned Among Them and Not Conditioned on Acceptance by All of Them. A CCP § 998 offer made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them [*Peterson v. John Crane, Inc.* (2007) 154 CA4th 498, 505, 65 CR3d 185] . An exception to this rule occurs when 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] . However, if a single offer is extended to a married couple, the community property aspects of the recovery must be considered [*Barnett v. First Nat. Ins. Co. of America* (2010) 184 CA4th 1454, 1458-1461, 110 CR3d 99] .

24.29[6] Offeror May Revoke CCP § 998 Offer. CCP § 998 offers are fully revocable before acceptance [*T.M. Cobb Co. v. Superior Court* (1984) 36 C3d 273, 277, 204 CR 143, 682 P2d 338] . If a CCP § 998 offer is withdrawn by a party before its statutory expiration (i.e., by start of trial or 30 days after offer is made), the withdrawing party's right to cost-shifting under CCP § 998 is determined by the last rejected CCP § 998 offer [*One Star, Inc. v. STAAR Surgical Co.* (2009) 179 CA4th 1082, 1093-1094, 102 CR3d 195] .

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses



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24.30 Court May Award Costs If Allowed by Statute.

24.30[1] Costs Are Allowable If Incurred, Whether or Not Paid. Any award of costs is subject to the provisions of *CCP § 1033.5(c)* [*CCP § 1033.5(c)*]. Costs are allowable if incurred, whether or not paid [*CCP § 1033.5(c)(1)*; *Estate of Bauer* (1943) 59 CA2d 161, 163, 138 P2d 721 (costs incurred in one action are not recoverable in another action)].

24.30[2] Costs Must Be Reasonably Necessary to Litigation, Not Merely Convenient. Allowable costs must be reasonably necessary to the conduct of the litigation, rather than merely convenient or beneficial to its preparation [*CCP § 1033.5(c)(2)*; *Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 775-776, 23 CR2d 810].

24.30[3] Amount Must Be Reasonable. Allowable costs must be reasonable in amount [*CCP § 1033.5(c)(3)*].

24.30[4] Costs Not Expressly Allowed or Denied Are Subject to Court's Discretion. Items not mentioned in *CCP § 1033.5* and items assessed on application may be allowed or denied in the court's discretion [*CCP § 1033.5(c)(4)*].

Courts have allowed a variety of costs under authority of *CCP § 1033.5(c)(4)* that were not specifically authorized or disallowed by *CCP § 1033.5* [see, e.g., *El Dorado Meat Company v. Yosemite Meat and Locker Service, Inc.* (2007) 150 CA4th 612, 617, 58 CR3d 590 (allowing recovery of hourly billings for personnel employed by consultant and counsel to process raw data that went into making exhibit)]. Allowable costs in the discretion of the trial court may include legislative history material, arbitrator's fees, and the fees of a special master [*Applegate v. St. Francis Lutheran Church* (1994) 23 CA4th 361, 364, 28 CR2d 436].

Example:

In a case that was dismissed after a three-day hearing, \$2,500 claimed by a defendant for courier and messenger charges were allowable based on the attorney's declaration that the charges were related to trial preparation and were incurred for filing documents with the court, complying with appellants' document demands, and transporting exhibits to and from the courtroom. The declaration provided evidence that these charges were reasonably necessary. The trial court therefore had an adequate basis for allowing these costs under *CCP § 1033.5(c)(4)* [*Ladas v. California State Auto. Ass'n* (1993) 19

CA4th 761, 776, 23 CR2d 810 ; see *Nelson v. Anderson* (1999) 72 CA4th 111, 132, 84 CR2d 753 (messenger fees are not expressly authorized by statute, but may be allowed in court's discretion)].



Strategic Point--Party Seeking to Recover Costs:

The declaration in support of a particular item of costs may be crucial in determining the allowance of that item. Counsel should clarify why the item was *reasonably necessary* for trial or trial preparation [see, e.g., *Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 776, 23 CR2d 810] . Note that the party seeking to recover costs might not have prevailed clearly, and thus could certainly be either the plaintiff or the defendant. Further, when costs are unique, keep detailed notes at the time the costs are incurred regarding the purpose of the costs, the benefit derived, and the lack of available alternatives to achieve the benefit without incurring the cost. These notes will be of immense value if it becomes necessary to oppose a motion to tax the costs.

Whether a cost item was "reasonably necessary" to the litigation is a question of fact for the trial court and is reviewed for abuse of discretion [*Applegate v. St. Francis Lutheran Church* (1994) 23 CA4th 361, 363, 28 CR2d 436] . Hence, different judges may make conflicting determinations about the same types of costs, yet both be found under the circumstances not to have abused judicial discretion.

Example:

In a case in which the plaintiff voluntarily dismissed the case with prejudice on the day of trial, the trial court allowed the defendants to recover costs for photographs and blueprints that were prepared in anticipation of trial. Until a dismissal was filed, defendants had to continue preparing for trial; the exhibits prepared were reasonably necessary to the conduct of the litigation. Although these costs are not allowed pursuant to CCP § 1033.5(a)(12), which requires exhibits to be used at trial, they still may be allowed in the trial court's discretion pursuant to CCP § 1033.5(c)(4). Items not specifically allowable under CCP § 1033.5(a) and not prohibited under CCP § 1033.5(b) may be recoverable in the discretion of the court if reasonably necessary to the conduct of the litigation [*Applegate v. St. Francis Lutheran Church* (1994) 23 CA4th 361, 363-364, 28 CR2d 436] .



Strategic Point:

If seeking costs for items prepared in anticipation of trial but not used because, for example, the case was dismissed, the party should note that the preparation was necessary to assure readiness for trial. That is, the dismissal may occur too close to the trial time to avoid incurring those costs [see, e.g., *Applegate v. St. Francis Lutheran Church* (1994) 23 CA4th 361, 363-364, 28 CR2d 436] . In contrast, if taxing costs, the party should note that the opposing party was not required to incur those costs in order to prepare for trial, for example, because the opposing party knew that the case would be dismissed, the dismissal was reasonably foreseeable, or the dismissal occurred far in advance of the trial date [see, e.g., *Great W. Bank v. Converse Consultants, Inc.* (1997) 58 CA4th 609, 615, 68 CR2d 224 (party seeking costs was told it would be given reasonable continuance to prepare for trial if its request for good-faith settlement was denied)].



Cross Reference:

Discussion of court's discretion as to costs, see *California Forms of Pleading and Practice*, § 174.15 (Matthew Bender).

24.30[5] Statutory Reference to "Costs and Attorney's Fees" Includes Fees As Costs. When a statute refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded and are

allowable as costs pursuant to *CCP* § 1033.5(a)(10)(B) [*CCP* § 1033.5(c)(5)].

**Cross Reference:**

General discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsVoluntary DismissalsAppellate ReviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsWitnesses



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24.31 Calculating Costs.

Counsel must calculate costs by itemizing the allowable costs and determining which of those items were reasonable and necessary to the litigation [see CCP § 1033.5(c)(2), (3); *Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 775-776, 23 CR2d 810] .

► **Cross Reference:**

Discussion of entitlement to costs, see 24.07.

The calculation of attorney's fees as costs involves the use of the "touchstone" or "lodestar" method [see *In re Vitamin Cases* (2003) 110 CA4th 1041, 1049-1050, 2 CR3d 358] .

► **Cross Reference:**

Discussion of calculating fees as costs, see Ch. 25A, *Recovering Attorney's Fees From Opposing Party*, 25A17.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Costs & Attorney Fees Costs General Overview



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24.32 Clerk Enters Costs After Time for Motions or Determination Has Passed.

After the time has passed for a motion to strike or tax costs or for determination of that motion, the clerk immediately enters the costs on the judgment [*Cal Rules Ct, Rule 3.1700(b)(4)*].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Governments Courts Clerks of Court



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24.33 Parties May Stipulate to Alternative Procedures for Awarding Costs.

Nothing in *CCP* § 1032 prohibits parties from stipulating to alternative procedures for awarding costs pursuant to rules adopted under *CCP* § 1034 [*CCP* § 1032(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Costs & Attorney Fees Costs General Overview



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24.34 Local Court Rules May Provide for Inclusion of Costs in Judgment.

Sacramento Court rules provide that in drafting forms of judgment for the trial judge to sign, counsel must, unless costs have already been awarded in a specific amount, leave a blank space for insertion of any costs [Sacramento Super Ct Rules, Rule 9.16(C)].



Strategic Point:

Counsel should always consult s regarding how to include costs in the judgment.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Governments Courts Rule Application & Interpretation



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.35

24.35 Recovery by Judgment Creditor.

24.35[1] Reasonable and Necessary Costs of Enforcing Judgment. A judgment creditor is entitled to recover the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under the provisions for enforcement of judgment [*see CCP § 680.010 et seq.*] unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as collectible costs if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to *CCP § 1033.5(a)(10)(A)* [*CCP § 685.040*].

► **Cross References:**

Form, see 24.47.

Discussion of recovering attorney's fees, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

24.35[2] Costs and Interest to Satisfy Writ to Enforce Judgment. If a writ is issued pursuant to the provisions for enforcement of judgments [*see CCP § 680.010 et seq.*], the costs and interest to be satisfied in a levy under the writ include the following [*CCP § 685.050(a)*]:

- The statutory fee for issuance of the writ.
- The amount of interest accrued from the date of entry or renewal of the judgment to the date of issuance of the writ, adjusted for partial satisfactions, if the judgment creditor has filed an affidavit with the court clerk stating that amount.
- The amount of interest accrued on the principal amount of the judgment remaining unsatisfied from the date of issuance of the writ until the date interest ceases to accrue.
- The levying officer's statutory costs for performing the duties under the writ.

In a levy under the writ, the levying officer's duties are set forth in *CCP § 685.050(b)* [*see CCP § 685.050(b)*].

24.35[3] Statutory Costs and Fees.

24.35[3][a] Costs and Attorney's Fees As Expressly Provided by Statute and Costs for Pursuing Creditor's Remedies. A judgment creditor can claim under *CCP* § 685.070 the following costs of enforcing a judgment [*CCP* § 685.070(a)]:

- Statutory fees for preparing and issuing, and recording and indexing, an abstract of judgment or a certified copy of a judgment.
- Statutory fees for filing a notice of judgment lien on personal property.
- Statutory fees for issuing a writ for the enforcement of the judgment to the extent that the fees are not satisfied pursuant to *CCP* § 685.050.

 Cross Reference:

Discussion of *CCP* § 685.050, see 24.35[2].

- Statutory costs of the levying officer for performing the duties under a writ to the extent that the costs are not satisfied pursuant to *CCP* § 685.050 and the statutory fee of the levying officer for performing the duties under the Wage Garnishment Law to the extent that the fee has not been satisfied pursuant to the wage garnishment.

 Cross Reference:

Discussion of *CCP* § 685.050, see 24.35[2].

- Costs incurred in connection with any proceeding for creditor's remedies [*see CCP* § 708.010 *et seq.*] that have been approved as to amount, reasonableness, and necessity by the judge or referee conducting the proceeding.

- Attorney's fees, if allowed by *CCP* § 685.040.

 Cross Reference:

Discussion of *CCP* § 685.040, see 24.35[1].

24.35[3][b] File and Serve Memorandum of Costs Within Two Years After Costs Incurred. Before the judgment is fully satisfied but not later than two years after the costs have been incurred, a judgment creditor seeking costs under *CCP* § 685.070 must file a memorandum of costs with the court clerk and serve a copy on the judgment debtor. Service must be made personally or by mail. The memorandum of costs must be executed under oath by a person who has knowledge of the facts, and must state that to the person's best knowledge and belief the costs are correct, reasonable, and necessary, and have not been satisfied [*CCP* § 685.070(b)]. *CCP* § 1013, extending the time within which a right may be exercised or an act may be done, applies to *CCP* § 685.070 [*CCP* § 685.070(f)].

 Cross References:

Form, see 24.20.

Discussion of *CCP* § 1013, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 27.07.

If a memorandum of costs for the costs specified in *CCP* § 685.070(a) is filed at the same time as an application for a

writ of execution, these statutory costs not already allowed by the court in an amount not to exceed \$100 in the aggregate may be included in the amount specified in the writ of execution, subject to subsequent disallowance as ordered by the court pursuant to a motion to tax if filed by the debtor. The memorandum of costs must contain the following statement [CCP § 685.070(e)]: "The fees sought under this memorandum may be disallowed by a court on a motion to tax filed by the debtor notwithstanding the fees having been included in the writ of execution." The inclusion of the above costs in the writ of execution or the pendency of the motion to tax on these costs may not be cause for the clerk of the court to delay issuing the writ of execution or for the levying officer to delay enforcing the writ of execution [CCP § 685.070(e)].

The memorandum of costs must also be served on default judgment debtors [*David S. Karton, a Law Corp. v. Dougherty* (2009) 171 CA4th 133, 145-148, 89 CR3d 506] .

24.35[3][c] Move to Tax Costs Within 10 Days After Service of Cost Memorandum. Within 10 days after the memorandum of costs is served on the judgment debtor, the judgment debtor may apply to the court on noticed motion to have the costs taxed by the court. The notice of motion must be served on the judgment creditor. Service must be made personally or by mail. The court must make an order allowing or disallowing the costs to the extent justified under the circumstances of the case [CCP § 685.070(c)]. CCP § 1013, extending the time within which a right may be exercised or an act may be done, applies to CCP § 685.070 [CCP § 685.070(f)].

Cross Reference:

Discussion of CCP § 1013, see *Matthew Bender(R) Practice Guide: California Pretrial Civil Procedure*, 27.07.

If no motion to tax costs is made within the time provided in CCP § 685.070(c), the costs claimed in the memorandum are allowed [CCP § 685.070(d)].

24.35[4] Bring Motion to Recover Enforcement Costs Within Two Years After Costs Incurred. The judgment creditor may claim costs authorized by CCP § 685.040 by noticed motion. The motion must be made before the judgment is satisfied in full, but not later than two years after the costs have been incurred. The costs claimed under CCP § 685.080 may include, but are not limited to, costs that may be claimed under CCP § 685.070 and costs incurred but not approved by the court or referee in a proceeding for creditor's remedies under CCP § 708.010 *et seq.* [CCP § 685.080(a)].

Consider:

In cases when the prevailing party has difficulty in collecting the judgment, and is pursuing debtor examination proceedings and other collection efforts, the time limits should be considered carefully and included in the strategy considerations.

Drawback:

Costs recovered under this procedure do not include attorney's fees, unless the underlying judgment provides for such recovery.

Cross Reference:

Discussion of CCP §§ 685.040, 685.070, see 24.35[3].

The notice of motion must describe the costs claimed, state their amount, and be supported by an affidavit of a person who has knowledge of the facts stating that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied. The notice of motion must be served on the judgment debtor. Service must be made personally or by mail [CCP § 685.080(b)].

The court must make an order allowing or disallowing the costs to the extent justified under the circumstances of the case [CCP § 685.080(c)].

24.35[5] File Deposit to Cover Costs of Levy. Except as otherwise provided by law, as a prerequisite to the performance by the levying officer of a duty under a proceeding for the enforcement of judgments [see CCP § 680.010 *et seq.*], the judgment creditor must deposit a sum of money with the levying officer sufficient to pay the costs of performing the duty [CCP § 685.100(a)(1)].

Except as otherwise provided by law, as a prerequisite to the taking of property into custody by the levying officer, whether by keeper or otherwise, the judgment creditor must deposit with the levying officer a sum of money sufficient to pay the costs of taking the property and keeping it safely for a period not to exceed 15 days. If continuation of the custody of the property is required, the levying officer must, from time to time, demand orally or in writing that the judgment creditor deposit additional amounts to cover estimated costs for periods not to exceed 30 days each. A written demand may be mailed or delivered to the judgment creditor. The judgment creditor has not fewer than three business days after receipt of the demand within which to comply with the demand. If the amount demanded is not paid within the time specified in the oral or written demand, the levying officer must release the property [CCP § 685.100(a)(2)].

The levying officer is not liable for failure to take or hold property unless the judgment creditor has complied with the provisions of CCP § 685.100 [CCP § 685.100(b)].

24.35[6] Enforcement Costs May Become Part of Judgment.

24.35[6][a] Costs May Be Included in Judgment. Costs are added to and become a part of the judgment [CCP § 685.090(a)]:

- On the filing of an order allowing the costs pursuant to CCP § 685.010 *et seq.* (interest in costs regarding enforcement of judgments).
- If a memorandum of costs is filed pursuant to CCP § 685.070 and no motion to tax is made, on the expiration of the time for making the motion.



Cross Reference:

Discussion of memorandum, see 24.35, 24.46.

- As specified in CCP § 685.095 (costs of serving writ are included in judgment).

The costs added to the judgment pursuant to CCP § 685.090 are included in the principal amount of the judgment remaining unsatisfied [CCP § 685.090(b)].



Strategic Point:

The principal benefit of having costs added to your judgment is that interest on the judgment will include interest on the costs too. These costs, at the time they are so included, begin to bear interest at the legal, post-judgment rate. In addition, another benefit of adding costs to your judgment is that the bond required on appeal will be greater [see 24.35[6][b]]. Further, by having the costs included in the judgment, no separate action is necessary for their recovery.

24.35[6][b] Costs May Be Added to Amount of Outstanding Writ. If a writ or earnings withholding order is outstanding when the costs are added to the judgment pursuant to CCP § 685.090, the levying officer must add the amount of those costs to the amount to be collected pursuant to the writ or earnings withholding order if the levying

officer receives either of the following before the writ or earnings withholding order is returned [*CCP* § 685.090(c)]:

- A certified copy of the court order allowing the costs.
- A certificate from the clerk of the court that the costs have been added to the judgment when the costs have been added to the judgment after a memorandum of costs has been filed pursuant to *CCP* § 685.070 and no motion to tax has been made within the time allowed for making the motion.



Cross Reference:

Discussion of recovering statutory costs, see 24.35[3].

The levying officer must include the costs described in *CCP* § 685.090(c) in the amount of the sale or collection distributed to the judgment creditor only if the levying officer receives the certified copy of the court order or the clerk's certificate before the distribution is made [*CCP* § 685.090(d)].

When a writ is served by a levying officer or registered process server, the costs for that service, as determined pursuant to *CCP* § 1033.5, must be added to and become part of the judgment [*CCP* § 685.095].



Cross Reference:

Discussion of *CCP* § 1033.5, see 24.10, 24.11.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsCourt & Marshal FeesCivil ProcedureRemediesJudgment InterestGeneral Overview



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24.36 CHECKLIST: Opposing Recovery of Costs.

☐ If client offered a settlement to the opposing party that was refused, determine whether opposing party obtained a more favorable judgment or award after trial.

☐ Oppose recovery of costs by opposing party in appropriate case.

☐ Seek recovery of costs in appropriate case.

Authority:
CCP § 998

Discussion:
See 24.29, 24.38

☐ If client is defendant, and case was not brought as limited civil case, but judgment could have been rendered in limited civil case, bring motion to tax costs.

Authority:
CCP § 1033(a)

Discussion:
See 24.39

☐ If client is defendant and case was brought as limited civil case but plaintiff recovered an amount within jurisdiction of small claims court and plaintiff could have brought action in small claims court, bring motion to tax costs.

Authority:

CCP § 1033(b)

Discussion:

See 24.39

☐ Consult local court rules to determine whether prevailing plaintiff is barred from recovering costs for failure to bring case in small claims court.

Authority:

See, e.g., Alameda Super Ct Rules, Rule 4.11

Discussion:

See 24.39

☐ Bring motion to strike costs and/or tax costs.

Authority:

Cal Rules Ct, Rule 3.1700(b)

Discussion:

See 24.41

Forms:

See 24.49 -24.52

☐ Determine grounds for motion, e.g., that item is expressly not allowed by statute.

Authority:

CCP § 1033.5(b)

Discussion:

See 24.11

☐ If appropriate, seeks to reduce any allowable costs.

☐ Claimed costs may not be completely reasonable or necessary.

Authority:

See, e.g., *CCP § 1033.5(c)(2)*; *Nelson v. Anderson* (1999) 72 CA4th 111, 130, 84 CR2d 753

Discussion:

See 24.45

☐ Object to entire cost memorandum or specify which items are objectionable.

☐ Refer to each item by same number and in same order in which they appear on cost memorandum.

☐ State reason for each objection.

Authority:

Cal Rules Ct, Rule 3.1700(b)(2)

Discussion:

See 24.41[4]

☐ Consult local court rules to determine if motion should be made to particular judge or department.

☐ Consult local court rules to determine requirements for motion papers.

Authority:

See, e.g., Sacramento Super Ct Rules, Rule 9.16.5

Discussion:

See 24.41[5]



Serve and file motion within 15 days after cost memorandum served, unless period was extended.

Authority:

Cal Rules Ct, Rule 3.1700(b)(1)

Discussion:

See 24.41[3]

☐ Period is extended if cost memorandum was served by mail.

Authority:

CCP § 1013; Cal Rules Ct, Rule 3.1700(b)(1)

Discussion:

See 24.41[3]

☐ Period may be extended if parties agree in writing and file agreement with clerk.

☐ Court may extend period in absence of extension agreement between parties.

Authority:

Cal Rules Ct, Rule 3.1700(b)(3)

Discussion:

See 24.41[3]

☐ If client is judgment debtor and judgment creditor filed cost memorandum under *CCP* § 685.070 seeking recovery of enforcement costs:

☐ Bring motion to tax costs.



File motion within 10 days after the memorandum of costs is served.

☐ Serve motion papers personally or by mail.

Authority:

CCP § 685.070(c)

Discussion:

See 24.46

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewGovernmentsCourtsRule Application & InterpretationGovernmentsCourtsSmall Claims Courts



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24.37 Options and Strategies.

A prospective strategy for not owing costs at the end of trial is to avoid incurring the liability for costs when possible. For example, counsel should be aware of the dangers of rejecting a reasonable settlement offer under *CCP* § 998, and the resultant liability for costs.

➤ **Cross Reference:**

Discussion of avoiding costs under *CCP* § 998, see 24.38.

If the client is an unsuccessful litigant, counsel may reduce or avoid the client's liability for costs of the prevailing party by diligently analyzing the memorandum of costs for items that are not allowed or claimed costs that are inflated. If a motion to tax or strike costs is appropriate, counsel should draft and serve the motion in a timely manner [see *Cal Rules Ct, Rule 3.1700(b)*].

➤ **Cross Reference:**

Discussion of allowed costs, see 24.10, 24.11, 24.41[2].

Counsel should always consult local rules and trial court preferences regarding allowable costs and required procedures [see, e.g., Alameda Super Ct Rules, Rule 4.17].

➤ **Cross Reference:**

Discussion of local rules, see 24.41[5].

Counsel should be aware, based on the cost memorandum, of which party carries the burden of showing that the costs are allowed or disallowed [see *Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 774, 23 CR2d 810] .

➤ **Cross Reference:**

Discussion of burden, see 24.43, 24.44.

Strategic Points:



- If one is seeking to avoid costs that he or she would have to pay to the prevailing "other" costs or interest on the costs to that point, then payment either directly or into an escrow account or court controlled account pending resolution of the motion to tax costs might be appropriate.
- Counsel is advised to seek creative, lesser, or non-cost alternatives to achieving the purpose sought without incurring the expense. If opposing another party's costs, counsel should, likewise, be prepared to point out to the court how such purpose could be achieved without incurring the expense, or at a lesser expense.

Counsel for a judgment debtor may avoid costs of enforcement by assuring that the client pays the judgment in a timely manner.



Strategic Point:

Counsel for a judgment debtor might advise the client to prioritize the satisfaction of the judgment above other less important matters to avoid further expenses of execution and continuing to incur post-judgment interest that is higher than the prevailing interest rate on commercially available loans.

If faced with enforcement costs, counsel for the judgment debtor should remain aware of the judgment creditor's entitlement to costs under *CCP § 685.010 et seq.* As with prejudgment costs, the judgment creditor must seek costs within a certain time. Counsel for the judgment debtor should analyze any costs memorandum or motion for costs to ascertain that it is timely, and that the items in it are legitimate and recoverable [see *CCP §§ 685.040, 685.050, 685.070, 685.080*].

Consider:

Negotiations might lead to a resolution that would avoid additional costs and interest. However, keep in mind the potential unavailability of insurance recoveries for the loss of "agreed" costs if they are determined by contract.

Caution:

To stop the time within which the judgment creditor may seek costs under *CCP § 685.080(a)*, the judgment debtor should be sure to pay the entire judgment, including interest and attorney's fees [see *Lucky United Properties Investment, Inc. v. Lee (2010) 185 CA4th 125, 141-145, 110 CR3d 159*].



Cross References:

Discussion of costs owed judgment creditor, see 24.35.

See generally 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 Procedure Settlements General Overview Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Evidence Procedural Considerations Burdens of Proof General Overview Governments Courts Rule Application & Interpretation



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24.38 Opposing Costs After Rejection of More Favorable Settlement Offer Under CCP § 998.

A party that rejects a settlement offer properly tendered pursuant to *CCP* § 998 may be precluded from obtaining otherwise allowable costs after failing to obtain a more favorable judgment or award; and may be required to pay some of the opposing party's costs for which it would otherwise not be responsible [see *CCP* § 998].

Strategic Point:



The party that offered to settle with a party that did not obtain a more favorable judgment or award after trial should oppose the recovery of costs against it or seek the recovery of its own costs under *CCP* § 998, depending on the circumstances.



Cross Reference:

Discussion of recovering costs under *CCP* § 998, see 24.29.

Legal Topics:

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

Civil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.39

24.39 Allowable Costs May Be Denied If Case Should Have Been Filed As Limited Civil Case or Small Claims Case.

Costs (or a part of claimed costs) must be as determined by the court in its discretion in a case other than a limited civil case in accordance with *CCP § 1034* when the prevailing party recovers a judgment that could have been rendered in a limited civil case [*CCP § 1033(a)*; *Chavez v. City of Los Angeles* (2010) 47 C4th 970, 982-991, 104 CR3d 710, 224 P3d 41 (upholding denial of costs in FEHA action that could have been brought as limited civil case)].

When a prevailing plaintiff in a limited civil case recovers less than the amount prescribed by law as the maximum limitation on the jurisdiction of the small claims court, but did not bring the action in small claims court, the court may, in its discretion, allow or deny costs to the prevailing party, or may allow costs in part in any amount as it deems proper [*CCP § 1033(b)(1)*].

When the party could not have brought the action in the small claims court, costs and necessary disbursements are limited to the actual cost of the filing fee, the actual cost of service of process, and, when otherwise specifically allowed by law, reasonable attorney's fees [*CCP § 1033(b)(3)*].

➡ **Cross Reference:**

Discussion of recovery of attorney's fees, see *Ch. 25A, Recovering Attorney's Fees, 25A.15 et seq.*

Prerequisite:

These costs may be awarded to the plaintiff only if the court is satisfied that before the commencement of the action, the plaintiff informed the defendant in writing of the intended legal action against the defendant, and that legal action could result in a judgment against the defendant that would include the costs and necessary disbursements [*CCP § 1033(b)(2)*].

➡ **Cross Reference:**

Discussion of court's approval of costs, see *California Forms of Pleading and Practice, § 174.15* (Matthew Bender).

In Alameda County, the court can deny costs and attorney's fees to a prevailing plaintiff when the amount recovered is within the limitation on a small claims court action and the action could have been brought in small claims court, in the

absence of unusual circumstances. When the amount sought is within the jurisdiction of small claims court but the party could not bring the action in that a court, a declaration setting for the specific basis for such a claim and a copy of the notice required by *CCP § 1033(b)(2)* must be submitted [Alameda Super Ct Rules, Rule 4.11].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Governments Courts Small Claims Courts



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.40

24.40 Costs Regarding Multiple Defendants May Be Limited If Defendants Not Properly Joined in One Action.

When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instruments in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of the actions, which may be at the plaintiff's election, if the party proceeded against in the other actions were, at the commencement of the previous action, openly within California. However, the disbursements of the plaintiff must be allowed to the plaintiff in each action [*CCP* § 1022].

Legal Topics:

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

Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.41

24.41 Striking and Taxing Costs of Opposing Party.

24.41[1] Party May Move to Strike Costs and Tax Costs. A party subject to the payment of costs may oppose the recovery of costs by filing a motion to tax costs and/or a motion to strike costs [*see Cal Rules Ct, Rule 3.1700(b)*].



Strategic Point--Moving Party:

A motion to strike costs may be brought alternatively with a motion to tax costs [*see, e.g., Slavin v. Fink (1994) 25 CA4th 722, 724, 30 CR2d 750*].



Cross References:

Form of notice of motion and motion to taxcosts, see 24.49.

Form of order, see 24.50.

Form of notice of motion and motion to strike costs, see 24.51.

Form of order, see 24.52.

Discussion of motion to tax costs in supplemental cost memorandum in unlawful detainer action under *Cal Rules Ct, Rule 3.2000*, see 24.16.

Discussion of motion to tax costs by judgment debtor under *CCP § 685.070(c)*, see 24.35.

24.41[2] Grounds for Motion May Include Items Specifically Not Allowed by Statute. A party opposing the recovery of costs may assert, if appropriate, that a given item is expressly not allowed by statute [*see CCP § 1033.5(b)*].

Examples:

These items are not allowed to be claimed as costs [*CCP § 1033.5(b)*]:

- Fees of experts not ordered by the court.
- Investigation expenses for trial preparation.
- Postage, telephone, and photocopying, except for exhibits.
- Jury voir dire preparation.
- Transcripts not ordered by the court.

► **Cross Reference:**

Discussion of allowable costs, see 24.11.

Premature filing of a cost memorandum is not a ground to strike costs [*Pamela W. v. Millsom* (1994) 25 CA4th 950, 961, 30 CR2d 690] .

24.41[3] Party Must Serve and File Notice of Motion 15 Days After Service of Cost Memorandum, Unless Period Extended. A notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum. If the cost memorandum was served by mail, the period is extended as provided in CCP § 1013 [Cal Rules Ct, Rule 3.1700(b)(1)].

► **Cross References:**

Discussion of cost memorandum, see 24.09[1].

Discussion of extension under CCP § 1013, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 27.07.

The party seeking to recover costs and the party contesting costs may agree to extend the time for serving and filing the cost memorandum and a motion to strike or tax costs. The agreement must be confirmed in writing, specify the extended date for service, and be filed with the clerk. In the absence of an agreement, the court may extend the times for serving and filing the cost memorandum or the notice of motion to strike or tax costs for a period not to exceed 30 days [Cal Rules Ct, Rule 3.1700(b)(3)]. Rule 3.1700(b)(3) does not require that a party expressly request the extension, or that the court specifically state that it granted an extension [*Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2009) 169 CA4th 116, 155, 87 CR3d 5] .

24.41[4] Motion Must Refer to Each Objectionable Item, and Must State Each Objection, Unless Objection Is to Entire Memorandum. Unless objection is made to the entire cost memorandum, the motion to strike or tax costs must refer to each item objected to by the same number and appear in the same order as the corresponding cost item claimed on the memorandum of costs. The motion must also state why the item is objectionable [Cal Rules Ct, Rule 3.1700(b)(2)].

Example:

In defendant's schedule of costs under "Deposition Related Travel Expenses," the item requesting more than \$1,000 for lunches while attending local depositions and other meals simply designated "Business Meal Expenses (Not Deposition Related)" were not recoverable as costs [*Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 774-775, 23 CR2d 810] .

24.41[5] Local Court Rules May Control Location of Filing or Hearing on Motion to Tax Costs. In Orange County, motions to tax must be heard in the department of the court where the case was tried at a time designated by the

judge of that department [Orange Super Ct Rules, Rule 300].

In Sacramento County, a motion to tax costs after trial must be made to the trial judge [Sacramento Super Ct Rules, Rules 3.00(D)(5)]. All motions to tax costs presented for filing must have a copy of the memorandum of costs attached and must be filed in the department that entered the judgment [Sacramento Super Ct Rules, Rule 9.16.5].

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil
 ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney
 FeesCostsDepositions & TranscriptsCivil ProcedureRemediesCosts & Attorney
 FeesCostsWitnessesGovernmentsCourtsRule Application & Interpretation



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.42

24.42 Outcome of Motion to Tax or Strike Costs May Depend on Definition of "Prevailing Party."

Because the prevailing party is entitled to costs, a cost memorandum filed by a party on the ground that it prevailed may raise the issue of which party or parties did prevail in the action [see *CCP* § 1032].



Strategic Point:

The party served with a cost memorandum should therefore analyze the memorandum to ascertain whether the party that filed it is actually a prevailing party. If not, the motion to tax or strike should be based on that ground.



Cross Reference:

Discussion of who is prevailing party, see 24.07.

Examples--Motion to Strike Granted:

- Among parties in mandate proceedings about the accuracy of the title and summary in a countywide ballot measure, the proponent of the ballot measure, the registrar of voters, and former county counsel were all treated as prevailing defendants. Hence, the ballot-measure proponent could not recover costs from the others, and the court properly granted the motion by the registrar of voters and former county counsel to strike costs [see *Nestande v. Watson* (2003) 111 CA4th 232, 243, 4 CR3d 18] .

- In a consolidated action in which a defendant seeking costs was united in interest with the "main defendant" who lost, the trial court properly exercised its discretion in striking most of the costs. Because the actions were consolidated and the party seeking costs and the main defendant were united in interest and shared counsel, the circumstances did not fall within the specific situations in *CCP* § 1032(a)(4) (prevailing party entitled to costs). Under terms of the statute, the trial court properly exercised its discretion to determine allocation between the parties [*Slavin v. Fink* (1994) 25 CA4th 722, 726, 30 CR2d 750] .

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil
ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.43

24.43 If Items Appear Proper, Burden Is on Moving Party to Show Costs Were Not Reasonable or Necessary.

If the items appearing in a cost bill appear to be proper, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary [*Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 774, 23 CR2d 810] . The verified memorandum is prima facie evidence that the costs, expenses, and services listed were necessarily incurred by that party; the burden of showing that an item is not properly chargeable or is unreasonable is on the objecting party [*Nelson v. Anderson* (1999) 72 CA4th 111, 131, 84 CR2d 753] .

The court's first determination is whether CCP § 1033.5 expressly allows the particular item, and whether it appears proper on its face. If so, the burden is on the objecting party to show them to be unnecessary or unreasonable [*Nelson v. Anderson* (1999) 72 CA4th 111, 131, 84 CR2d 753] .

 Cross Reference:

Discussion of proper costs, see 24.30[2].



Strategic Point--Moving Party:

If objection to items is properly made, they are put in issue and the burden of proof is on the party claiming them as costs [*Wagner Farms, Inc. v. Modesto Irrigation District* (2006) 145 CA4th 765, 773-774, 52 CR3d 683] .

Example:

In a case resulting in judgment for the plaintiff against one defendant and judgment for other defendants against the plaintiff, the trial court disallowed all expenses relating to the deposition taken by the successful defendants of the expert of a co-plaintiff who had settled. In its opposition to the motion to tax costs, the defendants submitted a copy of the nonsettling plaintiff's joinder in the settling plaintiff's designation of that witness as an expert. Although the court allowed the deposition costs related to other experts designated by the joinder, it was on the ground that the other experts relied on their deposition testimony. The court of appeal held that the court should have determined the need for the deposition from the pretrial perspective of a litigant who does not yet know whether to oppose the expert's opinions. The expense was expressly allowable by statute, and the defendants showed that the witness had been

designated by the nonsettling plaintiff through joinder. The plaintiff who proceeded to trial therefore had the burden to prove the cost unnecessary or unreasonable. The trial court erred in requiring additional proof from the defendants, and in making its determination based on the expert's usefulness at trial [*Nelson v. Anderson* (1999) 72 CA4th 111, 131-132, 84 CR2d 753] .

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.44

24.44 Proper Objection to Costs Shifts Burden to Party Seeking to Recover Costs.

The mere filing of a motion to tax costs may be a proper objection to an item that does not appear to be a necessity, or that does not appear to be proper on its face [*Nelson v. Anderson* (1999) 72 CA4th 111, 131, 84 CR2d 753] .

If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if a proper objection is made to the items, they are put in issue; the burden of proof is on the party claiming them as costs [*Nelson v. Anderson* (1999) 72 CA4th 111, 131, 84 CR2d 753] .

Example:

The prevailing party sought recovery of costs for messenger fees. The court of appeal noted that messenger fees are not expressly authorized by statute, but may be allowed in the discretion of the court. The trial court found the messenger fees to be of doubtful necessity and unreasonable on their face when compared to the probable cost of alternatives in view of the capabilities of the law firm representing that party. The burden was therefore properly on the prevailing party, which provided no evidence that the charges were reasonable or necessary [*Nelson v. Anderson* (1999) 72 CA4th 111, 132, 84 CR2d 753] .

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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24.45 Seeking Reduction of Costs Claimed by Opposing Party.

24.45[1] Party May Seek to Reduce Costs Claimed by Opposing Party. A party subject to liability for costs may seek to reduce the claimed items or the amount of the claimed costs, based on the circumstances under which the costs were incurred. For example, costs recoverable under *CCP* § 1032 are restricted to those reasonably necessary to the conduct of the litigation and reasonable in amount [*CCP* § 1033.5(c)(2); *Nelson v. Anderson* (1999) 72 CA4th 111, 130, 84 CR2d 753]. The total costs claimed may include unreasonable or unnecessary costs; and may therefore be reduced to costs claims that are reasonable and necessary to the litigation [*see CCP* § 1033.5(c)(2)].

➡ **Cross Reference:**

Discussion of reasonably necessary costs, *see* 24.30[2].

Example:

A claim for costs may be reduced to cover costs "necessary" to the conduct of the litigation, rather than "merely convenient or beneficial to its preparation" pursuant to *CCP* § 1033.5(c)(2) [*see, e.g., Pamela W. v. Millsom* (1994) 25 CA4th 950, 961, 30 CR2d 690 (motion to tax costs granted in part)].

Costs awarded under *CCP* § 1032 against a plaintiff in intervention must relate to the period during which the plaintiff was a party to the action [*Garcia v. Hyster Co.* (1994) 28 CA4th 724, 731, 733, 34 CR2d 283 (denying pre-intervention costs under *CCP* §§ 998, 1032)].

24.45[2] Court Cannot Reduce Costs Beyond Statutory Limits. A trial court may not reduce allowable costs for reasons not provided by statutory authority. Court must be cautious in adding exceptions to the language of *CCP* § 1032 [*see Nelson v. Anderson* (1999) 72 CA4th 111, 129, 84 CR2d 753].

Example:

In a case in which some plaintiffs settled, the pretrial costs claimed by the successful defendants were reduced by two thirds without respect to whether the costs were allowable by statute or whether they were reasonably necessary. Among other nonstatutory factors, the trial court cited the settlement among the defendants and two of the three plaintiffs, and noted that one of the terms of those settlements stated that the defendants would waive their right to collect costs. The trial court found that allowing all costs

would be unfair to the plaintiff who went to trial, and would constitute an inappropriate windfall to the defendants. The court of appeal reversed the reduction after finding no statutory authority for reducing allowable costs for any of the reasons advanced by the trial court, and finding that the trial court did not analyze the reasonableness or necessity of the costs affected by the two-thirds reduction [*Nelson v. Anderson* (1999) 72 CA4th 111, 129-130, 84 CR2d 753 (noting that plaintiff did not seek reduction under "windfall" theory and that it did not condone cost award resulting in windfall)].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.46

24.46 Opposing Recovery of Costs for Enforcement of Judgment.

An unsuccessful party is faced with liability for the costs of enforcing the judgment if it does not satisfy the judgment in a timely manner.

Cross Reference:

Discussion of enforcement of judgments, see Matthew Bender[(R)] Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, Planning Enforcement of Judgment.

If the judgment creditor has filed a memorandum of costs under *CCP* § 685.070, the judgment debtor may file a motion to tax costs. Within 10 days after the memorandum of costs is served on the judgment debtor, the judgment debtor may apply to the court on noticed motion to have the costs taxed by the court. The notice of motion must be served on the judgment creditor; service must be made personally or by mail. The court must make an order allowing or disallowing the costs to the extent justified under the circumstances of the case [*CCP* § 685.070(c)]. *CCP* § 1013, extending the time within which a right may be exercised or an act may be done, applies to *CCP* § 685.070 [*CCP* § 685.070(f)].

Cross References:

Discussion of *CCP* § 685.070, see 24.35[3].

Discussion of *CCP* § 1013, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 27.07.

Warning:

If no motion to tax costs is made within the time provided in *CCP* § 685.070(c), the costs claimed in the memorandum are allowed [*CCP* § 685.070(d)].

If the judgment creditor has filed a motion for enforcement costs under *CCP* § 685.080, counsel for the judgment debtor should ascertain whether the motion was timely filed (i.e., before the judgment is satisfied in full, and not later than two years after the costs have been incurred); and analyze the items of costs to determine whether they are recoverable [see *CCP* §§ 685.040, 685.070, 685.080].

Counsel should also analyze the motion papers for sufficiency, for example, for inclusion of the required supporting affidavit under *CCP* § 685.080(b), and note whether service was made personally or by mail, as required [*see CCP* § 685.080(b)]. Counsel should oppose the motion on the appropriate grounds, and raise any justifying circumstances supporting denial of the motion [*see CCP* § 685.080(c)].



Cross Reference:

Discussion of bringing creditor's motion, see 24.35[4].



Strategic Point:

Counsel for the judgment debtor should offer to waive appeal in return for the judgment debtor waiving court costs, especially where the chances of winning on appeal are not great.

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview



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24.47 Judicial Council Form MC-010--Memorandum of Costs (Summary).

Judicial Council Form MC-010--Memorandum of Costs (Summary).

[Click here to view image.](#)

[Go to Interactive Fillable Form.](#)

Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP §§ 685.070, 1032, 1033.5

Grounds:

See 24.35 -27.39

Related Form of Worksheet:

See 24.48

Related Forms of Memoranda:

See California Points and Authorities, §§ 60.10 -60.14 (Matthew Bender)



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.48

24.48 Judicial Council Form MC-011--Memorandum of Costs (Worksheet).

Judicial Council Form MC-011--Memorandum of Costs (Worksheet).

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NOTES.

Authority:

Cal Rules Ct, Rule 3.1700(a)(1); CCP §§ 1032, 1033.5

Grounds:

See 24.09, 24.35.

Related Form of Summary:

See 24.47

Related Forms of Memoranda:

See California Points and Authorities, §§ 60.10 -60.14 (Matthew Bender)



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24.49 Notice of Motion and Motion to Tax Costs.

Notice of Motion and Motion to Tax Costs.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND MOTION TO TAX
) COSTS, SUPPORTING DECLARATION OF
) _____ [name], AND MEMOR-
) ANDUM
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____

To _____ [party seeking costs, 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 for an order taxing the costs of this
action under *California Rules of Court, Rule 3.1700(b)(1)* as follows:

[EITHER, when party is moving to strike items]

By striking from _____ [party seeking costs, e.g., Plaintiff John Smith]'s memorandum of costs, filed herein the following items: _____ [specify items to be stricken].

[AND/OR, when party moving to reduce, in addition to or in lieu of striking, items]

By reducing certain items as follows: _____ [specify items to be reduced].

The motion is based on this notice of motion, on the declaration(s) of _____ [name(s)] and the supporting memorandum served and filed with this motion, 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]

SUPPORTING DECLARATION OF _____ [name]

I, _____ [name], declare:

I am the attorney of record herein for _____ [moving party, e.g., Defendant Mary Jones], and make this declaration on his/her behalf.

On _____ [date], _____ [moving party, e.g., Defendant Mary Jones] was served with a copy of the memorandum of costs, a copy of which is attached hereto as Exhibit A and made a part hereof, as shown by the _____ [unsigned copy of the proof of service attached to the memorandum of costs (Exhibit A) or the proof of service of memorandum of costs filed in this case].

The memorandum of costs contains items which are not properly chargeable as costs in the following respects:
 _____ [List items from notice of motion for order taxing costs and state facts, with supporting documentation, if any, showing that items are objectionable, e.g.:

1. Item No. _____, fees of _____ (name of expert witness) in the amount of \$_____ are not properly chargeable as a cost in this action in that this witness was not appointed by the court and his/her services were performed for the benefit and at the request of _____ (prevailing party, e.g., Plaintiff John Smith), and this item should be reduced to the amount of \$_____, which is the ordinary witness fee authorized by law.

2. Item No. _____ in the amount of \$_____ for a copy of the deposition of _____ (

name of deponent) taken on _____ (*date*), is not properly chargeable as a cost in this action in that the charge for a copy of this deposition was only \$_____, as indicated in the true copy of the invoice from _____ (*name of reporter*), attached hereto as Exhibit _____ (*designate exhibit*) and made a part thereof. Item No. _____ is therefore excessive and should be reduced to 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]

MEMORANDUM

[Add memorandum supporting motion.]

NOTES.

Authority:

Cal Rules Ct, Rule 3.1700(b)(1)

Grounds:

See 24.41 et seq.

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 60.40 -60.56, 60.70 (Matthew Bender)

Related Form of Order Taxing Costs:

See 24.50



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2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.50

24.50 Order Taxing Costs.

Order Taxing Costs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____
ORDER TAXING COSTS

The motion of _____ [specify moving party, e.g., Defendant Mary Jones] for an order taxing costs on the ground that certain items of _____ [party claiming costs, e.g., Plaintiff John Smith]'s memorandum of costs and disbursements were not properly chargeable came on regularly for hearing 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 [in part],

[EITHER, if items are being stricken]

IT IS ORDERED that items _____ [specify numbers and descriptions] of _____ [party entitled to costs, e.g., Plaintiff John Smith]'s memorandum of costs and disbursements be disallowed and be and hereby are stricken.

[AND/OR, if there are items being reduced in addition to or in lieu of items being stricken]

IT IS [FURTHER] ORDERED that items _____ [specify numbers and descriptions] of _____ [party entitled to costs, e.g., Plaintiff John Smith]'s memorandum of costs and disbursements be and hereby are reduced and are allowed in the amounts set forth below.

IT IS FURTHER ORDERED that _____ [party entitled to costs, e.g., Plaintiff John Smith] be allowed the following items as costs: _____ [in this paragraph include all items with their descriptions and amounts being allowed, including any items listed in cost bill to which no objection was made].

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

Cal Rules Ct, Rule 3.1700(b)(1)

Grounds:

See 24.41 et seq.

Related Forms of Notice of Motion and Motion to Tax Costs:

See 24.49



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Chapter 24 Costs
IV. FORMS

2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.51

24.51 Notice of Motion and Motion to Strike Costs.

Notice of Motion and Motion to Strike Costs.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name]

Plaintiff,

vs.

_____[name],

Defendant.

)

)

)

)

)

)

)

)

)

)

NO. _____

NOTICE OF MOTION AND MOTION TO STRIKE

MEMORANDUM OF COSTS, SUPPORTING DE-

CLARATION OF _____ [name],

AND MEMORANDUM

Date: _____

Time: _____

Location: _____

Judge: _____

Date Action Filed: _____

Trial Date: _____

To _____ [party seeking costs, 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 for an order taxing the costs of this
action under *California Rules of Court, Rule 3.1700(b)(1)* taxing the costs of this action by striking
_____ [party claiming costs, e.g., Plaintiff John Smith]'s memorandum of costs in its entirety. The

motion will be made on the ground(s) that _____ [*specify, e.g.,* _____] (*party claiming costs, e.g., Plaintiff John Smith's memorandum of costs was not timely filed*).

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 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 OF _____ [*name*]

I, _____ [*name*], declare:

I am the attorney of record herein for _____ [*moving party, e.g., Defendant Mary Jones*] and make this declaration in support of _____ [*e.g., defendant's*] motion for an order striking the entire memorandum of costs herein filed.

_____ [*Here and in subsequent paragraphs, set forth facts and documentation, if any, showing that the memorandum of costs was improperly filed and should be stricken in its entirety, e.g.: As shown by the court's records herein, the judgment in this action was entered on _____ (date), the clerk mailed the notice of entry of judgment to each party on _____ (date), and the memorandum of costs was filed on _____ (date) (more than 15 days after the latter date)*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [*signature*]

MEMORANDUM

[*Add memorandum supporting motion.*]

NOTES.

Authority:

Cal Rules Ct, Rule 3.1700(b)(1)

Grounds:

See 24.41 et seq.

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 60.40 -60.56, 60.70 (Matthew Bender)

Related Form of Order Striking Costs:

See 24.52



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Chapter 24 Costs
IV. FORMS

2-24 MB Practice Guide: Trial & Post-Trial Civil Proc 24.52

24.52 Order Striking Costs.

Order Striking Costs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	ORDER STRIKING COSTS
Defendant.	)	
	)	
	)	

The motion of _____ [*specify moving party, e.g., Defendant Mary Jones*] for an order striking the memorandum of costs filed by _____ [*party claiming costs, e.g., Plaintiff John Smith*] on the ground that _____ [*specify ground, e.g., the memorandum of costs was not filed within the time prescribed by California Rules of Court, Rule 3.1700(a)(1)*] came on regularly for hearing 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 it is, granted and that the memorandum of costs be and it is stricken.

Dated: _____

_____ [*signature*]

Judge of the Superior Court

NOTES.

Authority:

Cal Rules Ct, Rule 3.1700(b)(1)

Grounds:

See 24.41 et seq.

Related Forms of Notice of Motion and Motion to Strike Costs:

See 24.51



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Chapter 25 Collecting Attorney's Fees From Client

2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.syn

§ 25.syn Synopsis to Chapter 25: Collecting Attorney's Fees From Client

25.01 Scope.

25.02 Objective and Strategy.

25.03 CHECKLIST: Grounds for Obtaining Attorney's Fees From Client.

25.04 Options and Strategies.

25.05 Some Fee Agreements Must Be Written and Comply With Other Requirements.

25.05[1] Contingency Fee Agreements Must Be Written and Must Contain Certain Information, Such As Contingency Rate.

25.05[2] Limitations on Contingency Fee Contracts Do Not Apply to Certain Contracts Between Merchants.

25.05[3] Fee Contracts Exceeding \$1,000 Must Be Written and Must Contain Certain Information; All Bills Must Be Itemized and Detailed.

25.05[3][a] Fee Contracts Exceeding \$1,000 Must Be Written and Must Contain Certain Information.

25.05[3][b] All Bills Must Be Itemized and Contain Calculations, and Must Be Mailed to Client on Request.

25.05[3][c] Requirements Do Not Apply to Corporate Clients, Emergencies, and Other Circumstances.

25.06 Person Seeking Recovery of Fees Must Be Member of State Bar.

25.07 CHECKLIST: Collecting Attorney's Fees From Client.

25.08 Options and Strategies.

25.09 Arbitration and Mediation of Fee Disputes Under Mandatory Fee Arbitration Act.

25.09[1] Mandatory Fee Arbitration Act Provides Quick and Inexpensive Resolution of Fee Disputes.

25.09[2] Arbitration and Mediation of Disputes Concerning Fees and/or Costs Are Administered by California State Bar.

25.09[3] Arbitration Is Voluntary for Client Unless Client Agrees to Arbitration in Writing, and Is Mandatory for Attorney If Commenced by Client.

25.09[4] Mediation Is Voluntary for Client and Attorney.

25.09[5] Attorney Must Give Client Notice of Right to Arbitration.

25.09[6] Arbitration Award Under MFAA Is Usually Not Binding for 30 Days, but Parties May Agree to Binding Award After Dispute Arises.

25.09[7] Client Waives Right to Arbitration by Failing to Request Arbitration or Filing Suit for Affirmative Relief.

25.09[8] Time for Filing Civil Action Topped From Initiation of Arbitration.

25.09[9] Mandatory Fee Arbitration Act Includes Requirements for Arbitration Award and Other Provisions.

25.09[10] Binding Arbitration Agreement Under California Arbitration Act May Be Enforceable.

25.10 State and Local Bar Associations Have Jurisdiction Over Arbitration of Fee Disputes.

25.10[1] State Bar Arbitrates Fee Disputes in Absence of Approved Local Bar Association Program.

25.10[2] State Bar Has Approved Arbitration Programs in Alameda, Los Angeles, Orange, Sacramento, San Diego, San Francisco, and Santa Clara Counties, Among Others.

25.10[3] Client May Request State-Bar Enforcement of State-Bar or State-Bar-Approved Fee Arbitration or Mediation Program.

25.11 Attorney May Bring Action Against Client for Breach of Contract.

25.12 Defenses to Contract Action for Attorney's Fees Include Duress, Menace, Fraud, Undue Influence, and Mistake.

25.13 Attorney May Bring Action Against Client for Account Stated.

25.14 Attorney May Bring Action Against Client for Reasonable Value of Services.

25.15 Limitations Period Depends on Nature of Action.

25.16 Notice of Client's Right to Arbitration.



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Chapter 25 Collecting Attorney's Fees From Client
I. STRATEGY

2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.01

25.01 Scope.

This chapter covers:

- Requirements for fee agreements with clients [*see* 25.03 -25.06].
- Arbitration of attorney's fee disputes under the Mandatory Fee Arbitration Act (*B&P Code* § 6200 *et seq.*) [*see* 25.07 -25.09; Form: *see* 25.16].
- Local bar association fee-arbitration programs approved by the State Bar [*see* 25.10].
- Bringing actions to collect attorney's fees from clients [*see* 25.11 -25.15].

Core Statutes:

CC § 1717; *CCP* §§ 1021-1031

➡ Cross Reference:

For discussion of recovering fees from the other party, see Ch. 25A, Recovering Attorney's Fees From Opposing Party.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRLegal EthicsClient RelationsAttorney FeesFee Agreements



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Chapter 25 Collecting Attorney's Fees From Client
I. STRATEGY

2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.02

25.02 Objective and Strategy.

Entitlement to attorney's fees from a client, and ultimately the collection of fees if necessary, will often depend on the existence of a fee agreement with the client. Counsel must draft each fee agreement according to statutory requirements if applicable. For example, contingency fee agreements must conform to requirements set forth in the Business and Professions Code [see *B&P Code* §§ 6147, 6147.5, 6148].

► Cross References:

Discussion of fee agreements, see 25.05.

Discussion and forms regarding drafting and entering into fee agreements, see *Matthew Bender*[(R)]
Practice Guide: California Pretrial Civil Procedure, 3.11 et seq., 3.39 et seq.

Counsel should be aware of mandatory fee arbitration requirements before drafting a fee agreement, and the State and local bar associations' jurisdiction in those matters [see *B&P Code* § 6200 et seq.]. When drafting an arbitration clause, counsel should realize that a *binding* arbitration provision regarding a dispute over *fees or costs* is enforceable [*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal4th 557, 573-575, 87 CR3d 700, 198 P3d 1109] .

► Cross Reference:

Discussion of arbitration, see 25.09.

► 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 ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRContracts LawContract Conditions & ProvisionsArbitration ClausesLegal EthicsClient RelationsAttorney FeesFee Agreements



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Chapter 25 Collecting Attorney's Fees From Client
II. GROUNDS FOR OBTAINING ATTORNEY'S FEES FROM CLIENT

2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.03

25.03 CHECKLIST: Grounds for Obtaining Attorney's Fees From Client.

☐ Determine whether the attorney has entered into an enforceable fee agreement with the client.

☐ Contingency fee agreements must be in writing and must include contingency rate.

Authority:

B&P Code §§ 6147(a), 6148

Discussion:

See 25.04, 25.05

☐ Determine whether mandatory fee arbitration requirements apply.

Authority:

B&P Code § 6200 et seq.

Discussion:

See 25.09

☐ Review bills to client.

☐ Bills must be itemized and include calculations.

☐ Attorney must mail bills to client on request.

Authority:

B&P Code § 6148(b)

Discussion:

See 25.05[3][b]

- ☐ Determine whether person seeking recovery of fees is a member of the State Bar.

Authority:

Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court (1998) 17 C4th 119, 127, 70 CR2d 304, 949 P2d 1

Discussion:

See 25.06

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRLegal EthicsClient RelationsAttorney FeesFee Agreements



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II. GROUNDS FOR OBTAINING ATTORNEY'S FEES FROM CLIENT

2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.04

25.04 Options and Strategies.

Counsel should begin planning for the recovery of fees from a client far in advance in all cases by drafting an enforceable fee agreement with the client. Some fee agreements, such as contingency fee agreements, must be in writing [see *B&P Code* § 6147(a)], although counsel should consider reducing any fee agreement to writing. Counsel should realize from the outset of the relationship with the client that such factors as the relevant statutes of limitations may eventually be determined by whether or not the fee agreement is in writing [see, e.g., *CCP* § 339(1)].

CCP § 339(1) can be construed to be limited to fee agreements. However, *B&P Code* § 6148 states that in all cases not excepted (e.g., not when client is a corporation), the agreement for the performance of services, not just the fee portion of the agreement, has to be in writing. That is important in a situation in which the client charges the attorney with misfeasance for not performing some agreed upon service. If the agreement for services is not in writing, the attorney may not be able to establish the limited nature of the services that were to be performed. On the *fee* issue, it should be noted that even in cases where a written retainer agreement is not necessary (e.g., when client is a corporation (see *B&P Code* § 6148)), counsel should nevertheless attempt to reduce any fee agreement to writing.



Strategic Point:

It is good practice always to insist that retainer agreements providing for fees, contingent or otherwise, and providing for dispute resolution mechanisms, be reduced to writing. Attorneys are unable to enter into such agreements *after* the attorney-client relationship commences without advising client to seek the advice of other counsel [see *Cal Rules of Prof Conduct*, Rule 3-300].



Cross References:

Discussion of fee agreements, see 25.05, 25.11 -25.15.

Discussion and forms regarding drafting and entering into fee agreements, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 3.11 et seq., 3.39 et seq.

In addition, before drafting a fee agreement with a client counsel should be aware of mandatory fee arbitration requirements, and the State and local bar associations' jurisdiction in those matters [see *B&P Code* § 6200 et seq.].

When drafting an arbitration clause, counsel should realize that a *binding* arbitration provision regarding a dispute over *fees or costs* may not be enforceable [see *Alternative Sys., Inc. v. Carey* (1998) 67 CA4th 1034, 1044, 79 CR2d 567] .

Consider:

Note that binding arbitration clauses regarding any other disputes between the client and the attorney are effective and may operate to the benefit of all parties to the relationship.



Cross Reference:

Discussion of arbitration, see 25.09.

Legal Topics:

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

Governments
Legislation
Statutes of Limitations
Time Limitations
Legal Ethics
Client Relations
Attorney Fees
Fee Agreements



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II. GROUNDS FOR OBTAINING ATTORNEY'S FEES FROM CLIENT

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25.05 Some Fee Agreements Must Be Written and Comply With Other Requirements.

25.05[1] Contingency Fee Agreements Must Be Written and Must Contain Certain Information, Such As Contingency Rate. An attorney who contracts to represent a client on a contingency fee basis must, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client (or the client's guardian or representative) to the plaintiff (or the client's guardian or representative). The contract must be in writing and must include, but is not limited to, all of the following [*B&P Code § 6147(a)*]:

- A statement of the contingency fee rate on which the client and attorney have agreed.
- 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. This may include any amounts collected for the plaintiff by the attorney.
- Unless the claim is subject to the provisions of *B&P Code § 6146* (limitations on percentage of contingency fee in medical malpractice cases), a statement that the fee is not set by law but is negotiable between attorney and client.
- If the claim is subject to the provisions of *B&P Code § 6146* (limitations on percentage of contingency fee in medical malpractice cases), 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.



Warning:

Failure to comply with any provision of *B&P Code § 6147* renders the agreement voidable at the plaintiff's option, and the attorney is entitled to collect a reasonable fee [*B&P Code § 6147(b)*].

► Cross References:

Action for reasonable value of services, see 25.14.

Additional discussion of contingency fee agreements, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 3.16[7].

Exception:

B&P Code § 6147 does not apply to contingency fee contracts for the recovery of workers' compensation benefits [*B&P Code § 6147(c)*].

Consider:

It is always a good idea to have a fee agreement in writing.

25.05[2] Limitations on Contingency Fee Contracts Do Not Apply to Certain Contracts Between Merchants.

B&P Code §§ 6147 and *6148* do not apply to contingency fee contracts for the recovery of claims between merchants [see *Com Code § 2104*], arising from the sale or lease of goods or services rendered, or money loaned for use, in the conduct of a business or profession if the merchant contracting for legal services employs 10 or more individuals [*B&P Code § 6147.5(a)*].

When no written contract for legal services exists as permitted by *B&P Code § 6147.5(a)*, an attorney may not contract for or collect a contingency fee in excess of the following limits [*B&P Code § 6147.5(b)(1)*]:

- 20 percent of the first \$300 collected.
- 18 percent of the next \$1,700 collected.
- 13 percent of sums collected in excess of \$2,000.

However, the following minimum charges may be charged and collected [*B&P Code § 6147.5(b)(2)*]:

- \$25 in collections of \$75 to \$125.
- 33 1/3 percent of collections less than \$75.

25.05[3] Fee Contracts Exceeding \$1,000 Must Be Written and Must Contain Certain Information; All Bills Must Be Itemized and Detailed.

25.05[3][a] Fee Contracts Exceeding \$1,000 Must Be Written and Must Contain Certain Information. In any case not coming within *B&P Code § 6147* in which it is reasonably foreseeable that total expense to a client, including attorney's fees, will exceed \$1,000, the contract for services in the case must be in writing. At the time the contract is entered into, the attorney must provide a duplicate copy of the contract 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. The written contract must contain all of 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.

**Strategic Point:**

Keep in mind that *B&P Code § 6148* applies to more than a "fee contract." Rather, it applies to any attorney-client relationship, and if the fees are to exceed \$1,000, then the agreement for performance of services must be in writing (with the exceptions noted in 25.05[3][c]).

**Warning:**

Failure to comply with any provision of *B&P Code § 6148* renders the agreement voidable at the client's option [see *B&P Code § 6148(c)*; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 995-996, 90 CR2d 665] .

**Strategic Point:**

If the agreement is void, the attorney is entitled to collect a reasonable fee [see *B&P Code § 6148(c)*; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 995-996, 90 CR2d 665] .

Example:

In an action by an attorney to recover fees, a promissory note attached to the complaint that failed to meet the requirements of *B&P Code § 6148* did not constitute a valid enforceable written contract. Consequently, the attorney could assert only an action on a common count for quantum meruit [*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 995-996, 90 CR2d 665] .

**Cross References:**

Action for reasonable value of services, see 25.14.

See also Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions.

B&P Code § 6148 applies prospectively only to fee agreements from its operative date of January 1, 2000 [*B&P Code § 6148(e), (f)*].

25.05[3][b] All Bills Must Be Itemized and Contain Calculations, and Must Be Mailed to Client on Request.

All bills rendered by an attorney to a client must clearly state the basis of the bill. Bills for the fee portion of the bill must include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for the cost and expense portion of the bill must clearly identify the costs and expenses incurred and the amount of the costs and expenses [*B&P Code § 6148(b)*].

On request by the client, the attorney must provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days before the request. In that case the attorney may provide a bill no later than 31 days following the date the most recent bill was provided. The client may make similar requests at intervals of no fewer than 30 days following the initial request. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they must be described and estimated [*B&P Code § 6148(b)*].

**Warning:**

Failure to comply with any provision of *B&P Code § 6148* renders the agreement voidable at the client's option [see *B&P Code § 6148(c)*; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990,

995-996, 90 CR2d 665] .



Strategic Point:

If the agreement is void, the attorney is entitled to collect a reasonable fee [see *B&P Code § 6148(c)*; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 995-996, 90 CR2d 665] .

B&P Code § 6148 applies prospectively only to fee agreements following its operative date of January 1, 2000 [*B&P Code § 6148(e), (f)*].

25.05[3][c] Requirements Do Not Apply to Corporate Clients, Emergencies, and Other Circumstances. *B&P Code § 6148* does not apply to any of the following [*B&P Code § 6148(d)*; *Flannery v. Prentice* (2001) 26 C4th 572, 589-590, 110 CR2d 809, 28 P3d 860] :

- Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or when a writing is otherwise impractical.
- An arrangement as to the fee implied by the fact that the attorney's services are of the same general kind as previously rendered and paid for by the client.
- The client knowingly states in writing, after full disclosure of *B&P Code § 6148*, that a writing concerning fees is not required.
- The client is a corporation.

B&P Code § 6148 applies prospectively only to required written agreements for the performance of legal services following its operative date of January 1, 2000 [*B&P Code § 6148(e), (f)*].

Legal Topics:

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

Contracts Law Statutes of Frauds Requirements General Overview Contracts Law Types of Contracts Lease Agreements General Overview Contracts Law Types of Contracts Oral Agreements Legal Ethics Client Relations Attorney Fees Contingency Fees Legal Ethics Client Relations Attorney Fees Fee Agreements



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Chapter 25 Collecting Attorney's Fees From Client
II. GROUNDS FOR OBTAINING ATTORNEY'S FEES FROM CLIENT

2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.06

25.06 Person Seeking Recovery of Fees Must Be Member of State Bar.

As a general rule, no one may recover compensation for services as an attorney at law in California unless the person was at the time the services were performed an active member of the State Bar [*Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 C4th 119, 127, 70 CR2d 304, 949 P2d 1] .

Exceptions:

- An out-of-state attorney engaged to render services in bankruptcy proceedings is entitled to collect his or her fee [see *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 C4th 119, 130, 70 CR2d 304, 949 P2d 1 (citing *Cowen v. Calabrese* (1964) 230 CA2d 870, 872, 41 CR 441)]. Note that this exception applies to federal courts generally, not just bankruptcy courts. Bankruptcy courts are just given as an example of a federal court.
- If an otherwise unenforceable fee agreement is severable, the part of the agreement for fees performed in another state that does not amount to the practice of law in California may be enforceable [see *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 C4th 119, 139-140, 70 CR2d 304, 949 P2d 1 ; see B&P Code § 6125 (unauthorized practice of law)].

Legal Topics:

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

Legal Ethics Client Relations Attorney Fees General Overview Legal Ethics Unauthorized Practice of Law



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Chapter 25 Collecting Attorney's Fees From Client
III. COLLECTING ATTORNEY'S FEES FROM CLIENT

2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.07

25.07 CHECKLIST: Collecting Attorney's Fees From Client.

☐ Determine whether State Bar has approved fee-arbitration program in the relevant county.

☐ State Bar controls arbitration of fee disputes pursuant to the Mandatory Fee Arbitration Act (MFAA).

Authority:
B&P Code § 6200 et seq.

Discussion:
See 25.09, 25.10

☐ Approved programs exist in Alameda, Los Angeles, Orange, Sacramento, San Diego, San Francisco, and Santa Clara Counties, among others.

Authority:
See, e.g., Alameda County Mandatory Fee Arbitration Program

Discussion:
See 25.10[2]

☐ Arbitration is generally voluntary for client, mandatory for attorney at client's request.

Authority:
B&P Code § 6200(c)

Discussion:
See 25.09[3]

- ☐ Attorney must give client notice of arbitration right.

**Timing:**

Notice must be given before, or at time of service of summons or claims against client, or before or at commencement of any other proceeding against client under any contract between attorney and client that provides for alternative to arbitration.

Authority:

See *B&P Code § 6201(a)*

Discussion:

See 25.09[5]

**Warning:**

Failure to give this notice is ground for dismissal of action or proceeding.

Authority:

See *B&P Code § 6201(a)*

Discussion:

See 25.09[5]

**Warning:**

Client waives right to arbitration by failing to request arbitration or by filing suit for affirmative relief against attorney.

Authority:

Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rule 7.1; see *B&P Code § 6201(b)*

Discussion:

See 25.09[7]

- ☐ Arbitration is generally not binding.



Arbitration award under MFAA is generally not binding provided that (1) either party seeks trial within 30 days of award of arbitrators, and (2) party seeking trial following award appeared at arbitration.

Authority:

B&P Code § 6204(a)



Parties may agree in writing to be bound by MFAA arbitration any time after dispute over fees, costs, or both, has arisen.

Authority:

B&P Code § 6204(a); see *Aguilar v. Lerner (2004) 32 C4th 974, 985, 12 CR3d 287, 88*

P3d 24

Discussion:

See 25.09[6]

Exception:

Fee contract provision for binding arbitration under California Arbitration Act, instead of under MFAA, may be enforceable.

Authority:

CCP § 1280 et seq.; see, e.g., *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C4th 557, 573-575, 87 CR3d 700, 198 P3d 1109

Discussion:

See 25.09[10]

☐ Contact relevant local bar program approved by State Bar, and comply with its requirements for arbitration if appropriate.

Authority:

See, e.g., Alameda County Mandatory Fee Arbitration Program

Discussion:

See 25.10

☐ State Bar arbitrates fee disputes in absence of approved local bar association program.

Authority:

Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rule 10.1(b)-(d)

Discussion:

See 25.10[1]

☐ Bring action against client if appropriate.

☐ Contract action.

Authority:

See *Hardy v. San Fernando Valley Chamber of Commerce* (1950) 99 CA2d 572, 576-577, 222 P2d 314

Discussion:

See 25.11, 25.12



Timing:

Bring action within four years of date of breach.

Authority:See *CCP* § 337(1)**Discussion:**

See 25.15

- ☐ Action for account stated.

Authority:See *Trafton v. Youngblood* (1968) 69 C2d 17, 25, 69 CR 568, 442 P.2d 648**Discussion:**

See 25.13

**Timing:**

Bring action within two years.

Authority:See *CCP* § 339(1)**Discussion:**

See 25.15

- ☐ Action for reasonable value of services.

Authority:See *Flannery v. Prentice* (2001) 26 C4th 572, 589, 110 CR2d 809, 28 P3d 860**Discussion:**

See 25.14

**Timing:**

Bring action within two years.

Authority:See *CCP* § 339(1)**Discussion:**

See 25.15

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRContracts LawContract Conditions & ProvisionsArbitration ClausesGovernmentsLegislationStatutes of LimitationsTime LimitationsLegal EthicsClient RelationsAttorney FeesGeneral Overview



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25.08 Options and Strategies.

If collection of attorney's fees from a client becomes necessary, counsel will be better prepared if the fee obligation is based on a written fee agreement that complies with all statutory requirements, for example, a contingency fee agreement [see *B&P Code § 6147(a)*]. In any event, the existence of a written fee agreement will give the attorney more options if he or she needs to file suit [see, e.g., *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 997, 90 CR2d 665] .

► **Cross Reference:**

Discussion of fee agreements, see 25.05, 25.13, 25.15.

In addition, resolution of the fee dispute will be facilitated if any fee arbitration clause complies with the Mandatory Fee Arbitration Act (MFAA), which governs arbitration of disputes between attorney and client concerning fees and costs [see *B&P Code § 6200 et seq.*]. For this purpose, counsel should also be familiar with the fee arbitration program of the local bar association, and know whether that program is approved by the State Bar [see, e.g., Alameda County Mandatory Fee Arbitration Program]. If there is no approved program in the relevant county, counsel should be prepared to seek assistance from the State Bar.

If a fee arbitration clause provides for *binding* arbitration in a dispute over *fees or costs*, it is enforceable [*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 C4th 557, 573-575, 87 CR3d 700, 198 P3d 1109] .

► **Cross Reference:**

Discussion of arbitration, see 25.09, 25.10.

If counsel files suit against the client for fees, counsel must give the client notice of the client's arbitration rights under MFAA *before or concurrent with* service of the summons and complaint, or risk dismissal of the complaint [see *B&P Code § 6201(a)*].

► **Cross Reference:**

Discussion of notice of right to arbitrate, see 25.09[5].

**Strategic Point:**

Because almost all cases of non-payment of attorney's fees involve claims of attorney misfeasance, attorneys should be well versed in avoiding malpractice claims. These claims are often asserted as counterclaims in the action for fees, and thus it is important to consider the possibility of any such claims before making a claim for fees against a client. Clear communication, constant reporting, and "no surprises" can be of great help in preventing fee disputes. In addition, counsel should not allow a client to get behind in the payment of fees.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionMandatory ADRContracts LawContract Conditions & ProvisionsArbitration ClausesLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency Fees



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25.09 Arbitration and Mediation of Fee Disputes Under Mandatory Fee Arbitration Act.

25.09[1] Mandatory Fee Arbitration Act Provides Quick and Inexpensive Resolution of Fee Disputes. The Mandatory Fee Arbitration Act (MFAA), set forth in *B&P Code § 6200 et seq.*, provides a quick and inexpensive method for clients, at their option, to resolve fee disputes with their attorneys [see *Law Offices of Dixon R. Howell v. Valley (2005) 129 CA4th 1076, 1076, 29 CR3d 499*].

25.09[2] Arbitration and Mediation of Disputes Concerning Fees and/or Costs Are Administered by California State Bar. The California State Bar administers procedure for the arbitration and mediation of disputes concerning fees, costs, or both, charged for professional services by members of the State Bar or by members of the bar of other jurisdictions [see *B&P Code § 6200(a)*; Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rules 1.1-47; see also *B&P Code § 6200(b)* (exceptions)].

The primary limitation of MFAA is that it applies only to disputes concerning legal fees, costs, or both [*B&P Code § 6200(a)*], and is specifically inapplicable to claims for affirmative relief against an attorney for damages or otherwise based on alleged malpractice or professional misconduct [see *B&P Code § 6200(b)(2)*; *Aguilar v. Lerner (2004) 32 C4th 974, 984, 12 CR3d 287, 88 P3d 24*].

Distinguish:

By contrast, virtually any civil dispute, including claims of legal malpractice, can be the subject of arbitration under the California Arbitration Act (*CCP § 1280 et seq.*) [see *Aguilar v. Lerner (2004) 32 C4th 974, 984, 12 CR3d 287, 88 P3d 24*; see also *CCP § 1281* (written agreement to submit existing or future controversy to arbitration is valid, enforceable, and irrevocable, although as contract it may be revoked)].

➡ **Cross Reference:**

Further discussion of arbitration, see California Forms of Pleading and Practice, Ch. 30, Using Alternative Dispute Resolution, Ch. 32, Contractual Arbitration (Matthew Bender).

25.09[3] Arbitration Is Voluntary for Client Unless Client Agrees to Arbitration in Writing, and Is Mandatory for Attorney If Commenced by Client. Unless the client has agreed in writing to arbitration under *B&P*

Code § 6200 et seq. of all disputes concerning fees, costs, or both, arbitration is voluntary for a client and is mandatory for an attorney if commenced by a client [*B&P Code § 6200(c)*; see *B&P Code § 6200(g)* (powers of arbitrator)].

Distinguish:

Although a client cannot be forced under MFAA to arbitrate a dispute concerning legal fees, at the client's election an unwilling attorney can be forced to do so [see *Aguilar v. Lerner (2004) 32 C4th 974, 984, 12 CR3d 287, 88 P3d 24*].

25.09[4] Mediation Is Voluntary for Client and Attorney. Mediation under *B&P Code § 6200 et seq.* is voluntary for an attorney and a client [*B&P Code § 6200(c), (h)*].

25.09[5] Attorney Must Give Client Notice of Right to Arbitration. An attorney must forward a written notice to the client before or at the time of service of the summons or claim in an action against the client, or before or at the commencement of any other proceeding against the client under a contract between the attorney and client that provides for an alternative to arbitration under *B&P Code § 6200 et seq.* for recovery of fees, costs, or both [see *B&P Code § 6201(a)*].



Warning:

Failure to give this notice is grounds for dismissal of the action or other proceeding [see *B&P Code § 6201(a)*].

Distinguish:

The notice is not required before initiating mediation of the dispute [see *B&P Code § 6201(a)*].



Strategic Point:

In the typical MFAA case, the client receives the CCP § 6201(a) notice and thereafter expressly chooses either to proceed under MFAA or not. If the client decides to arbitrate pursuant to MFAA, the client has the right to do so whether or not the parties had also executed an arbitration agreement [see *Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009) 45 C4th 557, 573-575, 87 CR3d 700, 198 P3d 1109*]. If the client fails to invoke rights under MFAA, those rights are waived and any preexisting arbitration agreement is enforceable against the client, with no residual MFAA protections standing as an obstacle [see *Aguilar v. Lerner (2004) 32 C4th 974, 989, 12 CR3d 287, 88 P3d 24*; *Ervin, Cohen & Jessup, LLP v. Kassel (2007) 147 CA4th 821, 54 CR3d 685*].

The right-to-arbitrate notice is effective only after an actual fee dispute has arisen [*Huang v. Cheng (1998) 66 CA4th 1230, 1234-1235, 78 CR2d 550*].



Cross Reference:

Form, see 25.16.

25.09[6] Arbitration Award Under MFAA Is Usually Not Binding for 30 Days, but Parties May Agree to Binding Award After Dispute Arises. An award rendered under an arbitration pursuant to MFAA is usually nonbinding, provided that (1) either party seeks a trial within 30 days of service of notice of the award, and (2) the party seeking a trial following the award appeared at the arbitration. Further, either party may seek a trial de novo [see *B&P Code § 6204(a)*; *Aguilar v. Lerner (2004) 32 C4th 974, 985, 12 CR3d 287, 88 P3d 24*].

However, the parties may agree in writing to be bound by the award of arbitrators appointed under MFAA at any time after the dispute over fees, costs, or both, has arisen [*B&P Code § 6204(a)*; see *Aguilar v. Lerner (2004) 32 C4th 974,*

985, 12 CR3d 287, 88 P3d 24] .



Warning:

Before its 1996 amendment, this provision stated: "The parties may agree in writing to be bound by the award of the arbitrators" [see Stats 1992, ch 1265, § 6]. As amended in 1996, *B&P Code § 6204(a)* reads: "The parties may agree in writing to be bound by the award of the arbitrators *at any time after the dispute over fees, costs, or both, has arisen*" [see Stats 1996, ch 1104, § 16 (emphasis added and indicates amendment); see also *Aguilar v. Lerner* (2004) 32 C4th 974, 988, 12 CR3d 287, 88 P3d 24] . Whether a *predispute* agreement for binding arbitration is enforceable is not settled [see *Aguilar v. Lerner* (2004) 32 C4th 974, 993, 12 CR3d 287, 88 P3d 24 , concur. op., Moreno, J.]. The distinction between a *predispute* agreement to arbitrate disputes about the services performed, as opposed to the fees, is important here. The former is enforceable, the latter is problematic.



Cross Reference:

Discussion of binding arbitration, see 25.09[10].

In the absence of such an agreement, either party is entitled to a trial after arbitration if sought within 30 days of service of notice of the award [see *B&P Code § 6204(b), (c)*]. However, if either party willfully fails to appear at the arbitration hearing in the proper manner, that party is not entitled to a trial after arbitration. The determination of willfulness is made by the court. The party who failed to appear at the arbitration has the burden of proving that the failure to appear was not willful. In making its determination, the court may consider any findings made by the arbitrators on the subject of a party's failure to appear [see *B&P Code § 6204(a)*].

Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award is binding 30 days after service of notice of the award, unless a party has, within the 30 days, sought a trial after arbitration pursuant to *B&P Code § 6204* [see *B&P Code § 6204(b)*].

25.09[7] Client Waives Right to Arbitration by Failing to Request Arbitration or Filing Suit for Affirmative Relief. A client's right to request or maintain arbitration is waived if the client does any of the following:

- Answers a complaint in a civil action or other equivalent response to the civil action before filing a request for arbitration, after the required form ("Notice of Client's Right to Arbitration") was given pursuant to *B&P Code § 6201(a)* [Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rule 7.1; see *B&P Code § 6201(b)*].



Cross Reference:

Form, see 25.16.

- Commences an action or files any pleading seeking judicial resolution of a fee or cost dispute, or seeking affirmative relief against the attorney for damages or otherwise based on alleged malpractice or professional misconduct [Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rule 7.2; see *B&P Code § 6201(d)*].



Strategic Point:

"The MFAA thus 'provides the client with an *alternative* method of resolving a fee dispute with his attorney, *not one in addition* to traditional litigation' " [*Aguilar v. Lerner* (2004) 32 C4th 974, 985, 12 CR3d 287, 88 P3d 24 (emphasis in original)].

Example:

A client waived his right to arbitration under MFAA by filing a legal malpractice action against the attorney [*Aguilar v. Lerner* (2004) 32 C4th 974, 987, 12 CR3d 287, 88 P3d 24] .

- Fails to deliver to the State Bar a request for arbitration on the approved State Bar form that is received on or before the 30th day from the date of the client's receipt of the form ("Notice of Client's Right to Arbitration") given pursuant to *B&P Code § 6201(a)* [Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rule 7.3; see *B&P Code § 6201(a)*; see *Ervin, Cohen & Jessup, LLP v. Kassel* (2007) 147 CA4th 821, 54 CR3d 685] .

 Cross Reference:

Form, see 25.16.

**Strategic Point:**

If the client waives the right to arbitration, the parties may stipulate to set aside the waiver and to proceed with arbitration [*B&P Code § 6201(e)*].

**Warning:**

The dismissal of an attorney's complaint seeking trial de novo of a fee dispute effectively repudiates the attorney's rejection of the arbitration award and thereby makes the arbitration award binding [*Perez v. Grajales* (2008) 169 CA4th 580, 596-605, 86 CR3d 784] .

25.09[8] Time for Filing Civil Action Told From Initiation of Arbitration. The time for filing a civil action seeking judicial resolution of a dispute subject to arbitration under *B&P Code § 6200 et seq.* is tolled from the time an arbitration is initiated until (1) 30 days after receipt of notice of the award of the arbitrators; or (2) receipt of notice that the arbitration is otherwise terminated, whichever comes first [*B&P Code § 6206*]. Arbitration may not be commenced under *B&P Code § 6200 et seq.* if a civil action requesting the same relief would be barred by any provision of *CCP § 312 et seq.* However, this limitation does not apply to a request for arbitration by a client, pursuant to the provisions of *B&P Code § 6201(b)*, following the filing of a civil action by the attorney [*B&P Code § 6206*].

25.09[9] Mandatory Fee Arbitration Act Includes Requirements for Arbitration Award and Other Provisions. MFAA also provides for the following:

- Disclosure of work product for purpose of arbitration; confidentiality in all other regards [see *B&P Code § 6202*].
- Requirements for contents of arbitration award; allocation of filing fees; evidentiary issues regarding claims of malpractice and professional misconduct; and scope of the award [see *B&P Code § 6203(a)*].
- Petition to confirm, correct, or vacate the award, including costs and fees [see *B&P Code § 6203(b), (c)*].
- Enforcement by the State Bar of a binding award [see *B&P Code § 6203(d)*].
- Trial de novo [see *B&P Code § 6204*].

- State Bar procedure to disqualify arbitrator or mediator; notice to parties of rights to judicial relief after arbitration [*see B&P Code § 6204.5*].

25.09[10] Binding Arbitration Agreement Under California Arbitration Act May Be Enforceable. An arbitration provision in a written retainer agreement between attorney and client is generally enforceable under the California Arbitration Act [*CCP § 1280 et seq.*] absent the client's exercise of the statutory right to mandatory fee arbitration [*see B&P Code § 6200 et seq.*] A client who waives MFAA rights by filing a malpractice action may then be compelled to arbitrate the malpractice claim and any fee dispute in accordance with the arbitration provision in the retainer agreement and *CCP § 1280 et seq.* [*Aguilar v. Lerner (2004) 32 C4th 974, 983-986, 12 CR3d 287, 88 P3d 24*] .

The MFAA does not limit the ability of attorneys and clients to enter into binding contractual arbitration [*Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009) 45 C4th 557, 573-575, 87 CR3d 700, 198 P3d 1109*] . Thus, a client who does not request arbitration under the MFAA within 30 days of receiving the statutory notice can be compelled to arbitrate a fee dispute under *CCP § 1280 et seq.* in accordance with an arbitration provision in the retainer agreement [*Ervin, Cohen & Jessup, LLP v. Kassel (2007) 147 CA4th 821, 826-830, 54 CR3d 685*] .

Consider:

Arbitration clauses are generally a good idea. It is good practice to draft a provision that provides for arbitration under both the CAA and the MFAA. This type of provision would thus indicate that both Acts are compatible and not necessarily alternatives. Note that the CAA is much stronger because if the contract requires it, it is mandatory and binding. If you have such a clause, you likely do not need to offer to proceed under *B&P Code § 6201*, and you should be concerned about waiving rights under the arbitration clause.

➡ Cross Reference:

Further discussion of arbitration, see California Forms of Pleading and Practice, Ch. 30, Using Alternative Dispute Resolution, Ch. 32, Contractual Arbitration (Matthew Bender).

Legal Topics:

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

Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsContracts LawContract Conditions & ProvisionsArbitration ClausesLegal EthicsClient RelationsAttorney FeesGeneral Overview



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25.10 State and Local Bar Associations Have Jurisdiction Over Arbitration of Fee Disputes.

25.10[1] State Bar Arbitrates Fee Disputes in Absence of Approved Local Bar Association Program. The State Bar will accept a matter for arbitration if there is no approved local bar association program with jurisdiction over the dispute [Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rule 10.1(a)]. In addition, the State Bar will accept a matter for arbitration if a party seeks removal from a local bar association program, or a party cannot obtain a fair hearing in a local bar association program; and the State Bar will waive jurisdiction if the parties consent to arbitration by a local bar association program [Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rule 10.1(b)-(d)].

25.10[2] State Bar Has Approved Arbitration Programs in Alameda, Los Angeles, Orange, Sacramento, San Diego, San Francisco, and Santa Clara Counties, Among Others. Among others, the following local bar associations have fee-arbitration programs approved by the California State Bar:

- **Alameda County Mandatory Fee Arbitration Program** Grace Fonseca, 610 16th Street Oakland, CA 94612 Voice: (510) 893-7160, ext. 422 Fax: (510) 893-3119

Filing jurisdiction requirements: Attorney's office located in county, client is a resident of county, or substantial attorney services were rendered in county. Will perform arbitrations for incarcerated clients. Fee Waiver program.

Filing Fee: 3 percent of disputed amount with minimum of \$50 for \$10,000 or less; 4 percent for \$10,001 to \$25,000; 5 percent with \$5,000 maximum for over \$25,000.

Panel Size: One arbitrator for disputed amounts of \$7,500 or less; three for over \$7,500.

- **Los Angeles County Bar Association** Sharron McLawyer, P.O. Box 55020 Los Angeles, CA 90055 Voice: (213) 896-6426

Filing jurisdiction requirements: Attorney's office in county or substantial legal services rendered in county. Client must agree to binding arbitration if disputed amount is less than \$10,000, or if fee waiver

is requested. Also offering fee dispute mediation. Will not perform arbitrations for incarcerated clients.

Filing fee: \$50 plus 5 percent of amount in dispute when total amount in dispute is less than \$10,000; 6 percent of amount in dispute when total amount in dispute is \$10,000 or more but less than \$20,000; 7 percent of amount in dispute when total amount in dispute is \$20,000 or more with a maximum fee of \$5,000.

Panel size: One if less than \$7,500 for binding arbitration, or less than \$20,000 for non-binding arbitration; three in all other cases.

The following bar associations in Los Angeles County also have State Bar approved fee-arbitration programs: Antelope Valley Bar Association; Beverly Hills Bar Association; Glendale Bar Association; Long Beach Bar Association; San Gabriel Valley Bar Association; and Santa Monica Bar Association.

■ **Orange County Bar Association** Rebecca Craft, P.O. Box 17777 Irvine, CA 92623-7777 Voice: (949) 440-6700, ext. 128

Filing jurisdiction requirements: Attorney's office in county, substantial legal services rendered in county, client resides in county and no program in attorney's county, or by stipulation of both parties. Client must agree to binding arbitration if dispute is less than \$1,500. No fee waiver program. Offering fee dispute mediation.

Filing fee: \$75 for \$1-\$2,500; 3 percent of amount for over \$2,500 with \$3,500 maximum.

Panel size: One for \$5,000 or less, or if non-binding; three for over \$5,000 and binding; three for all cases over \$10,000.

■ **Sacramento County Bar Association** Vince Miles, 901 "H" Street, Suite 101 Sacramento, CA 95814 Voice: (916) 448-1087, ext. 206

Filing jurisdiction requirements: Attorney's office in county, client resides in county or substantial attorney services rendered in county. Will perform arbitrations for incarcerated clients.

Filing fee: 5 percent of dispute with \$25 minimum and \$3,500 maximum.

Panel size: One for everything under \$10,000; three for everything over \$10,000.

Arbitration rules in Sacramento County do not apply to the arbitration of attorney's claims in connection with actions to recover attorney's fees or costs. Actions by attorneys or their assignees to collect attorney's fees, costs, or both from their clients are governed by *B&P Code § 6200 et seq.* and related Rules of the Sacramento County Bar Association [Sacramento Super Ct Rules, Rule 12.03(A)]. Each complaint filed by an attorney or assignee for the recovery of attorney's fees, costs, or both from a client must state in the caption that the complaint is for recovery of attorney's fees, costs, or both fees and costs [Sacramento Super Ct Rules, Rule 12.03(B)].

■ **San Diego County Bar Association** Debbie Hatchell, 1333 Seventh Avenue San Diego, CA 92101-4309 Voice: (619) 231-0781, ext. 101
<http://www.sdcba.org>

Filing jurisdiction requirements: Attorney's office in county, or substantial services rendered in county.

Disputed amount must be \$750 or more. Will arbitrate with incarcerated clients.

Filing fee: 5 percent of amount in dispute with \$75 minimum and \$3,500 maximum.

Panel size: One for \$10,000 or less; three for over \$10,000.

The Bar Association of Northern San Diego County also has a State Bar approved fee-arbitration program.

■ **San Francisco County Bar Association** Oliver Sandmann, 465 California Street, Suite 1100 San Francisco, CA 94104 Voice: (415) 782-8972 / (415) 982-1600

Filing jurisdiction requirements: Attorney's office in county or substantial legal services rendered in county, or, client resides in county and no program is available in the attorney's county. Disputed amount must be \$1,000 or more. Offering fee dispute mediation and fee waiver program.

Filing fee: 5 percent of amount in dispute for disputes under \$10,000; 7 percent of amount for disputes over \$10,000; and, for disputes of \$1 million or more, \$250 for each million with \$5,000 maximum.

Panel size: One for all matters under \$10,000; one for less than \$20,000 and non-binding; three for less than \$20,000 and binding; three for all matters over \$20,000.

■ **Santa Clara County Bar Association** Irene Cortez, 4 North 2nd Street, Ste. 400 San Jose, CA 95113 Voice: (408) 287-2557, ext. 120 Fax: (408) 287-6083

Filing jurisdiction requirements: Attorney's office in county, or attorney participated in a substantial number of cases in county. No fee waiver program. Will perform arbitrations for incarcerated clients.

Filing fee: \$25 for \$1-\$500; \$50 for \$501-\$1,000; \$75 for \$1,001-\$2,000; \$100 for \$2,001-\$3,000; \$125 for \$3,001-\$4,000; \$150 for \$4,001-\$5,000; \$175 for \$5,001-\$6,000; \$200 for \$6,001-\$7,000; \$225 for \$7,001-\$8,000; \$250 for \$8,001-\$9,000; \$275 for \$9,001-\$10,000; 3 percent of amount \$7,500 maximum for over \$10,000.

Panel size: One if \$5,000 or less; three if over \$5,000.

The Palo Alto Area Bar Association also has a State-Bar approved fee-arbitration program.



Cross Reference:

Consult the website of the California State Bar (<http://www.calbar.ca.gov/state/calbar>) for approved fee-arbitration programs.

25.10[3] Client May Request State-Bar Enforcement of State-Bar or State-Bar-Approved Fee Arbitration or Mediation Program. In any fee arbitration or fee mediation conducted by the State Bar or by an approved mandatory fee arbitration program in which the client is awarded or owed a refund of previously paid fees or costs, the client may request State Bar assistance in enforcing the award or agreement if the attorney has not timely complied with that award or agreement [see Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar, Rules 39.0-39.45].

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute
ResolutionMediationsLegal EthicsClient RelationsAttorney FeesGeneral Overview



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25.11 Attorney May Bring Action Against Client for Breach of Contract.

In an appropriate case, the attorney may bring an action against the client for breach of the contract for fees. A complaint for attorney's fees must state all of the following elements [*Hardy v. San Fernando Valley Chamber of Commerce* (1950) 99 CA2d 572, 576-577, 222 P2d 314] :

- An express agreement of employment.
- An agreement to pay a fixed measure of compensation.
- Performance of the services.
- Demand for payment.
- Refusal to pay.

➡ **Cross Reference:**

See *California Forms of Pleading and Practice*, § 72.350 et seq.; Ch. 140, Contracts (Matthew Bender)



Warning:

A summons and complaint must be accompanied by a notice regarding the Mandatory Fee Arbitration Act [see *B&P Code* § 6201(a)].



Cross References:

Discussion of notice of right to arbitrate, see 25.09[5].

Form, see 25.16.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionMandatory ADRContracts LawBreachGeneral OverviewLegal
EthicsClient RelationsAttorney FeesGeneral Overview



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25.12 Defenses to Contract Action for Attorney's Fees Include Duress, Menace, Fraud, Undue Influence, and Mistake.

A party opposing the recovery of attorney's fees sought in a breach of contract action may raise the defenses available in all contract actions, including the following:

- Lack of consent [*see CC § 1565 et seq.*], which may be based on any of the following:

- ☐ Duress [*CC § 1567(1)*].
- ☐ Menace [*CC § 1567(2)*].
- ☐ Fraud [*CC § 1567(3)*].
- ☐ Undue influence [*CC § 1567(4)*].
- ☐ Mistake [*CC § 1567(5)*].

- Illegality [*see CC § 1596*].
- Lack of capacity [*see CC § 1556*].



Cross Reference:

Discussion of contract defenses, 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:

Contracts LawBreachGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts

LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral
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25.13 Attorney May Bring Action Against Client for Account Stated.

In a proper case, the attorney may bring an action against the client based on an account stated. An account stated is an agreement based on the prior transactions between the parties, that the items of the account are true, and that the balance struck is due and owing from one party to another [*Trafton v. Youngblood* (1968) 69 C2d 17, 25, 69 CR 568, 442 P2d 648] . When parties assent to the account, it becomes a new contract [*Truestone, Inc. v. Simi West Indus. Park II* (1984) 163 CA3d 715, 725, 209 CR 757] .

The elements of an account stated are [*Truestone, Inc. v. Simi West Indus. Park II* (1984) 163 CA3d 715, 725, 209 CR 757] :

- At the time of the statement an indebtedness from one party to the other existed;
- A balance was then struck and agreed to be the correct sum owing from the debtor to the creditor;
and
- The debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.

The bill of an attorney for services, like any other bill, may under proper circumstances and conditions be the subject of an account stated [*Trafton v. Youngblood* (1968) 69 C2d 17, 25, 69 CR 568, 442 P2d 648] . As with any contract, the agreement need not be express, but may be implied from the circumstances. If the account is sent to the debtor, and the debtor does not object to it within a reasonable time, the debtor's acquiescence is taken as an admission that the account is correctly stated [*Trafton v. Youngblood* (1968) 69 C2d 17, 25, 69 CR 568, 442 P2d 648] .

However, because accounts stated are intended to preserve and protect legitimate demands, not create obligations independent of prior indebtedness, the rendering of an account, even if not objected to, cannot create liability if no liability existed before [*Trafton v. Youngblood* (1968) 69 C2d 17, 26, 69 CR 568, 442 P2d 648] .



Cross Reference:

Discussion of account stated, see California Forms of Pleading and Practice, Ch. 8, Accounts Stated and Open Accounts (Matthew Bender).

Jury Instructions:

Common Count: Account Stated, see *Judicial Council of California Civil Jury Instructions, CACI No. 373* (LexisNexis Matthew Bender).

**Warning:**

If there is no writing that meets the requirements of *B&P Code § 6148(b)*, an attorney may not state a claim for fees on an account stated based on a *written obligation*, which provides for a four-year limitations period (*CCP § 337(2)*, P 2), because *B&P Code § 6148(b)* requires that all bills for services rendered by an attorney to a client "shall clearly state the basis thereof, including the amount, rate, basis for calculation, or other method of determination of the member's fees." If there is no writing that meets the requirements of *B&P Code § 6148(b)*, the attorney cannot plead "an account stated based upon an account in writing" [see *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 997, 90 CR2d 665] .

**Cross Reference:**

Discussion of *B&P Code § 6148(b)*, see 25.05.

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureRemediesEquitable AccountingsGeneral OverviewContracts LawDebtor & Creditor RelationsGovernmentsLegislationStatutes of LimitationsTime Limitations



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Chapter 25 Collecting Attorney's Fees From Client
III. COLLECTING ATTORNEY'S FEES FROM CLIENT

2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.14

25.14 Attorney May Bring Action Against Client for Reasonable Value of Services.

In the absence of an agreement on the subject, the client is deemed to have promised to pay the attorney the reasonable value of the services performed in the client's behalf and with the client's consent and knowledge [*Flannery v. Prentice* (2001) 26 C4th 572, 589, 110 CR2d 809, 28 P3d 860] . This is an action on a common count for quantum meruit [*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 995-996, 90 CR2d 665] .

Example:

Even when the Legislature has required a written fee agreement (*see, e.g., B&P Code §§ 6147* (contingency fee agreements), 6148 (other agreements for fees exceeding \$1,000)), it has provided that, although noncompliance renders the agreement voidable, the attorney nevertheless is "entitled to collect a reasonable fee" [*see, e.g., B&P Code §§ 6147(b), 6148(c); see Flannery v. Prentice* (2001) 26 C4th 572, 589, 110 CR2d 809, 28 P3d 860 ; *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 CA4th 257, 275-276, 62 CR3d 665] .

➡ Cross References:

Discussion of requirement for written fee agreement, *see* 25.05.

See also Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Volebant Recovery in Contract Actions.

Legal Topics:

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

Contracts Law Remedies Equitable Relief Quantum Meruit Legal Ethics Client Relations Attorney Fees Contingency Fees Legal Ethics Client Relations Attorney Fees Fee Agreements



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2-25 MB Practice Guide: Trial & Post-Trial Civil Proc 25.15

25.15 Limitations Period Depends on Nature of Action.

These limitations periods apply to actions by an attorney to recover fees:

- In an action on a written contract, four years from the date of the breach [see CCP § 337(1) (four years for contracts and accounts)].
- In an action on a common count for quantum meruit, i.e., for reasonable value of services, two years [see CCP § 339(1) (two years for contract or obligation not founded on written contract); *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 996, 90 CR2d 665] .
- In an action for account stated based on an obligation not founded on a written instrument, two years [see CCP § 339(1) (two years for contract or obligation not founded on written contract); *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 997, 90 CR2d 665] .

 Cross Reference:

Discussion of statute of limitations, see *California Forms of Pleading and Practice*, § 72.350 et seq.; Ch. 345, Limitation of Actions (Matthew Bender).

 Warning:

If there is no writing that meets the requirements of *B&P Code* § 6148(b), the attorney may not state a claim for fees on an account stated based on a *written obligation*, which provides for a four-year limitations period (CCP § 337(2), P 2), because *B&P Code* § 6148(b) requires that all bills for services rendered by an attorney to a client "shall clearly state the basis thereof, including the amount, rate, basis for calculation, or other method of determination of the member's fees." If there is no writing that meets the requirements of *B&P Code* § 6148(b), the attorney cannot plead "an account stated based upon an account in writing" [see *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 CA4th 990, 997, 90 CR2d 665] .

 Cross Reference:

Discussion of *B&P Code* § 6148(b), see 25.14.

Legal Topics:

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

Civil Procedure Remedies Equitable Accountings General Overview Contracts Law Remedies Equitable Relief Quantum
Meruit Legal Ethics Client Relations Attorney Fees Fee Agreements



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Chapter 25 Collecting Attorney's Fees From Client
IV. FORMS

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25.16 Notice of Client's Right to Arbitration.

Notice of Client's Right to Arbitration.

[Click here to view image.](#)

NOTES.

Authority:

B&P Code § 6201(a); Rules of Procedure for Fee Arbitrations and Enforcement of Awards by State Bar,
Rule 7.1

Related Form of Memorandum:

See *California Points and Authorities*, § 25.73 (*Matthew Bender*)



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Chapter 25A Recovering Attorney's Fees From Opposing Party

2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.syn

§ 25A.syn Synopsis to Chapter 25A: Recovering Attorney's Fees From Opposing Party

25A.01 Scope.

25A.02 Objective and Strategy.

25A.03 CHECKLIST: Grounds for Obtaining Attorney's Fees From Opposing Party.

25A.04 Options and Strategies.

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25A.05[2] Recovery of Fees Is Generally Left to Agreement Absent Statutory Provision for Fees.

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25A.06 Local Court Rules May Provide for Recovery of Attorney's Fees.

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25A.07[4][a] Costs Are Allowable If Incurred, Whether or Not Paid.

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25A.07[4][c] Amount of Court-Awarded Costs Must Be Reasonable.

25A.07[4][d] Costs Not Expressly Allowed or Denied Are Subject to Court's Discretion.

25A.07[5] Claim Not Based on Court's Schedule of Attorney's Fees Bears Burden of Proof.

25A.07[6] Attorney's Fees Based on Statute May Be Fixed on Noticed Motion, When Statement of Decision Is Rendered, in Costs Affidavit, or on Entry of Default Judgment.

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25A.08[2] Reasonable Fees Must Be Fixed by Court As Element of Costs.

25A.08[3] Attorney's Fees Under CC § 1717 Are Not Subject to Waiver.

25A.08[4] Determination of "Prevailing Party" Under CC § 1717.

25A.08[4][a] Prevailing Party Is Determined by Noticed Motion.

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25A.08[4][c] Defendant Is Prevailing Party If Defendant Deposits Full Amount Owed After Tendering Amount to Plaintiff.

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25A.08[6] Trial Court Need Not Add Potential Fee Award Under CC § 1717 to Damage Award Before Determining Whether Judgment Exceeds Jurisdictional Limits.

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25A.08[9] CC § 1717 Applies to Work of In-House Counsel.

25A.08[10] Although CC § 1717 Does Not Apply to Tort Action, Fee Provision May Encompass Tort Action.

25A.08[11] Fees Awarded As Costs May Exceed Fees Actually Incurred If Contract Allows.

25A.09 Party May Recover Attorney's Fees in Contract Action on Book Account.

25A.09[1] Prevailing Party in Action on Book Account May Recover Attorney's Fees.

25A.09[2] Reasonable Fees Are Fixed by Court.

25A.09[3] Court Must Award Set Attorney's Fees to Successful Defendant As Prevailing Party.

25A.09[4] Attorney's Fees Not Awarded If Written Agreement Exists but Does Not Provide for Fees.

25A.09[5] Amount of Attorney's Fees Is Limited by Statute; Default Fees Exceeding Schedule Amount Must Be Reasonable and Necessary.

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25A.10[4] Prevailing Party May Recover Attorney's Fees in Certain Actions to Recover Damages to Personal or Real Property.

25A.10[5] Prevailing Plaintiff May Recover Attorney's Fees in Action Regarding Wrongful Interstate Sale of Cigarettes.

25A.10[6] Small Business May Recover Attorney's Fees in Action Involving State Regulatory Agency.

25A.10[7] Party May Recover Attorney's Fees in Action for Damages Based on Defendant's Conviction of Felony

Offense.

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25A.10[10] Statutory Schemes May Provide for Attorney's Fees.

25A.10[11] Party May Recover Attorney's Fees for Frivolous Action or Delaying Tactics of Opposing Party.

25A.11 Party May Recover Attorney's Fees Under Private Attorney General Theory.

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25A.11[4] Claimant's Objective Must Affect "Broader World" or "General Public."

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25A.11[6] Award of Attorney's Fees Is Appropriate When Burden of Pursuing Litigation Is Disproportionate to Plaintiff's Individual Interest.

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25A.12[1] American Rule Requires Each Party to Pay Own Fees.

25A.12[2] "Common Fund" and "Substantial Benefit" Theories Apply to Distinct Class of Beneficiaries, Including Shareholders in Derivative Suit.

25A.12[3] Plaintiff Must Have Engaged In Reasonable Attempt To Settle Dispute Prior To Litigation.

25A.13 Party May Recover Fees Out of Fund After Creating Beneficial Common Fund.

25A.13[1] Common Fund Must Benefit Many Persons.

25A.13[2] Under Common Fund Theory, Person Who Expends Attorney's Fees Creating Common Fund May Require Passive Beneficiaries to Share Costs.

25A.13[3] Common Fund Doctrine Requires Existence of Fund.

25A.14 Party May Recover Fees Under Substantial Benefit Doctrine After Obtaining Judgment Conferring Substantial Benefit on Defendant.

25A.14[1] Substantial Benefit Doctrine Requires That Judgment Confer Substantial Benefit on Defendant.

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25A.17 Calculating Attorney's Fees.

25A.17[1] Applying "Lodestar" or "Touchstone" Calculation Method to Determine Reasonable Fees.

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25A.18[2] Alameda County Rules.

25A.18[3] Los Angeles County Rules.

25A.18[3][a] Judgments and Post-Judgment Orders.

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25A.18[3][c] Party May Recover Attorney's Fees on Motion for Change of Venue.

25A.18[4] In Orange County, Attorney's Fees Are Set by Schedule on Clerk's Entry of Default Judgment.

25A.18[5] Sacramento County Rules Provide Schedule for Attorney's Fees on Promissory Notes, Fee Contracts, and Foreclosures.

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25A.18[7] Party May Recover Attorney's Fees in Unlawful Detainer Action.

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25A.19 Party Seeking Statutory or Contractual Attorney's Fees That Are Fixed by Formula Must Claim Fees As Costs in Cost Memorandum.

25A.20 Party Seeking Attorney's Fees Based on Statute and Contract Must Bring Noticed Motion If Court Determination of Right to Fees and/or Amount Is Required.

25A.20[1] Cal Rules Ct, Rule 3.1702, Applies to Claims for Fees Based on Statute and Contract Except As Otherwise Provided by Statute.

25A.20[2] Party Must Serve and File Notice of Motion Within Time for Filing Notice of Appeal Unless Deadline Is Extended.

25A.20[3] Parties May Stipulate to Deadline Extension.

25A.20[4] Court May Extend Deadline in Absence of Stipulation or Beyond Stipulated Date.

25A.20[5] Court Has Broad Discretion to Excuse Late Filing Absent Prejudice to Opposing Party.

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25A.23 Responding to Motion to Recover Attorney's Fees.

25A.23[1] Failure to Respond to Motion for Fees May Result in Fee Award.

25A.23[2] Grounds for Opposing Motion for Fees Include Excessive Amount of Fees.

25A.23[2][a] Requested Fees Are Excessive.

25A.23[2][b] Although Opposing Party Is Entitled to Attorney's Fees, It Is Not Entitled to Fees Under Private Attorney General Theory.

25A.23[2][c] Statutory Scheme Cited in Support of Fee Award Does Not Provide for Fees in This Case.

25A.23[2][d] Contract Disallows Fees in This Case.

25A.23[2][e] Attorney's Fees Are Generally Not Recoverable in Tort Actions.

25A.23[2][f] Party Seeking Fees Is Not Prevailing Party.

25A.23[2][g] Attorney's Fees Should Be Apportioned.

25A.23[2][h] Fees As Costs in Limited Civil Case May Be Denied If Judgment Could Have Been Rendered in Small Claims Court.

25A.24 Court May Not Condition Continuance on Payment of Fees.

25A.25 CHECKLIST: Appealing Award of Attorney's Fees.

25A.26 Options and Strategies.

25A.27 Standard of Review Is Typically Abuse of Discretion.

25A.27[1] Award of Attorney's Fees Normally Reviewed for Abuse of Discretion.

25A.27[2] Determination of Abuse of Discretion Requires Finding That Decision Effected Injustice.

25A.27[3] Burden Is on Appellant to Establish Abuse of Discretion.

25A.27[4] Award of Private Attorney General Fees Is Reviewed for Abuse of Discretion.

25A.28 De Novo Review Is Appropriate When Requiring Determination of Statutory Construction and Question of Law.

25A.29 Appellate Court May Review Entitlement to and Amount of Fee Award.

25A.30 Failure to Raise Proper Objection to Fees Waives Issue on Appeal.

25A.31 Grounds for Appeal of Fee Award Include Unclear Basis for Award.

25A.31[1] Grounds Stated in Opposition to Motion for Fees May Be Raised on Appeal.

25A.31[2] Grounds Include Trial Court's Failure to Adequately Consider All Factors.

25A.31[3] Grounds Include Unclear Basis for Award of Fees.

25A.32 Reversal of Underlying Judgment Requires Reversal of Connected Private Attorney General Fee Award.

25A.33 Bringing Motion for Attorney's Fees on Appeal After Judgment.

25A.33[1] Timing Requirements Apply When Court Determines Entitlement to Fees and/or Amount of Fees.

25A.33[2] Notice of Motion Must Be Served and Filed Within Time for Serving and Filing Memorandum of Costs.

25A.33[3] Parties May Stipulate to Extend Time to Bring Motion Up to 60 Days.

25A.34 Notice of Motion and Motion to Determine Prevailing Party on Contract and/or to Fix Amount of Attorney's Fees to Be Awarded As Costs.

25A.35 Notice of Motion and Motion to Recover Attorney's Fees on Private Attorney General Theory.

25A.36 Order Awarding Attorney's Fees on Private Attorney General Theory.



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Chapter 25A Recovering Attorney's Fees From Opposing Party
I. STRATEGY

2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.01

25A.01 Scope.

This chapter covers:

- Entitlement to costs as a prevailing party [see 25A.07; Form: see 25A.34].
- Entitlement to fees under private attorney general doctrine [see 25A.11; Forms: see 25A.35, 25A.36].
- Entitlement to attorney's fees under "common fund" and "substantial benefit" theories [see 25A.12 -25A.14].
- Local court rules providing for recovery of attorney's fees [see 25A.18].
- Calculating attorney's fees [see 25A.17].
- Seeking recovery of attorney's fees as costs after trial, and bringing motion to recover fees [see 25A.19, 25A.20].
- Attacking award of attorney's fees sought by opposing party, and responding to motion to recover fees [see 25A.21 -25A.24].
- Appealing award for attorney's fees [see 25A.25 -25A.32].
- Bringing motion for attorney's fees on appeal after judgment [see 25.33].

Core Statutes:

CC § 1717; CCP §§ 1021-1031

 Cross Reference:

Discussion of collecting attorney's fees from the client, see Ch. 25, Collecting Attorney's Fees From Client.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil

Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Civil

Procedure Appeals Appellate Jurisdiction State Court Review Governments Courts Rule Application & Interpretation



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Chapter 25A Recovering Attorney's Fees From Opposing Party
I. STRATEGY

2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.02

25A.02 Objective and Strategy.

The most common procedure for obtaining an award of attorney's fees from the opposing party is as the prevailing party in an action, if those fees are otherwise authorized [see *CCP* §§ 1032(b), 1033.5(a)(10)].

► **Cross Reference:**

Recovering fees as prevailing party, see 25A.07.

That is, a party that is potentially entitled to recover fees from the opposing party must understand that fees are allowed only if provided by contract, statute, or other law. Counsel should therefore be familiar with statutes and local court rules that allow fees applicable to the case [see, e.g., *CC* §§ 52, 52.1, 55.1 (discrimination)]. If planning to request fees under the private attorney general doctrine (*CCP* § 1021.5) or an equitable doctrine such as the "common fund" theory, before trial counsel should be aware of the requirements for recovery of fees. For example, a shareholder derivative suit is likely to result in a fee award under the "substantial benefit" doctrine if requirements such as resulting significant benefits exist [see, e.g., *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 397, 25 CR3d 514]. However, counsel should not presume that a shareholder derivative suit will result in a fee award.

► **Cross Reference:**

Bases to recover attorney's fees, see 25A.05 -25A.14, 25A.18.

Before and during trial, counsel should keep careful billing records. Attorney's fees may be recovered from the opposing party only to the extent that the amounts and items are reasonable. The primary method for establishing the amount of "reasonable" attorney's fees is the "lodestar method" [see *In re Vitamin Cases* (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358].

► **Cross References:**

Calculating attorney's fees by lodestar method, see 25A.17[1].

Requirement of reasonableness of costs generally, see Ch. 24, Costs.

Counsel should also remain aware of the procedures of filing a cost memorandum and filing a noticed motion to recover

fees, and must keep the deadline dates in mind as the trial ends [see, e.g., *Cal Rules Ct, Rule 3.1702(a), (b)*].

► **Cross References:**

Filing memorandum and motion, see 25A.19, 25A.20.

Further discussion relating to costs, see Ch. 24, Costs.

Counsel for each side should begin planning before trial for the avoidance of liability for costs, including attorney's fees.

► **Cross Reference:**

Discussion of costs, see Ch. 24, Costs.

A party that is potentially liable for the opposing party's fees must oppose any request or motion for fees in a timely manner. Whenever a request for an award of fees is made, in addition to questioning the entitlement itself, opposing counsel should carefully analyze the amounts sought and the items mentioned, particularly if multiple law firms were involved and are seeking fees. In that case, counsel should, for example, question any possibility of duplicate billing or padding [*Graham v. DaimlerChrysler Corp. (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140*]. As with all requested costs, attorney's fees must be reasonable, and may always be opposed on that ground. Counsel should object at the earliest possible opportunity, and file a response to a motion for fees if appropriate.

► **Cross References:**

Analyzing costs and fees, see 25A.17, 25A.23.

Further discussion of costs, see Ch. 24, Costs.

If an appeal is necessary, the standard of review is usually that of abuse of discretion, and an appellate court will generally defer to the decision of the trial court [see *Graham v. DaimlerChrysler Corp. (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140*]. Counsel should be prepared to raise issues brought up in the trial court, and to show why the ruling was an abuse of discretion if that standard applies.

► **Cross Reference:**

Issues on appeal, see 25A.27, 25A.28.



Strategic Point:

Counsel defending a party in a matter in which attorney's fees may be awarded is well advised to try, at the earliest stage, to bring closure to the matter. In all too many instances, such matters take on a life of their own in which the attorney's fees become the battleground and exceed, sometimes astronomically, the underlying value of the case.

Legal Topics:

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

Civil ProcedureClass ActionsClass CounselFeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesGovernmentsCourtsRule Application & Interpretation



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Cathcart Durie McGee Prather

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Chapter 25A Recovering Attorney's Fees From Opposing Party
II. GROUNDS FOR OBTAINING ATTORNEY'S FEES FROM OPPOSING PARTY

2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.03

25A.03 CHECKLIST: Grounds for Obtaining Attorney's Fees From Opposing Party.

☐ Determine if client as prevailing party is entitled to attorney's fees as costs.

☐ Determine that client is prevailing party.

☐ Determine that client is entitled to attorney's fees pursuant to one of the following:

☐ Contract;

☐ Statute; or

☐ Law.

Authority:

CCP §§ 1032(b), 1033.5(a)(10)

Discussion:

See 25A.05, 25A.07

Form:

See 25A.34

☐ Costs must be allowable if incurred, whether or not paid.

☐ Costs must be reasonably necessary to conduct of litigation.

- ☐ Amount of requested fees must be reasonable.

Authority:

CCP § 1033.5(c)(1)-(3)

Discussion:

See 25A.07

- ☐ Determine entitlement to attorney's fees pursuant to contract.

- ☐ Action is on contract.
- ☐ Contract provides for attorney's fees.
- ☐ Client is entitled to attorney's fees under fee provision.

Authority:

CC § 1717

Discussion:

See 25A.08

- ☐ Determine entitlement to fees under specific statute authorizing fees.

- ☐ For example, seek recovery of attorney's fees in action to recover damages to personal or real property.

- ☐ Client is successful plaintiff.
- ☐ Action resulting from trespass on lands used for livestock.

Authority:

See, e.g., *CCP § 1021.9*

Discussion:

See 25A.10

- ☐ Fees may be recovered for frivolous actions or delaying tactics of opposing party.

Authority:

See *CCP § 128.7(b), (c)*

Discussion:

See 25A.10[11]

☐ Determine entitlement to attorney's fees under private attorney general theory.

- ☐ Client is successful plaintiff.
- ☐ Case resulted in enforcement of important right affecting public interest.
- ☐ Case conferred significant benefit on general public or large class of persons.
- ☐ Award is appropriate based on either necessity and financial burden of private enforcement, or enforcement by one public entity against another public entity.
- ☐ Interest of justice requires that fees not be paid out of recovery.

Authority:

CCP § 1021.5

Discussion:

See 25A.11

Forms:

See 25A.35, 25A.36

☐ Determine entitlement to attorney's fees under "common fund" theory.

- ☐ Client is successful plaintiff.
- ☐ Litigation created or preserved common fund that benefits many persons.
- ☐ Benefit accrues to proper class of beneficiaries, e.g., shareholders in derivative suit.

Authority:

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y (1975) 421 US 240, 257, 95 S Ct 1612, 44 L Ed2d 141

Discussion:

See 25A.12, 25A.13

☐ Determine entitlement to attorney's fees under "substantial benefit" theory.

- ☐ Client is successful plaintiff.
- ☐ Judgment conferred substantial benefit on ascertainable class.

- ☐ Benefit accrues to proper class of beneficiaries, e.g., shareholders in derivative suit.

Authority:

Serrano v. Unruh (1982) 32 C3d 621, 629, 186 CR 754, 652 P2d 985

Discussion:

See 25A.12, 25A.14

- ☐ Determine entitlement to attorney's fees under applicable local court rules.

☐ For example, in Orange County, seek recovery of attorney's fees on default judgment in action on contract providing for fees.

☐ Request fees under local court rule according to procedure regarding those fees, if specific procedures are provided.

Authority:

See, e.g., Orange Super Ct Rules, Rule 366(A)

Discussion:

See 25A.06, 25A.18

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil

Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Civil Procedure Remedies Costs &

Attorney Fees Attorney Expenses & Fees Statutory Awards Governments Courts Rule Application & Interpretation Legal

Ethics Client Relations Attorney Fees Fee Agreements



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.04

25A.04 Options and Strategies.

Counsel should clearly understand the scope of available theories allowing an award of attorney's fees. The most common ground for obtaining fees at the conclusion of a case is as costs awarded to the prevailing party, providing that the fees are otherwise allowed [*see CCP §§ 1032(b), 1033.5(a)(10)*].

➤ **Cross References:**

Fees to prevailing party, *see* 25A.07.

Recovery of costs to prevailing party, *see* Ch. 24, Costs.

From the outset of the case, counsel should be familiar with any statutory provisions that allow or limit the recovery of fees in the particular case, for example, with respect to an implied-indemnity claim [*see, e.g., CCP § 1021.6*]. Counsel should therefore comply with any prerequisites for the award of fees, to assure that he or she will be entitled to recover them.

➤ **Cross Reference:**

Recovery of attorney's fees in specific cases, *see* 25A.10.

During the course of litigation, counsel should keep careful billing records, itemizing each entry and realizing that only reasonable fees will be awarded [*see In re Vitamin Cases (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358*].



Strategic Point:

Do not "block bill"; that is, do not aggregate time on multiple tasks into a single entry. The reason for this is that if counsel is awarded fees, it may be necessary to justify how much time was spent on particular tasks.

➤ **Cross References:**

Calculating fees, *see* 25A.17.

Requirement of reasonableness of costs generally, see Ch. 24, Costs.

Counsel should therefore be aware of the grounds for opposing an award of fees, and avoid documentation of fees vulnerable to attack.

 Cross Reference:

Responding to fee motions, see 25A.23.

As with all procedural aspects of the trial, counsel should consult local court rules that may allow or disallow fees in a particular case.

 Cross Reference:

Impact of local rules, see 25A.06, 25A.18.

Consider:

Counsel representing a party in an action in which attorney's fees are being requested by the opposing party should keep in mind that some, but not all, bases for the recovery of attorney's fees, are applied mutually, even if not so stated. For example, a contractual provision providing for the recovery of attorney's fees to a "prevailing plaintiff" may provide for fees to the "prevailing defendant" even if not so stated [*see, e.g., CC § 1717(a)* which provides for the recovery of attorney's fees by a prevailing party whether he or she is the party specified in the contract or not].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Governments Courts Rule Application & Interpretation



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.05

25A.05 Party May Recover Attorney's Fees Only If Allowed by Contract, Statute, or Other Law.

25A.05[1] Under General Rule, Each Party Pays Its Own Attorney's Fees. As a general proposition, each party in litigation must pay its own attorney's fees. This is known as the "American rule" [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 557, 3 CR3d 419 ; see also CCP § 1021; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y* (1975) 421 US 240, 95 S Ct 1612, 44 L Ed2d 141] .

► **Cross Reference:**

Discussion of American rule, see *California Forms of Pleading and Practice*, § 174.50 et seq. (Matthew Bender).

Exception:

This rule has statutory exceptions, and courts have created several exceptions pursuant to their inherent equitable powers. Exceptions to the American rule created under the courts' equitable powers include the "common fund" and "substantial benefit" doctrines [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 557, 3 CR3d 419] .

► **Cross Reference:**

Discussion of common fund and substantial benefit doctrines, see 25A.12 -25A.14.

25A.05[2] Recovery of Fees Is Generally Left to Agreement Absent Statutory Provision for Fees. Except with regard to attorney's fees specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. However, parties to actions or proceedings are entitled to their costs, as provided in the Code of Civil Procedure [CCP § 1021].

Example--Statutory Provision Bars Fees:

In an antitrust action the attorney's fee provision under the Cartwright Act (B&P § 16750(a)) provides a unilateral fees clause, referring to an award to a prevailing party who is "any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter." This provision's plain language does not create any reciprocal right on the part of a prevailing *defendant* to

such an award of "a reasonable attorneys' fee together with the costs of the suit," as incurred in *defense* of an action [*Carver v. Chevron U.S.A., Inc. (2002) 97 CA4th 132, 144-148, 118 CR2d 569*] .

➡ **Cross Reference:**

Fee agreements, see 25.05.

CCP § 1021 does not independently authorize recovery of attorney's fees. Rather, consistent with CCP § 1033.5(a)(10), it recognizes that attorney's fees incurred in prosecuting or defending an action may be recovered as costs only when they are otherwise authorized by statute or the parties' agreement [*Carver v. Chevron U.S.A., Inc. (2002) 97 CA4th 132, 143-144, 118 CR2d 569*] .

➡ **Cross References:**

Authorization for attorney's fees, see 25A.07[2].

Further discussion, see *California Forms of Pleading and Practice*, § 174.10 *et seq.* (Matthew Bender).

Exception:

In certain circumstances, attorney's fees may be awarded according to equitable considerations, under the "common fund" or "substantial benefit" theory.

➡ **Cross Reference:**

Common fund and substantial benefit theories, see 25A.12 -25A.14.

25A.05[3] Local Court Rule May Provide That Attorney's Fees Are Recoverable Only If Allowed Under Parties' Agreement. Local court rules may provide that in certain types of cases attorney's fees are not recoverable unless determined by agreement [see, e.g., Alameda Super Ct Rules, Div. VII, Probate, Rule 12.10.11 (regarding services performed in connection with filing spousal property petition in probate court)].

Legal Topics:

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

Civil ProcedureClass ActionsClass CounselFeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsGovernmentsCourtsRule Application & InterpretationInsurance LawClaims & ContractsUnjust Enrichment



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.06

25A.06 Local Court Rules May Provide for Recovery of Attorney's Fees.

25A.06[1] Review Local Court Rules. Before seeking attorney's fees, review local rules of court.

25A.06[2] Party May Recover Attorney's Fees As Travel Expenses When Opposing Party Fails to Appear by Telephone When Required. In Sacramento County civil law and motion proceedings, parties are encouraged to appear by telephone at most hearings and conferences. Failure to appear by telephone may in the court's discretion be considered in awarding or denying attorney's fees for travel time [Sacramento Super Ct Rules, Rule 3.00(J)].

25A.06[3] Party May Recover Attorney's Fees in Family Law Cases. Local court rules may provide for recovery of attorney's fees in family law cases, such as the following:

- In a family law case, the court, after making the proper determination based on the parties' abilities and needs, must award reasonable attorney's fees to a custodial parent or other person to whom payments should be made in any action to enforce an existing order for child support [see *Fam Code* § 3557(a)(1)(A)].
- In Los Angeles County, any request in excess of \$1,000 in attorney's fees and court costs must be accompanied by a separate written fee declaration signed by the attorney [see Los Angeles Super Ct Rules, Rule 14.10]. For all trials when attorney's fees, expert's fees, and costs are at issue, the party seeking fees and costs must comply with Los Angeles Super Ct Rules, Rule 14.10 [Los Angeles Super Ct Rules, Rule 14.15].
- In San Diego County, when awarding attorney's fees in support enforcement actions, including contempt matters, the court is governed by *Fam Code* § 3557 [San Diego Super Ct Rules Div V, Rule 5.47(I)].

25A.06[4] Local Court Rules May Provide for Attorney's Fees in Probate Cases. Local court rules may provide for attorney's fees in probate cases. For example, in Alameda County, attorney's fees in spousal property proceedings are not set by the court unless there is a dispute concerning the reasonableness of the fees [see Alameda Super Ct Rules, Div. VII, Probate, Rule 12.3.4, citing *Prob Code* § 13660; Alameda Super Ct Rules, Div. VII, Probate,

Rules 12.10 (general standards concerning reasonableness of attorney's fees), 12.10.11 (determination of fees in spousal property proceedings)].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Travel Expenses Governments Courts Rule
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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.07

25A.07 Prevailing Party Is Entitled to Attorney's Fees As Costs When Fees Are Otherwise Authorized.

25A.07[1] Prevailing Party Is Entitled to Costs Except As Otherwise Provided by Statute. 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)]. The identification of the party entitled to a fee award must be determined by the final result of the litigation, i.e., after conclusion of the appeal if an appeal is taken [*Butler-Rupp v. Lourdeaux* (2007) 154 CA4th 918, 928, 65 CR3d 242] . The term "prevailing party" does not include a plaintiff who prevails on the issue of a defendant's liability but recovers nothing from the defendant because the judgment against the defendant is offset by the amount of plaintiff's settlement with codefendants before trial [*Goodman v. Lozano* (2010) 47 C4th 1327, 1333-1338, 104 CR3d 219, 223 P3d 77] .

► **Cross References:**

Form, see 25A.34.

Discussion of costs, see Ch. 24, Costs.

25A.07[2] Attorney's Fees As Costs May Be Based on Contract, Statute, or Law. Attorney's fees are allowable as costs under CCP § 1032(b) when authorized by any of the following [see CCP § 1033.5(a)(10); *Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 143, 118 CR2d 569] :

- Contract [CCP § 1033.5(a)(10)(A)].
- Statute [CCP § 1033.5(a)(10)(B)].
- Law [CCP § 1033.5(a)(10)(C)].

Attorney's fees awarded pursuant to CC § 1717 are allowable costs under CCP § 1032 as authorized by CCP § 1032(a)(10)(A) [CCP § 1033.5(c)].

► **Cross References:**

Discussion of *CC § 1717*, see 25A.05.

Discussion of *Cal Rules Ct, Rule 3.1702*, see 25A.20.

Discussion of *CCP §§ 1032, 1033.5* generally, see Ch. 24, Costs.

CCP § 1021 does not independently authorize recovery of attorney's fees. Rather, consistent with *CCP § 1033.5(a)(10)*, *CCP § 1021* recognizes that attorney's fees incurred in prosecuting or defending an action may be recovered as costs only when they are otherwise authorized by statute or by the parties' agreement [*Santisas v. Goodin* (1998) 17 C4th 599, 607, n4, 71 CR2d 830, 951 P2d 399 ; *Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 143-144, 118 CR2d 569] .

When any California statute refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded, and are allowable as costs pursuant to *CCP § 1033.5(a)(10)(B)* [*CCP § 1033.5(c)(5)*].

25A.07[3] "Statute" Includes City Ordinance. A city ordinance passed by a municipality is considered a statute, and has the same force within its corporate limits as a statute passed by the Legislature itself throughout the state [*City of Santa Paula v. Narula* (2003) 114 CA4th 485, 492, 8 CR3d 75] . A city ordinance may properly authorize an award of attorney's fees [*Woodland Park Management, LLC v. City of East Palo Alto Rent Stabilization Board* (2010) 181 CA4th 915, 919, 104 CR3d 673] .

Example:

A city ordinance in Santa Paula allows the city to collect attorney's fees incurred in foreclosing a lien on real property [*City of Santa Paula v. Narula* (2003) 114 CA4th 485, 488, n1, 8 CR3d 75 ("Just as '... a rose is a rose ...' so is an ordinance a statute when it permits recovery of attorney's fees")].

25A.07[4] Court's Award of Costs Is Subject to Conditions.

25A.07[4][a] Costs Are Allowable If Incurred, Whether or Not Paid. Costs are allowable if incurred, whether or not paid [*CCP § 1033.5(c)(1)*].

25A.07[4][b] Costs Must Be Reasonably Necessary to Litigation, Not Merely Convenient. Allowable costs must be reasonably necessary to the conduct of the litigation, rather than merely convenient or beneficial to its preparation [*CCP § 1033.5(c)(2)*; *Ladas v. California State Auto. Ass'n* (1993) 19 CA4th 761, 775-776, 23 CR2d 810] .

25A.07[4][c] Amount of Court-Awarded Costs Must Be Reasonable. Allowable costs must be reasonable in amount [*CCP § 1033.5(c)(3)*]. The primary method for establishing the amount of "reasonable" attorney's 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 [*In re Vitamin Cases* (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358] .

 Cross Reference:

Discussion of lodestar method, see 25A.17.

25A.07[4][d] Costs Not Expressly Allowed or Denied Are Subject to Court's Discretion. Items not mentioned in *CCP § 1033.5* and items assessed on application may be allowed or denied in the court's discretion [*CCP § 1033.5(c)(4)*].

 Cross Reference:

Discussion of costs, see Ch. 24, Costs.

25A.07[5] Claim Not Based on Court's Schedule of Attorney's Fees Bears Burden of Proof. Any claim not

based on the court's established schedule of attorney's fees for actions on a contract must bear the burden of proof [CCP § 1033.5(c)(5)]



Strategic Points:

- This provision is limited to attorney's fees being sought in an action in which such fees are provided by statute. The practical implication is that the party seeking costs will need to compile information regarding the prevailing rates in the pertinent legal community for consideration by the court. This is contrasted to having a fee schedule providing prima facie evidence of what that calculation should be.
- This provision relates only to situations in which the fees sought are based on court schedules for fees in certain cases, and when sought as costs. It appears that the burden of proof means such evidence that would show that the fees in excess of the court's schedule are reasonable. That may require, for example, written fee agreements and agreed payments by the client of fees that are being reimbursed as costs, or evidence of the attorney's standard rates for similar cases, or some evidence of a reasonable standard among attorneys in the jurisdiction for such cases. In any case, you should always maintain adequate, contemporaneous time records that reflect the time actually spent on relevant tasks.

25A.07[6] Attorney's Fees Based on Statute May Be Fixed on Noticed Motion, When Statement of Decision Is Rendered, in Costs Affidavit, or on Entry of Default Judgment. Attorney's fees allowable as costs pursuant to CCP § 1033.5(a)(10)(B) (attorney's fees authorized by statute) may be fixed as follows [CCP § 1033.5(c)(5)]:

- On a noticed motion [CCP § 1033.5(c)(5)(A)];



Cross References:

Discussion of notice motion, see 25A.20.

Form, see 25A.34.

- At the time a statement of decision is rendered [CCP § 1033.5(c)(5)(B)];
- On application supported by affidavit made concurrently with a claim for other costs [CCP § 1033.5(c)(5)(C)]; or
- On entry of default judgment [CCP § 1033.5(c)(5)(D)].



Cross Reference:

Discussion of process, see *California Forms of Pleading and Practice*, § 174.50 et seq., Ch. 205, Defaults and Default Judgments, Ch. 529, Statement of Decision (Matthew Bender).

25A.07[7] Attorney's Fees Based on Contract or Law Are Determined on Noticed Motion or Entry of Default Judgment Unless Otherwise Stipulated. Attorney's fees allowable as costs pursuant to CCP § 1033.5(a)(10)(A) or (C) (attorney's fees authorized by contract or law, respectively) must be fixed either on a noticed motion or on entry of a default judgment, unless otherwise provided by stipulation of the parties [CCP § 1033.5(c)(5); see *Chinn v. KMR Property Management* (2008) 166 CA4th 175, 194, 82 CR3d 586 (noticed motion required, not prayer in complaint)].

► **Cross References:**

Discussion of noticed motion, see 25A.20.

Detailed coverage of motion process, see *California Forms of Pleading and Practice*, § 174.50 et seq., Ch. 205, Defaults and Default Judgments (Matthew Bender).

Strategic Point:



As long as the opposing party is not prejudiced, the trial court has the authority to provide a party with relief for a late filing or for a filing that is not a noticed motion [see *Gunlock Corp. v. Walk on Water, Inc.* (1993) 15 CA4th 1301, 1304-1305, 19 CR2d 197]. The better practice is to file the motion in a timely manner.

► **Cross References:**

Timing requirements of *Cal Rules Ct*, Rule 3.1702, not jurisdictional, see 25A.20[5].

Discussion of costs, see Ch. 24, Costs.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.08

25A.08 Party May Recover Attorney's Fees Pursuant to Contract.

25A.08[1] Party May Recover Fees in Action on Contract That Specifically Provides for Award of Fees. In any action on a contract, when the contract specifically provides that attorney's fees and costs incurred to enforce that contract must be awarded either to one of the parties or to the prevailing party, the party who is determined to be the prevailing party on the contract is entitled to reasonable attorney's fees in addition to other costs. This provision applies whether the prevailing party is the party specified in the contract or not [CC § 1717(a); *Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 144, 118 CR2d 569].

Example:

In a homeowners' action against the homeowners' association, CC&R's permitted recovery of attorney's fees by the prevailing party in any action to enforce their provisions: "In the event action is instituted to enforce any of the provisions contained in the Declaration, the party prevailing in such action shall be entitled to recover from the other party thereto as part of the judgment, reasonable attorney's fees and costs of such suit" [see *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 CA4th 847, 852, 26 CR3d 113].

25A.08[2] Reasonable Fees Must Be Fixed by Court As Element of Costs. Reasonable attorney's fees must be fixed by the court, and must be an element of the costs of suit [CC § 1717(a)].

25A.08[3] Attorney's Fees Under CC § 1717 Are Not Subject to Waiver. Attorney's fees provided for by CC § 1717 are not subject to waiver by the parties to any contract that is entered into after the statute's effective date (1968). Any provision in any contract that provides for a waiver of attorney's fees is void [CC § 1717(a)].

25A.08[4] Determination of "Prevailing Party" Under CC § 1717.

25A.08[4][a] Prevailing Party Is Determined by Noticed Motion. The court, on notice and motion by a party, determines who is the party prevailing on the contract for purposes of CC § 1717, whether or not the suit proceeds to final judgment. Except as provided in CC § 1717(b)(2), the party prevailing on the contract is the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of CC § 1717 [CC § 1717(b)(1)].

**Strategic Point:**

The term "greater relief" is not specifically defined and its determination is within the court's discretion in a particular action. The term implies a monetary evaluation of the relief provided, and the party with the net gain would seem to have received the "greater relief." However, there are sometimes close cases, when, for example, one party sues to enforce an easement and the other seeks to obtain damages in connection with traffic in and out of a piece of landlocked property. There may be an award of damages in excess of the value of the easement, but if the easement permits access to landlocked property, then that "win" could be priceless, and would seem to have the greater value [see, e.g., *Sears v. Baccaglio* (1998) 60 CA4th 1136, 1143, 70 CR2d 769 (party recovering "greater relief" does not necessarily mean party receiving greater monetary judgment; in event one party received earlier payments, settlements, insurance proceeds, or other recovery, court has discretion to determine whether party required to pay nominal net judgment is nevertheless prevailing party entitled to fees); *Acree v. General Motors Acceptance Corp.* (2001) 92 CA4th 385, 402-403, 112 CR2d 99 (trial court properly used comparative approach, not simply "net monetary recovery" standard, in determining who recovered greater relief)].

Thus, if both sides have won something, you generally net it out [see *Silver Creek, LLC v. Blackrock Realty Advisors, Inc.* (2009) 173 CA4th 1533, 1538-1541, 93 CR3d 864]. Keep in mind that this can become complicated if one side has obtained injunctive or other non-monetary relief, because the court must assign a value to that relief to compare it to the relief obtained by the other side.

CC § 717 does not support an award of fees to the prevailing party on appeal, but only to the prevailing party in the lawsuit [*Wood v. Santa Monica Escrow Co.* (2009) 176 CA4th 802, 808, 97 CR3d 909] .

**Cross Reference:**

Form, see 25A.34.

Use of the definition of "prevailing party" in CC § 1717(b)(1) is mandatory. It cannot be avoided or altered by contract; contractual provisions conflicting with it are void [*Wong v. Thrifty Corp.* (2002) 97 CA4th 261, 264, 118 CR2d 276] .

25A.08[4][b] No Prevailing Party When Action Is Voluntarily Dismissed or Dismissed Pursuant to Settlement. When a contract action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there is no prevailing party for purposes of CC § 1717 [CC § 1717(b)(2); see, e.g., *Ford Motor Credit Company v. Hunsberger* (2008) 163 CA4th 1526, 1531-1533, 78 CR3d 661].

Distinguish:

- A settlement agreement that provides that the trial court will determine the prevailing party in the action, and the amount of the attorney's fee award, if any, is valid and enforceable [*Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 CA4th 773, 784-786, 113 CR2d 363 (party waived its rights under CC § 1717 by entering into settlement that reserved issue for court)].
- CC § 1717(b)(2) does not apply if a party seeks attorney's fees under an independent fee-shifting statute that allows fees even without a contractual fee provision. CC § 1717(b)(2) concerns only attorney's fee provisions in contracts, and limits the "prevailing party" specifically for purposes of that section [see, e.g., *Parrott v. Mooring Townhomes Assn., Inc.* (2003) 112 CA4th 873, 879-880, 6 CR3d 116] .

25A.08[4][c] Defendant Is Prevailing Party If Defendant Deposits Full Amount Owed After Tendering Amount to Plaintiff. When the defendant alleges in the answer that he or she tendered to the plaintiff the full amount to which the plaintiff was entitled, and then deposits in court for the plaintiff the amount so tendered, and this allegation is found to be true, the defendant is deemed to be a party prevailing on the contract within the meaning of *CC § 1717* [*CC § 1717(b)*].

When a deposit has been made, the court must, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount must be allocated to the parties in the same proportion as the original funds are allocated [*CC § 1717(b)*].

25A.08[5] Some Courts Allow Recovery of Costs Under *CC § 1717* for Items Not Permitted Under *CCP § 1033.5*. Some courts have allowed litigants to expand the definition of "costs" in *CC § 1717* contractually to include items not permitted under *CCP § 1033.5* [see, e.g., *Bussey v. Affleck* (1990) 225 CA3d 1162, 1164-1166, 275 CR 646 (when contract obligated party "to pay all costs and expenses of collection including reasonable attorneys' fees," attorney's disbursements, e.g., for expert fees and photocopying, were arguably recoverable)]. However, other courts have rejected that expansive view, holding that *CC § 1717* limits recovery of costs pursuant to contract to those allowed under *CCP § 1033.5* [see, e.g., *Fairchild v. Park* (2001) 90 CA4th 919, 929-930, 109 CR2d 442 ; see also *Santisas v. Goodin* (1998) 17 C4th 599, 616, 71 CR2d 830, 951 P2d 399 ("The legislative history of section 1717 ... generally reflects a legislative intent to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions and to eliminate distinctions based on whether recovery was authorized by statute or by contract. A holding that in contract actions there is still a separate contractual right to recover fees that is not governed by section 1717 would be contrary to this legislative intent.")].

➡ **Cross Reference:**

Discussion of costs, see Ch. 24, Costs.

25A.08[6] Trial Court Need Not Add Potential Fee Award Under *CC § 1717* to Damage Award Before Determining Whether Judgment Exceeds Jurisdictional Limits. Costs may be denied if the judgment could have been rendered in a limited civil case, but the case was not so filed [see *CCP § 1033*].

➡ **Cross Reference:**

Discussion of costs, see Ch. 24, Costs.

The trial court is not required to add a potential award of attorney's fees, pursuant to *CC § 1717*, to the damage award before determining whether or not the prevailing party has recovered a judgment in excess of jurisdictional limits. However, that does not mean that the court need not consider the amount of reasonable fees or costs claimed when exercising its discretion pursuant to *CCP § 1033* [*Dorman v. DWLC Corp.* (1995) 35 CA4th 1808, 1815, 42 CR2d 459] .

The Legislature intended that an award of attorney's fees pursuant to *CC § 1717* should be in harmony with the statutory scheme relating to costs contained in *CCP § 1032 et seq.* Therefore, discretion to award fees pursuant to *CC § 1717* is controlled by the provisions of *CCP § 1033* when the primary damages awarded are less than the jurisdictional limit of a court of lesser jurisdiction [*Dorman v. DWLC Corp.* (1995) 35 CA4th 1808, 1814-1815, 42 CR2d 459] .

➡ **Cross Reference:**

Discussion of costs, see Ch. 24, Costs.

25A.08[7] Net Amount of Damages Is Adjusted When Action Seeks Relief in Addition to Contract Damages and Other Parties Are Awarded Damages. In an action that seeks relief in addition to that based on a contract, if the party prevailing on the contract has damages awarded against it on causes of action not on the contract, the amounts

awarded to the party prevailing on the contract under *CC* § 1717 must be deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under *CC* § 1717 exceeds the amount of damages awarded the party not prevailing on the contract, the net amount must be awarded the party prevailing on the contract; and judgment may be entered in favor of the party prevailing on the contract for that net amount [*CC* § 1717(c)].

25A.08[8] *CC* § 1717 Provides Reciprocal Right to Attorney's Fees.

25A.08[8][a] Right to Attorney's Fees Is Usually Reciprocal. Under *CC* § 1717, if a contract gives one party the right to recover attorney's fees in an action arising out of the contract, the other party, if it prevails, is also entitled to fees, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract [*Kachlon v. Markowitz* (2009) 168 CA4th 316, 346-347, 85 CR3d 532].

A party claiming fees under *CC* § 1717 must establish that the opposing party actually would have been entitled to receive fees if he or she had been the prevailing party [*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 899, 76 CR3d 325] .

Example:

In one case between a contractor and subcontractor, because the subcontract authorized the contractor to recover from the subcontractor "costs of effecting compliance with the contract," and specifically named attorney's fees as a recoverable cost, *CC* § 1717 made this provision reciprocal by operation of law [*Steiny & Co. v. California Elec. Supply Co.* (2000) 79 CA4th 285, 293, 93 CR2d 920] .

Pursuant to *CC* § 1717, parties may not limit recovery of attorney's fees to a particular type of claim, such as failure to pay escrow costs [*Kangarlou v. Progressive Title Co.* (2005) 128 CA4th 1174, 1178, 27 CR3d 754] .

Consider:

Recovery of attorney's fees is limited, pursuant to *CC* § 1717, to situations in which one party would have been liable for attorney's fees had the opposing party prevailed [*Exarhos v. Exarhos* (2008) 159 CA4th 898, 903-907, 72 CR3d 409]. If a party claims a contractual right to attorney's fees, but the contract does not contain such a provision, the opposing party will not be able to recover these fees, even if it prevails in the litigation. That is, a prevailing party is entitled to attorney's fees only if it can prove it would have been liable for fees had the opponent prevailed [*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 CA4th 456, 463-470, 3 CR3d 563 (rejecting application of judicial estoppel doctrine that would allow overly broad rule that when party claims contract allows fees and prevails, it gets fees; when it claims contract allows fees and loses, it must pay fees; i.e., rejecting rule that even if contract does not contain attorney's fee provision, if party claims that it does and loses case, it must pay prevailing party's fees)].

25A.08[8][b] Right to Attorney's Fees Is Not Reciprocal If Relevant Clause Does Not Put Principals on Notice That It Is Fee Clause. If a clause does not put the principals to an agreement on notice that it is an attorney's fees clause, *CC* § 1717 does not give all parties a right to recover attorney's fees [*Paul v. Schoellkopf* (2005) 128 CA4th 147, 152, 26 CR3d 766] .



Strategic Point:

Counsel representing a party seeking to include a fee clause in a contract is advised to make the language as clear as possible, which will help litigation on the meaning of the term which may not be recoverable as "reasonable fees incurred" in subsequent litigation. Further, the fee clause should be easily identifiable. One court has noted the "chronic problem [of] the misuse of attorney fee claims. ... The

question whether a given provision is a fees provision, which one might think was readily ascertainable, results in frequent, protracted, litigation which ties up the courts and parties long after the merits of a decision are settled. Time and again in civil cases, often those with parties willing and able to spend thousands or tens of thousands of dollars on the issue, the fees debate assumes a life of its own. The prospect of court-awarded attorney fees plays a significant part in determining a strategy for initiating or defending litigation. Litigation costs (including the potential fee award) can be enormous, sometimes rivaling or even exceeding the amount involved on the merits. ... Fee litigation has become a specialty of some lawyers and a 'fees phase' of cases is foreordained. This wasteful consumption of judicial resources and client money serves no public purpose and impairs the image of the legal profession" [*M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One* (2003) 111 CA4th 456, 464, 3 CR 3d 563] .

Therefore, when drafting an attorney's fee clause it is helpful to make the clause explicit and a separate part of the agreement. It should begin with a heading that says "Attorney's Fees" and simply state that "in any dispute arising under or related to this agreement, the prevailing party shall be awarded its reasonable attorney's fees and costs." The clause should specify how much the fees will be, how they are to be paid, when they will be due, and any penalties for late payment.

25A.08[8][c] Right to Attorney's Fees Is Not Reciprocal If Fees Constitute Recoverable Loss in Indemnity Agreement. The rule of reciprocity is subject to an exception when the recovery of attorney's fees is authorized as an item of loss or expense in an indemnity agreement or provision. Because an indemnity agreement is intended by the parties unilaterally to benefit the indemnitee, holding it harmless against liabilities and expenses incurred in defending against third-party tort claims (see CC § 2772), application of reciprocity principles would defeat the agreement's purpose. In requiring reciprocity of only provisions that authorize the recovery of attorney's fees "in an action on [the] contract," CC § 1717(a) expressly excludes indemnity provisions that allow the recovery of fees as an element of loss within the scope of the indemnity [*Baldwin Builders v. Coast Plastering Corp.* (2005) 125 CA4th 1339, 1343, 24 CR3d 9; see *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 CA4th 14, 19-23, 82 CR3d 128 (holding that attorney's fees recoverable only for indemnity, not for dispute arising out of contract)] .

25A.08[9] CC § 1717 Applies to Work of In-House Counsel. Attorney's fees may be recovered under CC § 1717 for the work of in-house counsel [*PLCM Group, Inc. v. Drexler* (2000) 22 C4th 1084, 1094-1095, 95 CR2d 198, 997 P2d 511] .

25A.08[10] Although CC § 1717 Does Not Apply to Tort Action, Fee Provision May Encompass Tort Action. CC § 1717 does not apply to tort claims, but rather determines which party, if any, is entitled to attorney's fees on a contract claim only [*Gil v. Mansano* (2004) 121 CA4th 739, 742-743, 17 CR3d 420] . Depending on the language of the applicable contractual attorney's fees clause, it may support an award of fees to a prevailing party whether the litigation was based on tort or contract, if it arose out of a relationship originally created by contract [*Santisas v. Goodin* (1998) 17 C4th 599, 608, 606, 71 CR2d 830, 951 P2d 399 ; *Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 149, 118 CR2d 569] . As to tort claims, the question of whether to award attorney's fees turns on the language of the contractual fee provision, that is: (1) whether the party seeking fees has "prevailed" within the meaning of the provision; and (2) whether the type of claim is within the provision's scope. This distinction between contract and tort claims flows from the fact that a tort claim is not "on a contract" and is therefore outside the ambit of CC § 1717 [*Gil v. Mansano* (2004) 121 CA4th 739, 743, 17 CR3d 420] .

Nevertheless, a broadly phrased contractual attorney's fee provision may support an award to the prevailing party in a tort action. Parties may validly agree that the prevailing party will be awarded fees incurred in any litigation between themselves, whether the litigation sounds in tort or in contract [*Gil v. Mansano* (2004) 121 CA4th 739, 743, 17 CR3d 420] .

25A.08[11] Fees Awarded As Costs May Exceed Fees Actually Incurred If Contract Allows. Reasonable attorney's fees awarded as costs may exceed the fees actually incurred. Attorney's fees may be awarded as costs even if

the prevailing party did not actually incur or become obligated to pay them. *CCP § 1033.5* does not prohibit this practice, and has no bearing on the question whether fees awarded as costs in a particular case must be actually incurred. Consequently, if the contract permits, the prevailing party may recover an amount of fees in excess of those incurred [*Persson v. Smart Inventions, Inc. (2005) 125 CA4th 1141, 1174-1176, 23 CR3d 335*] .



Cross References:

Court fixing of costs, see 25A.08[2].

Discussion of costs, see Ch. 24, Costs.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsVoluntary DismissalsGeneral
OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney
Expenses & FeesAmerican RuleCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable
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Chapter 25A Recovering Attorney's Fees From Opposing Party
II. GROUNDS FOR OBTAINING ATTORNEY'S FEES FROM OPPOSING PARTY

2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.09

25A.09 Party May Recover Attorney's Fees in Contract Action on Book Account.

25A.09[1] Prevailing Party in Action on Book Account May Recover Attorney's Fees. In any action on a contract based on a book account [see *CCP* § 337a (definition)], entered into on or after January 1, 1987, which does not provide for attorney's fees and costs, as provided in *CC* § 1717, the party who is determined to be the party prevailing on the contract is entitled to reasonable attorney's fees, as provided below, in addition to other costs [*CC* § 1717.5(a)].

Exception:

This provision may be superseded by other provision of law, or waived by the parties to an agreement [*CC* § 1717.5(a)].

The prevailing party on the contract is the party who recovered a greater relief in the action on the contract. The court may determine that there is no party prevailing on the contract for purposes of this provision [*CC* § 1717.5(a)].

25A.09[2] Reasonable Fees Are Fixed by Court. Reasonable attorney's fees awarded pursuant to *CC* § 1717.5 for the prevailing party bringing the action on the book account must be fixed by the court in an amount not to exceed the lesser of the following [*CC* § 1717.5(a)]:

- \$800 for book accounts based on an obligation owing by a natural person for goods, moneys, or services that were primarily for personal, family, or household purposes; and
- \$1,000 for all other book accounts to which *CC* § 1717.5 applies; or
- 25 percent of the principal obligation owing under the contract.

25A.09[3] Court Must Award Set Attorney's Fees to Successful Defendant As Prevailing Party. For the party against whom the obligation on the book account was asserted in the action subject to *CC* § 1717.5, if that party is found to have no obligation owing on a book account, the court must award that prevailing party reasonable attorney's fees not to exceed \$800 for book accounts based on an obligation owing by a natural person for goods, moneys, or services that were primarily for personal, family, or household purposes, and \$1,000 for all other book accounts to

which *CC* § 1717.5 applies. These attorney's fees are an element of the costs of the suit [*CC* § 1717.5(a)].

25A.09[4] Attorney's Fees Not Awarded If Written Agreement Exists but Does Not Provide for Fees. If there is a written agreement between the parties signed by the person to be charged, the fees provided by *CC* § 1717.5 may not be imposed unless that agreement contains a statement that the prevailing party in any action between the parties is entitled to the fees provided by *CC* § 1717.5 [*CC* § 1717.5(a)].

25A.09[5] Amount of Attorney's Fees Is Limited by Statute; Default Fees Exceeding Schedule Amount Must Be Reasonable and Necessary. The attorney's fees allowed under *CC* § 1717.5 must be the lesser of (1) the maximum amount allowed by *CC* § 1717.5, (2) the amount provided by any default attorney's fee schedule adopted by the court applicable to the suit, or (3) an amount as otherwise provided by the court [*CC* § 1717.5(b)].

Any claim for attorney's fees pursuant to *CC* § 1717.5 in excess of the amounts set forth in the default attorney's fee schedule must be reasonable attorney's fees, as proved by the party, as actual and necessary for the claim that is subject to *CC* § 1717.5 [*CC* § 1717.5(b)].

25A.09[6] *CC* § 1717.5 Does Not Apply to Insurance Cases Absent Specific Contractual Provision. *CC* § 1717.5 does not apply to an action in which an insurance company is a party. Moreover, an insurance company, surety, or guarantor cannot be liable under *CC* § 1717.5, in the absence of a specific contractual provision, for the attorney's fees and costs awarded a prevailing party against its insured [*CC* § 1717.5(c)].

25A.09[7] *CC* § 1717.5 Does Not Apply to Actions Involving Financial Institutions. *CC* § 1717.5 does not apply to an action in which a bank, savings association, federal association, state or federal credit union, or a subsidiary, affiliate, or holding company of any of those entities, or an authorized industrial loan company, licensed consumer finance lender, or licensed commercial finance lender, is a party [*CC* § 1717.5(c)].

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil

Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Civil

Procedure Remedies Equitable Accountings General Overview Insurance Law General Overview Legal Ethics Client Relations Attorney Fees Fee Agreements



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25A.10 Statutes Provide for Recovery of Attorney's Fees in Specific Cases.

25A.10[1] Prevailing Party May Recover Attorney's Fees on Implied-Indemnity Claim. On motion, a court, after reviewing the evidence in the principal case, may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds all of the following [CCP § 1021.6]:

- The indemnitee through the indemnitor's tort has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person.
- The indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so.
- The trier of fact determined that the indemnitee was without fault in the principal case that is the basis for the action in indemnity, or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, nonsuit, or directed verdict.

25A.10[2] Defendant May Recover Attorney's Fees in Action Arising From Performance of Peace Officer's Duties and Filed in Bad Faith. In an action for damages arising out of the performance of a peace officer's duties, brought against a peace officer [see *Pen Code § 830 et seq.* (definition)], or against a public entity employing a peace officer or in an action for libel or slander [see *CC §§ 45, 46*], the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs. However, the court must find that the action was not filed or maintained in good faith and with reasonable cause [CCP § 1021.7].

25A.10[3] Attorney General May Recover Attorney's Fees As Prevailing Party in Civil Action Enforcing Specified Public Rights. Whenever the Attorney General prevails in a civil action to enforce specified statutes [see, e.g., *CC §§ 52, 52.1, 55.1* (discrimination)], the court must award to the Attorney General all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs. The awards must be paid to the Public Rights Law Enforcement Special Fund [see *CCP § 1021.8(a)*; *Gov Code § 12530*; see also *CCP § 1021.8(b), (c)* (effective dates)].

25A.10[4] Prevailing Party May Recover Attorney's Fees in Certain Actions to Recover Damages to

Personal or Real Property. In an action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, the prevailing plaintiff is entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [CCP § 1021.9].

25A.10[5] Prevailing Plaintiff May Recover Attorney's Fees in Action Regarding Wrongful Interstate Sale of Cigarettes. Notwithstanding any other provision of law, in an action brought in the name of the people of the State of California against any person for failure to comply with the Jenkins Act relating to wrongful interstate sale of cigarettes [15 USC § 375 *et seq.*], the court, to the extent not expressly prohibited by federal law, must award fees and costs, including reasonable attorney's fees, to the people if the people succeed on any claim to enforce the Act. Any attorney's fees awarded under CCP § 1021.10 are in addition to any other remedies or penalties available under all other laws of California [CCP § 1021.10].

25A.10[6] Small Business May Recover Attorney's Fees in Action Involving State Regulatory Agency. In a civil action between a small business or a licensee and a state regulatory agency involving the regulatory functions of a state agency as applied to a small business or a licensee, if the small business or licensee prevails, and if the court determines that the action of the agency was undertaken without any substantial justification, the small business or licensee may, in the discretion of the court, be awarded reasonable litigation expenses in addition to other costs [CCP § 1028.5(a); *see* CCP § 1028.5(c), (d) (definitions), (e) (prevailing party), (f) (exception)].

Funds for expenses and costs must be paid from funds in the regular operating budget of the state regulatory agency when the appropriation encompasses the payment of costs and expenses, and not from unappropriated money in the General Fund [CCP § 1028.5(a)].

"Reasonable litigation expenses" means any expenses not in excess of \$7,500 that the judge finds were reasonably incurred in opposing the agency action, including court costs, expenses incurred in administrative proceedings, attorney's fees, witness fees of all necessary witnesses, and other expenses reasonably incurred [CCP § 1028.5(b)].

 Cross Reference:

Discussion of costs, see Ch. 24, Costs.

25A.10[7] Party May Recover Attorney's Fees in Action for Damages Based on Defendant's Conviction of Felony Offense. In an action for damages against a defendant based on that defendant's commission of a felony offense for which he or she has been convicted, the court may, on motion, award reasonable attorney's fees to a prevailing plaintiff against the defendant who has been convicted of the felony [CCP § 1021.4].

25A.10[8] Plaintiff May Recover Treble Damages, Costs, and Attorney's Fees in Action Against Certain Unlicensed Persons. In an action for injury or damage against certain persons who should have been, but were not, professionally licensed, the successful plaintiff may recover treble damages up to \$10,000 and all costs and attorney's fees from the defendant [*see* CCP § 1029.8(a), (c)].

 Cross Reference:

Discussion of costs, see Ch. 24, Costs.

25A.10[9] Plaintiff May Recover Attorney's Fees in Action for Wages for Labor Performed. In an action for the recovery of wages for labor performed, when the amount of the demand, exclusive of interest, does not exceed \$300, the court must add, as part of the cost, in any judgment recovered by the plaintiff or cross-complainant, an attorney's fee not exceeding 20 percent of the amount recovered [CCP § 1031].

25A.10[10] Statutory Schemes May Provide for Attorney's Fees. Some statutory schemes may provide for the

recovery of attorney's fees.

Examples:

- Attorney's fees are available to a prevailing defendant in a special motion to strike in a SLAPP suit [see CCP § 425.16(c); *Raining Data Corp. v. Barrenechea* (2009) 175 CA4th 1363, 1375, 97 CR3d 196]. A SLAPP (Strategic Litigation Against Public Participation) suit is a cause of action based on the defendant's actions in furtherance of his or her constitutional right of petition or free speech with regard to a public issue. It is subject to a special motion to strike, absent plaintiff's showing that plaintiff will probably prevail on the claim [see CCP § 425.16].

➡ Cross Reference:

Discussion of SLAPP suits, see California Forms of Pleading and Practice, Ch. 375, Motions to Strike (Matthew Bender).

- The Song-Beverly Consumer Warranty Act (CC § 1790 *et seq.*) provides: "If the buyer prevails in an action under this section, the buyer shall be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of such action" [CC § 1794(d); see *Pilimai v. Farmers Insurance Exchange Company* (2006) 39 C4th 133, 143-144, 45 CR3d 760, 137 P3d 939]. The language of the Act is mandatory, providing the buyer "shall" recover costs, including attorney's fees. However, the statute requires payment only of those costs and fees determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of the underlying action [*Levy v. Toyota Motor Sales U.S.A., Inc.* (1992) 4 CA4th 807, 812, 5 CR2d 770].

➡ Cross Reference:

Discussion of Song-Beverly act, see California Forms of Pleading and Practice, Ch. 502, Sales: Warranties (Matthew Bender).

- Discovery statutes provide for the recovery of fees in certain circumstances [see, e.g., CCP § 2033.420 (attorney's fees allowed after request for admission when other party refuses to admit matter later proved to be true); *Garcia v. Hyster Co.* (1994) 28 CA4th 724, 734-737, 34 CR2d 283 (request for fees based on former CCP § 2033(o))].

➡ Cross Reference:

Discussion of requests for admissions, see California Forms of Pleading and Practice, Ch. 196, Discovery: Requests for Admissions (Matthew Bender).

25A.10[11] Party May Recover Attorney's Fees for Frivolous Action or Delaying Tactics of Opposing Party.

CCP § 128.7 sets forth provisions for seeking "sanctions" against the opposing party if certain conditions are met. Sanctions may be appropriate if an action or motion is filed "for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" [CCP § 128.7(b)(1)]. A motion for sanctions under CCP § 128.7 must be made separately from other motions or requests and must describe the underlying conduct that is the basis for the motion [CCP § 128.7(c)(1)]. If sanctions are warranted, the court may award to the prevailing party on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [CCP § 128.7(c)(1)].

A sanction imposed for violating CCP § 128.7(b) will be limited to what is sufficient to deter repetition of the conduct.

The sanction may consist of an order directing payment to the moving party "of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation" [CCP § 128.7(d)]. CCP § 128.7 does not authorize sanctions in the form of attorney's fees to self-represented attorneys [*Musaelian v. Adams* (2009) 45 C4th 512, 516-520, 87 CR3d 475, 198 P3d 560] .



Cross References:

Discussion of CCP § 128.7, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 35.04[3].

Further discussion of sanctions, see *California Forms of Pleading and Practice*, § 510.12 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Civil Procedure Sanctions Baseless Filings Frivolous Lawsuits Governments State & Territorial Governments Licenses Labor & Employment Law Wage & Hour Laws Wage Payments Torts Premises Liability & Property Trespass General Overview



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25A.11 Party May Recover Attorney's Fees Under Private Attorney General Theory.

25A.11[1] Statute Codifies Case Law Allowing Attorney's Fees to Encourage Private Enforcement of Important Public Rights. *CCP § 1021.5* codifies the "private attorney general doctrine" adopted by the California Supreme Court [*Serrano v. Priest* (1977) 20 C3d 25, 141 CR 315, 569 P2d 1303 ; see *Press v. Lucky Stores, Inc.* (1983) 34 C3d 311, 317, 193 CR 900, 667 P2d 704] .

The doctrine is intended to encourage private enforcement of important public rights and to ensure aggrieved citizens have access to the judicial process when statutory or constitutional rights have been violated [*State Water Resources Control Board Cases* (2008) 161 CA4th 304, 311-315, 73 CR3d 842].

➡ **Cross Reference:**

Forms, see 25A.35, 25A.36.

25A.11[2] Successful Party May Move for Attorney's Fees in Action Resulting in Enforcement of Important Right Affecting Public Interest. On motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action that has resulted in the enforcement of an important right affecting the public interest if the following factors exist [*CCP § 1021.5*]:

- A significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons.
- The necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate.
- Such fees should not in the interest of justice be paid out of the recovery, if any.

With regard to actions involving public entities, *CCP § 1021.5* applies to allowances against, but not in favor of, public entities. In addition, no claim must be filed unless one or more successful parties and one or more opposing parties are public entities, in which case no claim will be required to be filed under *Gov Code § 900 et seq.* [*CCP § 1021.5*].

CCP § 1021.5 codifies the private attorney general doctrine of attorney's fees. The fundamental objective of the doctrine is to encourage suits enforcing important public policies by providing substantial fees to successful litigants in such cases [see *Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 565, 21 CR3d 331, 101 P3d 140] .

The private attorney general doctrine is based on the theory that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney's fees, private actions to enforce those important public policies will as a practical matter frequently be infeasible. When public enforcement is possible, public agencies are often unwilling or incapable because of insufficient staffing to protect important rights. Thus, attorney's fees may be recovered by a private party who acts to enforce laws that public agencies are either incapable of enforcing or unwilling to enforce. Similarly, private parties who cooperate with governmental officials in successful public interest litigation, and who contribute significantly to the result, may recover attorney's fees under CCP § 1021.5 [*Nestande v. Watson* (2003) 111 CA4th 232, 239-240, 4 CR3d 18] .

When the prevailing party has not obtained a monetary recovery, an award of attorney's fees against an "opposing" party is proper under CCP § 1021.5 if (1) the action has resulted in enforcement of an important right affecting the public interest; (2) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement makes the award appropriate [*Choi v. Orange County Great Park Corp.* (2009) 175 CA4th 524, 528-534, 96 CR3d 90] .

In a private attorney general case other than a catalyst case [see 25A.11[11]], a plaintiff need not first attempt to settle a matter short of litigation in order to recover attorney's fees under CCP § 1021.5 [*Vasquez v. California* (2008) 45 C4th 243, 251-261, 85 CR3d 466, 195 P3d 1049] .



Cross Reference:

Forms, see 25A.35, 25A.36.

25A.11[3] Important Right Involves Discrimination, Based on Statutory or Common Law. CCP § 1021.5 requires that an award be predicated on the enforcement of an important right affecting the public interest. The right in issue can be predicated on common law. When other statutory criteria are satisfied, CCP § 1021.5 explicitly authorizes the award in any action that has resulted in the enforcement of an important right affecting the public interest regardless of its source: constitutional, statutory, or other [*Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles* (1979) 23 C3d 917, 935, 154 CR 503, 593 P2d 200 ; *Serrano v. Stefan Merli Plastering Co.* (2010) 184 CA4th 178, 186-190, 108 CR3d 777 (providing stare decisis not important right)].

The criterion of an "important" right requires discrimination. The strength or importance to society of the right must be appraised, and the nature of the right in issue must be realistically assessed [*Friends of the Trails v. Blasius* (2000) 78 CA4th 810, 833, 93 CR2d 193 (right to public ownership of public property is important public right)].

The public right must be important and cannot involve trivial or peripheral public policies. The significance of the benefit conferred is determined from a realistic assessment of all the relevant surrounding circumstances. As to the necessity and financial burden of private enforcement, an award is appropriate when the cost of the legal victory transcends the claimant's personal interest; in other words, when the burden of pursuing the litigation is out of proportion to the plaintiff's individual stake in the matter [*Ryan v. California Interscholastic Fed'n* (2001) 94 CA4th 1033, 1044, 114 CR2d 787] .

One justification for allowing fees under CCP § 1021.5 is that it is equitable to impose public interest attorney's fees on parties that have done something to adversely affect the public interest [*Adoption of Joshua S.* (2008) 42 C4th 945, 954, 70 CR3d 372, 174 P3d 192] .

25A.11[4] Claimant's Objective Must Affect "Broader World" or "General Public." To recover private attorney general fees, the claimant's objective in the litigation must go beyond, or transcend, things that concretely, specifically, and significantly affect the litigant, to affect the "broader world" or "general public" [*Bradley v. Perrodin* (2003) 106 CA4th 1153, 1165, 131 CR2d 402 (attorney's fees connected to candidate's quest for elective office do not transcend candidate's palpable personal stake in election)]. CCP § 1021.5 does not authorize attorney's fees against an individual who has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public [*Adoption of Joshua S.* (2008) 42 C4th 945, 949, 70 CR3d 372, 174 P3d 192].

25A.11[5] Trial Court Should Determine Significance of Benefit and Size of Class Receiving Benefit. The trial court should determine the significance of the benefit and the size of the class receiving the benefit from a realistic assessment, in light of all the pertinent circumstances, of the gains that have resulted in a particular case [*Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles* (1979) 23 C3d 917, 939-940, 154 CR 503, 593 P2d 200 ; *Karuk Tribe of Northern California v. California Regional Water Quality Control Board* (2010) 183 CA4th 330, 363, 108 CR3d 40 (action must be "demonstrably influential" in changing situation)].

25A.11[6] Award of Attorney's Fees Is Appropriate When Burden of Pursuing Litigation Is Disproportionate to Plaintiff's Individual Interest. As to the necessity and financial burden of private enforcement, an award is appropriate when the cost of the legal victory transcends the claimant's personal interest; in other words, when the burden of pursuing the litigation is out of proportion to the plaintiff's individual stake in the matter [*Adoption of Joshua S.* (2008) 42 C4th 945, 952, 70 CR3d 372, 174 P3d 192 ; *Grodensky v. Artichoke Joe's Casino* (2009) 171 CA4th 1399, 1439-1442, 91 CR3d 732].

25A.11[7] Attorney's Fees May Be Awarded in Case Resulting in Settlement If Other Statutory Criteria Are Met. If the trial court has determined that the impact of the case has been the enforcement of an important right affecting the public interest and a consequent conferral of a significant benefit on the general public or a large class of persons, an award of attorney's fees under CCP § 1021.5 is not barred because the case was won on a preliminary issue or because it was settled before trial [*Folsom v. Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 685-686, 186 CR 589, 652 P2d 437 ; *Berti v. Santa Barbara Beach Properties* (2006) 145 CA4th 70, 75-76, 51 CR3d 364] .

➡ **Cross Reference:**

Enforcement of public right and significant benefits, see 25A.11[2] -[5].

25A.11[8] Attorney's Fees Awarded to Public Entity Are Not Subject to Fee Enhancements. Attorney's fees awarded to a public entity in accordance with CCP § 1021.5 may not be increased or decreased by a multiplier based on extrinsic circumstances [CCP § 1021.5; see *Serrano v. Priest* (1977) 20 C3d 25, 49, 141 CR 315, 569 P2d 1303] .

➡ **Cross Reference:**

Fee enhancement, see 25A.17[2].

25A.11[9] "Prevailing Party" and "Successful Party" Are Synonymous. "Prevailing party" and "successful party," as used in CCP § 1021.5, are synonymous [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 570, 21 CR3d 331, 101 P3d 140] .

25A.11[10] "Opposing Party" Means Losing Party. CCP § 1021.5 does not specifically define "opposing party." "Opposing party" as used in this statute means a party whose position in the litigation was adverse to that of the prevailing party, that is, a losing party [*McGuigan v. City of San Diego* (2010) 183 CA4th 610, 624-629, 107 CR3d 554] .

Example:

Among various parties involved in mandate proceedings regarding the accuracy of a ballot title and

summary of a county-wide ballot measure, the proponent of the ballot measure (i.e., the real party in interest), the registrar of voters, and former county counsel were all treated as prevailing defendants. Therefore, the registrar of voters and former county counsel were not "opposing" parties to the real party in interest within the meaning of *CCP § 1021.5*. The registrar of voters and former county counsel never took any legal position in the litigation that was adverse to the real party, and did not oppose him on the merits of any legal issue. All three parties defended the ballot title and summary in the trial court and the appellate court proceedings. Moreover, the registrar of voters and former county counsel were not losing parties. The final outcome of the two writ petitions was that the registrar of voters and former county counsel were not required to change the ballot title or summary prepared for the ballot measure in dispute. This was exactly the outcome that all three parties sought in the trial court and on appeal [*Nestande v. Watson* (2003) 111 CA4th 232, 241, 4 CR3d 18] .

25A.11[11] Catalyst Theory Allows Attorney's Fees When Defendant Changes Its Behavior, Regardless of Whether Judicial Resolution Was Reached. Under the catalyst theory, attorney's fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation. To be eligible for attorney's fees under *CCP § 1021.5*, a plaintiff must not only be a catalyst to defendant's changed behavior, but the lawsuit must have some merit, and the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant before litigation [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 560-561, 575-577, 21 CR3d 331, 101 P3d 140] . Therefore, the two-prong test for application of the catalyst theory requires both of the following [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 575-577, 21 CR3d 331, 101 P3d 140] :

- The trial court must determine that the lawsuit is not "frivolous, unreasonable or groundless," in other words that its result was achieved "by threat of victory, not by dint of nuisance and threat of expense."
- A plaintiff seeking attorney's fees under a catalyst theory must first reasonably attempt to settle the matter short of litigation.

However, attorney's fees may be awarded only when the lawsuit causes the defendant, not a third party such as the legislature, to change its behavior [*Marine Forests Society v. California Coastal Commission* (2008) 160 CA4th 867, 871, 74 CR3d 32] .

In a catalyst case, a plaintiff must first attempt to settle a matter short of litigation in order to recover attorney's fees under *CCP § 1021.5* [*Vasquez v. California* (2008) 45 C4th 243, 251-261, 85 CR3d 466, 195 P3d 1049] .

Attorney's fees may also be awarded to a prevailing party for fees incurring pursuing directly related ancillary judicial proceedings, including an amicus effort, that would have been undertaken by a reasonable and prudent lawyer to advance or protect the client's interest [*Ramon v. County of Santa Clara* (2009) 173 CA4th 915, 920-925, 93 CR3d 278] .

25A.11[12] No Attorney's Fees May Be Awarded When No Lawsuit Was Filed. In the context of *CCP § 1021.5*, the term "party" refers to a party to litigation. Thus, the statute precludes an award of attorney's fees when no lawsuit has been filed [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 570, 21 CR3d 331, 101 P3d 140 ; see *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 CA4th 588, 602-603, 57 CR3d 215 (third party seeking to unseal records was not "party")].

25A.11[13] Amount of Fees Is Calculated by Adjusting Lodestar or Touchstone Figure. The primary method for establishing the amount of "reasonable" attorney's 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 [*In re*

Vitamin Cases (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358] .



Cross Reference:

Calculating attorney's fees, see 25A.17.

In addition, *CCP § 1021.5* does not authorize the award of expert witness fees [*Olson v. Automobile Club of Southern California (2008) 42 C4th 1142, 1143-1156, 74 CR3d 81, 179 P3d 882*].

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureSettlementsGeneral OverviewCivil
ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts
& Attorney FeesAttorney Expenses & FeesReasonable FeesGovernmentsState & Territorial GovernmentsClaims By &
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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.12

25A.12 "Common Fund" and "Substantial Benefit" Theories Are Exceptions to Rule That Each Party Pays Its Own Fees.

25A.12[1] American Rule Requires Each Party to Pay Own Fees. Under the American rule, each party to a litigation must generally pay his or her own attorney's fees [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 557, 3 CR3d 419 ; see also CCP § 1021; *Alyeska Pipeline Co. v. Wilderness Society* (1975) 421 US 240, 95 S Ct 1612, 44 L Ed2d 141] .

 Cross Reference:

American rule as to fees, see 25A.05[1].

Exception:

Exceptions to the American rule under the courts' equitable powers include the "common fund" and "substantial benefit" doctrines [see *Abouab v. City and County of San Francisco* (2006) 141 CA4th 643, 662-663, 46 CR3d 206] .

Example:

A member of a putative class who successfully objects to class certification and approval of a proposed classwide settlement agreement may be entitled to attorney's fees under the equitable common fund or substantial benefit doctrines, provided the objector subsequently demonstrates he or she has actually benefited the class (that is, the ultimate class recovery exceeded that which would have been achieved in the absence of the objector's efforts). An objector who simply defeats class certification, however, even if he or she thereby confers some concrete benefit on absent members of the putative class, cannot be awarded attorney's fees under equitable principles because there is no one before the court from whom such fees can properly be recovered [*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 397-398, 25 CR3d 514 ; see also *Consumer Privacy Cases* (2009) 175 CA4th 545, 559-560, 96 CR3d 127].



Strategic Point:

The motion procedure for recovering fees pursuant to statute or contract is set forth in *Cal Rules Ct, Rule 3.1702* [see 25A.20[1]]. If there was no lawsuit, there would be no right to fees. Rather, there might simply be a demand for fees, and, on refusal to pay, a suit in equity seeking the fees. However, prevailing on such a motion, much less on a lawsuit, would be remote [see 25A.05[1] (discussion of "American rule")]. To the extent that there is a right, equitable or otherwise, to attorney's fees not available under *Cal Rules Ct, Rule 3.1702* or some other statute, the time for such motions, and the procedure itself, would not seem to be greater than that set forth in the rule. For example, a motion for fees up to the time of "judgment" (note: requires a lawsuit) is within the time to file a notice of appeal; and the parties can stipulate to an extension of up to 60 days after the time for filing a notice of an appeal.

Cross Reference:

Further discussion of common fund and substantial benefit theories, see *California Forms of Pleading and Practice*, § 174.55 (Matthew Bender).

25A.12[2] "Common Fund" and "Substantial Benefit" Theories Apply to Distinct Class of Beneficiaries, Including Shareholders in Derivative Suit. Courts generally apply the common fund and substantial benefit theories to cases involving a distinct class of beneficiaries, among whom the costs of litigation can be fairly spread to prevent the unjust enrichment of class members at the expense of the successful litigant [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 558, 3 CR3d 419] .

In a derivative action, the corporation represents the class of beneficiary shareholders. When the corporation pays attorney's fees to the successful plaintiff, all shareholders indirectly share the cost of the beneficial litigation with the shareholder who brought the action. In contrast, when a shareholder brings a derivative suit for the true purpose of advancing his or her personal adverse interests, neither equitable doctrine allows an award of attorney's fees [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 558, 3 CR3d 419] .

Cross Reference:

Discussion of substantial benefit theory, see 25A.14.

25A.12[3] Plaintiff Must Have Engaged In Reasonable Attempt To Settle Dispute Prior To Litigation. Under the substantial benefit theory, to recover fees the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant before engaging in litigation [*Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc.* (2010) 180 CA4th 1542, 1548-1551, 104 CR3d 78] .

Legal Topics:

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

Civil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleInsurance LawClaims & ContractsUnjust Enrichment



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.13

25A.13 Party May Recover Fees Out of Fund After Creating Beneficial Common Fund.

25A.13[1] Common Fund Must Benefit Many Persons. If the litigation succeeded in creating or preserving a common fund for the benefit of a number of persons, the plaintiff may be awarded attorney's fees out of that fund [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 557-558, 3 CR3d 419] .

Example:

The common fund doctrine is frequently applied in class actions when the efforts of the attorney for the named class representatives produce monetary benefits for the entire class [see *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 397, 25 CR3d 514] .

25A.13[2] Under Common Fund Theory, Person Who Expends Attorney's Fees Creating Common Fund May Require Passive Beneficiaries to Share Costs. The common fund doctrine is rooted in the "historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit" [*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 397, 25 CR3d 514 , citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y* (1975) 421 US 240, 257, 95 S Ct 1612, 44 L Ed2d 141] . The doctrine is based on the common-sense notion that a person who expends attorney's fees in winning a suit that creates a fund from which other people derive benefits may require those passive beneficiaries to bear a fair share of the litigation costs [see *Quinn v. State* (1975) 15 C3d 162, 167, 124 CR 1, 539 P2d 761 ; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 397, 25 CR3d 514] .

25A.13[3] Common Fund Doctrine Requires Existence of Fund. An award of fees under the equitable common fund doctrine is analogous to an action in quantum meruit. The individual seeking compensation has, by his or her actions, benefited another person and seeks payment for the value of the service performed [*Serrano v. Unruh* (1982) 32 C3d 621, 628, 186 CR 754, 652 P2d 985 ; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 397, 25 CR3d 514] .

An essential prerequisite to the application of the equitable common fund principle is the existence of a fund from which attorney's fees may be paid [*Serrano v. Priest* (1977) 20 C3d 25, 35, 141 CR 315, 569 P2d 1303 ; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 397, 25 CR3d 514] .

 Cross Reference:

Further discussion of common fund theory, see *California Forms of Pleading and Practice*, § 174.55 (Matthew Bender).

Legal Topics:

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

Civil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleInsurance LawClaims & ContractsUnjust Enrichment



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.14

25A.14 Party May Recover Fees Under Substantial Benefit Doctrine After Obtaining Judgment Conferring Substantial Benefit on Defendant.

25A.14[1] Substantial Benefit Doctrine Requires That Judgment Confer Substantial Benefit on Defendant.

If a judgment confers a substantial benefit on a defendant, such as in a corporate derivative action, the defendant may be required to pay the attorney's fees incurred by the plaintiff [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 558, 3 CR3d 419] .

Example--Substantial Benefit Doctrine Inapplicable:

Costs saved in avoiding litigation are not a benefit conferred on a party that can justify a fee award under the substantial benefit doctrine. That doctrine provides that fees may be awarded only when the litigation results in a substantial benefit to the corporation; however, avoidance of further costs is not a benefit resulting from litigation, but rather a benefit resulting from ceasing litigation [*Robbins v. Alibrandi* (2005) 127 CA4th 438, 448-449, 25 CR3d 387] .



Warning:

A party seeking a fee award under an equitable doctrine such as the substantial benefit doctrine must specifically request that award from the trial court [*Robbins v. Alibrandi* (2005) 127 CA4th 438, 448-449, 25 CR3d 387 (instead of requesting fees under substantial benefit doctrine, parties asked court to approve negotiated settlement under which corporation itself is not paying attorney's fees)]. Thus, counsel should be prepared to provide the court with sufficient information to quantify the benefit resulting from the litigation.



Cross Reference:

Further discussion of substantial benefit theory, see *California Forms of Pleading and Practice*, § 174.55 (Matthew Bender).

25A.14[2] Substantial Benefit Doctrine Applies When There Is No Common Fund, but Ascertainable Class Obtained Significant Benefits. The substantial benefit doctrine is an extension of the common fund doctrine. It applies when no common fund has been created, but a concrete and significant benefit, although non-monetary in nature, has

nonetheless been conferred on an ascertainable class [*Serrano v. Unruh* (1982) 32 C3d 621, 629, 186 CR 754, 652 P2d 985 ; *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc.* (2005) 127 CA4th 387, 397, 25 CR3d 514] .



Cross Reference:

Common fund doctrine, see 25A.12.

25A.14[3] Substantial Benefit Doctrine Commonly Used in Shareholder Derivative Suit. The substantial benefit doctrine is commonly used in shareholder derivative suits [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 558, 3 CR3d 419] . When fees are sought in a shareholder derivative suit under the substantial benefit doctrine, the court considers whether the litigation has conferred a substantial benefit on the corporation, that is, a benefit that is actual and concrete and not conceptual or doctrinal [*Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles* (1979) 23 C3d 917, 946-948, 154 CR 503, 593 P2d 200 ; *Robbins v. Alibrandi* (2005) 127 CA4th 438, 448-449, 25 CR3d 387] . A "substantial benefit" warranting an award of attorney's fees to a successful plaintiff in a shareholder derivative action exists when the results of the action maintain the health of the corporation and raise the standards of fiduciary relationships and other economic behavior, or prevent an abuse that would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest [see *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 558, 3 CR3d 419] .

The benefit need not be pecuniary, but must be something more than technical in its consequence, and must accomplish a substantial result [see *Mills v. Electric Auto-Lite* (1970) 396 US 375, 396, 90 S Ct 616, 24 L Ed2d 593 ; *Robbins v. Alibrandi* (2005) 127 CA4th 438, 448-449, 25 CR3d 387 (quoting *Bosch v. Meeker Coop. Light & Power Ass'n* (1960) 257 Minn 362, 101 NW2d 423, 427)] .

The court assessing fees begins with a lodestar figure based on the careful compilation of the time spent and reasonable hourly compensation of each attorney involved in the presentation of the case [*Ketchum v. Moses* (2001) 24 C4th 1122, 1131-1132, 104 CR2d 377, 17 P3d 735 ; *Robbins v. Alibrandi* (2005) 127 CA4th 438, 448-449, 25 CR3d 387] . The court then has the power and the duty to enhance, or reduce, the lodestar through the use of multipliers, by taking into consideration factors such as the novelty and complexity of the issues, the skill and expertise of counsel, the extent that the litigation precluded other employment, and the contingent nature (or risk) of nonrecovery [*Ketchum v. Moses* (2001) 24 C4th 1122, 1132, 104 CR2d 377, 17 P3d 735 ; *Robbins v. Alibrandi* (2005) 127 CA4th 438, 448-449, 25 CR3d 387 (includes calculation)].



Strategic Point:

This method requires the compilation of information regarding the prevailing rates in a particular legal community for the type of work performed by attorneys of similar experience and standing as the attorney seeking the fees. The resulting "lodestar" becomes the multiplier of the amount of time incurred by the attorney seeking fees. This lodestar does not include any appropriate multiplier the court may consider due to the novel and/or complex theories involved in a particular matter.



Cross References:

Lodestar calculation method, see 25A.17[1].

Further discussion of substantial benefit theory, see *California Forms of Pleading and Practice*, § 174.55 (Matthew Bender).

Legal Topics:

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

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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.15

25A.15 CHECKLIST: Seeking Recovery of Attorney's Fees From Opposing Party

- ☐ Determine whether statute or contract fixes fee amount.
 - ☐ Determine whether amount of attorney's fees is a set figure.
 - ☐ Determine whether fee schedule applies.
 - ☐ Consult any relevant statutes and local rules.

Authority:

See *Cal Rules Ct, Rule 3.1702(e)*

Discussion:

See 25A.18, 25A.19

- ☐ If statutory or contractual attorney's fees are fixed without necessity of court determination, claim fees in memorandum of costs.

Authority:

Cal Rules Ct, Rule 3.1702(e)

Discussion:

See 25A.19

Standard Procedure Checklist:

See *Ch. 24, Costs, 24.03*

- ☐ If attorney's fees are based on statute or contract, and court determination is required regarding entitlement to fees and/or amount of fees, bring motion under *Cal Rules Ct, Rule 3.1702*.

**Timing:**

Serve and file notice of motion within time for filing notice of appeal, unless deadline is extended.

Authority:

Cal Rules Ct, Rule 3.1702(a), (b), (d)

Discussion:

See 25A.20

**Strategic Point:**

Counsel for a prevailing party may want to delay entry of judgment until after the fee award is determined. By doing so, counsel may delay, or avoid, unreasonable time constraints when compiling the information that may be necessary to support the request for fees.



- Document fee calculations, describing and itemizing each entry.

Authority:

See, e.g., *In re Vitamin Cases (2003) 110 CA4th 1041, 1052, 2 CR3d 358*

Discussion:

See 25A.17

- ☐ If appropriate, bring motion to recover fees not covered in *Cal Rules Ct, Rule 3.1702*.

Standard Procedure Checklist:

See 25A.03.

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice General Overview Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Governments Courts Rule Application & Interpretation



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25A.16 Options and Strategies.

Counsel seeking the recovery of attorney's fees should have documented the corresponding items and amounts of those fees before and during trial.

➤ Cross Reference:

General strategy, see 25A.04.

During trial, counsel should be aware of the grounds for opposing an award of fees, and avoid documentation of fees vulnerable to attack. As with all requested costs, attorney's fees must be reasonable, and may always be opposed on the ground of reasonableness [see *In re Vitamin Cases* (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358] .

➤ Cross References:

Responding to attorney's fees motions, see 25A.23.

Requirement of reasonableness of costs generally, see Ch. 24, Costs.

For example, a request for fees will not be granted if it reflects duplicate billing or padding [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140] .

➤ Cross References:

Responding to attorney's fees motions, see 25A.23.

Discussion of costs, see Ch. 24, Costs.

As with all procedural aspects of trial, counsel should consult any relevant local court rules governing the recovery of fees in a particular case [see, e.g., Alameda Super Ct Rules, Ch 4, App D].

➤ Cross Reference:

Local rules, see 25A.18.

Counsel should be familiar with the "lodestar" calculation method for determining the amount of fees, and therefore should have some understanding of the reasonable hourly rate for similar services in that area [see *In re Vitamin Cases* (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358]. Counsel should also be prepared to argue in favor of fee enhancers based on relevant factors, such as the superior quality of representation [see *Ketchum v. Moses* (2001) 24 C4th 1122, 1139, 104 CR2d 377, 17 P3d 735].

 Cross Reference:

Calculating attorney's fees, see 25A.17.

Consider:

There are cases that seem to indicate that a lodestar, as a "multiplier" of reasonable fees, is the norm. This is particularly true in cases of astronomical damages (such as in tobacco litigation), or in a case of an extraordinary recovery and multiple law firms who contributed in varying levels. There are other cases that seem to look to some percentage interest in certain circumstances, although that is rare.

Counsel should remain aware of deadlines for filing a cost memorandum, and a noticed motion for fees, if necessary [see *Cal Rules Ct, Rule 3.1702(b)*].

 Cross Reference:

Filing deadlines and cost memoranda, see 25A.19, 25A.20.



Strategic Point:

Counsel for a prevailing party seeking fees may either (1) delay entry of judgment, which will trigger the time for filing a request for fees, or (2) seek a stipulation from opposing counsel to extend the time for filing the request.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees



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Chapter 25A Recovering Attorney's Fees From Opposing Party
III. SEEKING RECOVERY OF ATTORNEY'S FEES FROM OPPOSING PARTY

2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.17

25A.17 Calculating Attorney's Fees.

25A.17[1] Applying "Lodestar" or "Touchstone" Calculation Method to Determine Reasonable Fees. The primary method for establishing the amount of "reasonable" attorney's 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 [*Pellegrino v. Robert Half International, Inc.* (2010) 182 CA4th 278, 290-291, 106 CR3d 265]. The lodestar is the basic fee for comparable legal services in the community [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140 ; *Komarova v. National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 347-350, 95 CR3d 880].



Strategic Points:

- The calculation of fees is typically determined after the trier of fact has made its determination. Counsel seeking fees is advised to maintain detailed and contemporaneous records of time spent on matters in which fees may be sought. The determination of the reasonable hourly rate in a given location can be made by conferring with various experienced attorneys in a particular community. Additionally, reviewing fee applications and awards in those venues is educational.
- Typically, the number of hours is established by contemporaneous time records, and the rate is determined by the attorney's usual and customary rate charged to (and paid by) other clients, and the rates of other attorneys in the area who handle similar cases. The court applies a reasonable rate, not necessarily the rate the attorney actually charged the client in the case [*Chacon v. Litke* (2010) 181 CA4th 1234, 1260, 105 CR3d 214 (trial court did not abuse discretion in awarding fees at reasonable market value rate of \$350/hour compared to \$400/hour requested)]. The precise geographic location is less important than subject matter expertise and experience.
- In preparing for a request for attorney's fees, counsel is advised to keep careful time records, and be able to prove that the rates charged for the time put down on the records were "reasonable," which may

mean in line with the rates charged for similar work by that law firm. If the rate is higher than normally charged rates, some indication in the file that the rate used was appropriate is helpful, and should be indicated in the file at the beginning of the engagement. This is an extremely difficult issue, because rates may vary depending on the size and complexity of the matter or the size of the legal team involved. There are often indications of what the opposition charges for an hourly rate (e.g., declarations in sanction motions during litigation), which can provide support for a certain hourly rate. Evidence of a particular law firm's "usual" rates, and therefore that its rates in the subject litigation are within the range of "reasonable," also helps.

A court assessing attorney's fees begins with a touchstone or lodestar figure, based on the careful compilation of the time spent and reasonable hourly compensation of each attorney involved in the presentation of the case. The California Supreme Court has expressly approved the use of prevailing hourly rates as a basis for the lodestar, noting that anchoring the calculation of fees to the lodestar adjustment method is the only way of approaching the problem in an objective manner. The trial court determines "reasonable" compensation by carefully reviewing attorney documentation of hours expended. "Padding" in the form of inefficient or duplicative efforts is not subject to compensation [see *Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140] .

Once the court has fixed 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 [*Pellegrino v. Robert Half International, Inc.* (2010) 182 CA4th 278, 291-294, 106 CR3d 265 (upholding 1.75 multiplier)]. The court may adjust this figure based on factors that include the following:

- Quality of the representation [*Russell v. Foglio* (2008) 160 CA4th 653, 661-662, 73 CR3d 87] .
- Results obtained [*Chavez v. Netflix, Inc.* (2008) 162 CA4th 43, 61-62, 75 CR3d 413 ; *In re Vitamin Cases* (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358] .
- Novelty and difficulty of the questions involved [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140 , citing *Serrano v. Priest* (1977) 20 C3d 25, 141 CR 315, 569 P2d 1303] .
- Skill displayed in presenting issues to the court [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140 , citing *Serrano v. Priest* (1977) 20 C3d 25, 141 CR 315, 569 P2d 1303] .
- The extent to which the nature of the litigation precluded other employment by the attorneys [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140 , citing *Serrano v. Priest* (1977) 20 C3d 25, 141 CR 315, 569 P2d 1303] .
- Contingent nature of the fee award [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140 , citing *Serrano v. Priest* (1977) 20 C3d 25, 141 CR 315, 569 P2d 1303] .
- Necessity of the fees incurred [*EnPalm, LLC v. Teitler* (2008) 162 CA4th 770, 774-778, 75 CR 3d 902] .

Under certain circumstances, a lodestar calculation may be enhanced on the basis of a percentage-of-the-benefit analysis [*In re Vitamin Cases* (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358 (regarding attorney's fee award in class-action settlement involving price-fixing by vitamin manufacturers, appellate court questioned, among other things, \$1,000 per hour fee charged by one attorney)].

The purpose of the adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar to approximate the fair market rate for those services [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140 (concerning contingency risk), citing *Ketchum v. Moses* (2001) 24 C4th 1122, 1131-1132, 104 CR2d 377, 17 P3d 735 ; *In re Vitamin Cases* (2003) 110 CA4th 1041, 1052, 1061, 2 CR3d 358] .

Cross Reference:

Detailed discussion of lodestar calculation method, see *California Forms of Pleading and Practice*, § 174.54 (Matthew Bender).

25A.17[2] Court Need Not Apply Fee Enhancers. The trial court is not required to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in appropriate cases [*Ketchum v. Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377, 17 P3d 735] .

25A.17[3] Court Should Award Multiplier for Exceptional Representation Only When Quality of Representation Far Exceeds Quality at Lodestar Rate. A trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable. Nor should a fee enhancement be imposed for the purpose of punishing the losing party [*Ketchum v. Moses* (2001) 24 C4th 1122, 1139, 104 CR2d 377, 17 P3d 735] .

The factor of extraordinary skill, in particular, is susceptible to improper double counting. For the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar. A more difficult legal question typically requires more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate [*Ketchum v. Moses* (2001) 24 C4th 1122, 1138-1139, 104 CR2d 377, 17 P3d 735] .

25A.17[4] Contingency Fee Multiplier Is Based on Attorney's Risk and Loan of Attorney's Services. The economic rationale for fee enhancement in contingency cases is that a contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services the lawyer renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140 (citing Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567)]. A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his or her work if paid only for the second of these functions. If paid no more, competent counsel will be reluctant to accept fee award cases [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140] .

Example:

Fee enhancers, such as the contingency-fee factor, are available in SLAPP suits [*Ketchum v. Moses* (2001) 24 C4th 1122, 1136-1139, 104 CR2d 377, 17 P3d 735 (rejecting U.S. Supreme Court rejection of fee enhancements in certain types of federal cases); see CCP § 425.16(c)]. A SLAPP (Strategic Litigation Against Public Participation) suit is a cause of action based on the defendant's actions in furtherance of his or her constitutional right of petition or free speech with regard to a public issue. It is subject to a special motion to strike, absent plaintiff's showing that plaintiff will probably prevail on the claim [see CCP § 425.16].

Cross Reference:

Discussion of SLAPP suits, see *California Forms of Pleading and Practice*, Ch. 375, Motions to Strike

(Matthew Bender).

25A.17[5] Party Seeking Fee Enhancement Bears Burden of Proof. The party seeking a fee enhancement bears the burden of proof [*Ketchum v. Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377, 17 P3d 735] .

25A.17[6] Trial Court Should Consider Attorney's and Client's Efforts to Mitigate Risk of Nonpayment and Other Factors. In each case, the trial court should consider whether, and to what extent, the attorney and client have been able to mitigate the risk of nonpayment, for example, because the client has agreed to pay some portion of the lodestar amount regardless of outcome. It should also consider the degree to which the relevant market compensates for contingency risk, extraordinary skill, or other factors [*Ketchum v. Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377, 17 P3d 735 ; see *Serrano v. Priest* (1977) 20 C3d 25, 141 CR 315, 569 P2d 1303] .

When determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar [*Ketchum v. Moses* (2001) 24 C4th 1122, 1138, 104 CR2d 377, 17 P3d 735] .



Cross Reference:

Detailed discussion of calculating attorney's fees, see *California Forms of Pleading and Practice*, §§ 174.54, 174.55 (Matthew Bender).

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency Fees



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25A.18 Local Court Rules May Set Fee Schedule or Limit Recovery of Attorney's Fees.

25A.18[1] Review Local Rules of Court for Fee Schedule. Many counties have local rules of court with fee schedules. Review these schedules before seeking attorney's fees. Judges are free to depart from the fee schedules whenever the interests of justice require [*Cruz v. Ayromloo* (2007) 155 CA4th 1270, 1275, 66 CR3d 725] .

25A.18[2] Alameda County Rules. Except as otherwise ordered by the court in any civil case except an unlawful detainer, attorney's fees, when allowable, must be fixed in accordance with the following schedule [Alameda Super Ct Rules, Ch 4, App D]:

- For the first \$5,000 in principal, at the rate of 25 percent, or the sum of \$300, whichever is greater.
- For the next \$10,000, in principal, at the rate of 20 percent.
- For all principal above \$15,000 at the rate of 15 percent.

For unlawful detainers, the minimum fee is \$300 [Alameda Super Ct Rules, Ch 4, App D]. A written declaration for submission to the court is required to substantiate extraordinary fees that exceed this schedule [Alameda Super Ct Rules, Ch 4, App D].

25A.18[3] Los Angeles County Rules.

25A.18[3][a] Judgments and Post-Judgment Orders. The following rules apply in Los Angeles County to judgments and post-judgment orders.

When a promissory note or contract provides for the recovery of (or a statute authorizes the clerk to enter) a reasonable attorney's fee, the following schedule (unless otherwise determined by the court) is applied to the amount of the new judgment exclusive of costs [Los Angeles Super Ct Rules, Rule 3.2(a)].

The following amounts apply to a default case [Los Angeles Super Ct Rules, Rule 3.2(a)]:

- \$0.01 to \$1,000, 15 percent with a minimum of \$75.
- \$1,000.01 to \$10,000, \$150 plus 6 percent of the excess over \$1,000.
- \$10,000.01 to \$50,000, \$690 plus 3 percent of the excess over \$10,000.
- \$50,000.01 to \$100,000, \$1,890 plus 2 percent of the excess over \$50,000.
- Over \$100,000, \$2,890 plus 1 percent of the excess over \$100,000.

The following amounts apply to a contested case (unless otherwise determined by the court) [Los Angeles Super Ct Rules, Rule 3.2(a)]:

- \$0.01 to \$1,000, 15 percent with a minimum of \$100.
- \$1,000.01 to \$10,000, \$150 plus 8 percent of the excess over \$1,000.
- \$10,000.01 to \$50,000, \$870 plus 6 percent of the excess over \$10,000.
- \$50,000.01 to \$100,000, \$3,270 plus 4 percent of the excess over \$50,000.
- Over \$100,000, \$5,270 plus 2 percent of the excess over \$100,000.

When a mortgage or trust deed is foreclosed that provides for the recovery of a reasonable attorney's fee, the applicable fee in Los Angeles Super Ct Rules, Rule 3.2(a), above, increases by 10 percent [Los Angeles Super Ct Rules, Rule 3.2(b)].

When the lien of a street or other assessment, or of a bond issued for the cost of a public improvement is foreclosed, the fee is computed as provided in Los Angeles Super Ct Rules, Rule 3.2(a), above, except that the minimum is \$75 when only one assessment or bond is being foreclosed in the action, and \$20 additional for the second and each additional assessment or bond [Los Angeles Super Ct Rules, Rule 3.2(c)].

Any application for a fee in addition to the above schedule because of extraordinary services must be accompanied by an itemized statement of the services rendered or to be rendered [Los Angeles Super Ct Rules, Rule 3.2(d)].

No attorney's fee for services rendered on behalf of a minor will be approved except on application in open court. Notice must be given to the minor's guardian and to each of his/her parents and, if the minor is over 14, to the minor also [Los Angeles Super Ct Rules, Rule 3.2(e)].

25A.18[3][b] Civil Law and Motion Default Judgments. The following rules apply in Los Angeles County to civil law and motion default judgments [Los Angeles Super Ct Rules, Rule 9.15(a); *see also* Los Angeles Super Ct Rules, Rule 3.2, set forth in 25A.18[3][a]]:

- When a mortgage or deed of trust providing for the recovery of a reasonable attorney's fee is foreclosed, the applicable fee from the standard schedule is increased by 10 percent [Los Angeles Super Ct Rules, Rule 9.15(b)].
- When the lien of a public assessment or bond is foreclosed, the applicable fee from the standard schedule applies except that the minimum is \$75 for the first assessment or bond foreclosed and \$20 additional for each additional bond or assessment [Los Angeles Super Ct Rules, Rule 9.15(c)].

- Any application for a fee in addition to that derived from the standard schedule should be accompanied by an itemized statement of the services rendered [Los Angeles Super Ct Rules, Rule 9.15(d)].

- No attorney's fees for services rendered on behalf of a minor are allowed, and no contract for those services may be approved, except on application in open court. Notice must be given to the minor's guardian and to each of his/her parents and, if the minor is over 14, to the minor also. The notice must state the character and extent of the attorney's services and any expenses incurred in connection with the services. The notice must further state that objection may be made at the time of application [Los Angeles Super Ct Rules, Rule 9.15(e)].

- When the basis for a claim of attorney's fees is a contractual provision, the precise clause providing for fees should be cited [Los Angeles Super Ct Rules, Rule 9.15(f)].

25A.18[3][c] Party May Recover Attorney's Fees on Motion for Change of Venue. On the hearing of a motion for change of venue on the grounds stated in *CCP* § 395, the court may order the payment of reasonable expenses and attorney's fees to the prevailing party. If fees are requested, the amount sought must be supported by a declaration detailing the manner of calculation [Los Angeles Super Ct Rules, Rule 2.1(d)].

 Cross Reference:

Family law rules, see 25A.06[3].

25A.18[4] In Orange County, Attorney's Fees Are Set by Schedule on Clerk's Entry of Default Judgment. When the clerk is authorized by statute to enter judgment on entry of default in an action on a contract providing for allowance of attorney's fees, the clerk must use the schedule below in determining the amount to be included in the judgment. However, the amount cannot exceed the specific amount of attorney's fees sought in the complaint. The amount of attorney's fees must be the amount computed by applying to the amount recovered, exclusive of costs, the following schedule [Orange Super Ct Rules, Rule 366(A)]:

- \$5,000 or less, 10 percent with a minimum of \$150.
- \$5,000.01 to \$25,000, \$500 plus 6 percent of the excess over \$5,000.
- \$25,000.01 to \$60,000, \$1,400 plus 3 percent of the excess over \$25,000.
- \$60,000.01 to \$100,000, \$2,600 plus 2 percent of the excess over \$60,000.
- \$100,000.01 or more, \$3,400 plus 1 percent of the excess over \$100,000.

The rule set forth above does not apply to any award of attorney's fees made by the court, whether on entry of default or otherwise [Orange Super Ct Rules, Rule 366(C)].

When the clerk is authorized by statute to enter judgment upon entry of default on a book account which does not provide for attorney's fees and costs as provided by *CC* § 1717, the clerk must include in the judgment an award of attorney's fees pursuant to *CC* § 1717 [Orange Super Ct Rules, Rule 366(B)].

 Cross References:

Discussion of *CC* § 1717, see 25A.08.

Discussion of *CC* § 1717.5, see 25A.09.

Discussion of fee calculations generally, see 25A.17.

25A.18[5] Sacramento County Rules Provide Schedule for Attorney's Fees on Promissory Notes, Fee Contracts, and Foreclosures. The following attorney's fees must, under normal circumstances, be awarded in actions on promissory notes, contracts providing for the payment of attorney's fees, and foreclosures [Sacramento Super Ct Rules, Rule 9.11].

The following fee schedule applies to a default action on a note or contract, exclusive of cost [Sacramento Super Ct Rules, Rule 9.11(A)]:

- 25 percent of first \$1,000 with minimum fee of \$150.
- 20 percent of next \$4,000.
- 15 percent of next \$5,000.
- 10 percent of next \$10,000.
- 5 percent of next \$30,000.
- 2 percent of the amount over \$50,000.

Notwithstanding the above schedule, in a default action to obtain a judgment in which attorney's fees are awarded under *CC* § 2983.4 or 2988.9 (attorney's fees under Automobile Sales Finance Act), attorney's fees may not exceed \$1,000 except in unusual circumstances. Any application for attorney's fees for an amount in excess of \$1,000 must be filed before the default hearing and must be accompanied by a declaration [Sacramento Super Ct Rules, Rule 9.11(B)].

For a contested action on a note or contract, the same amount as computed under the above schedule applies, increased by such reasonable compensation computed on an hourly or per-day basis for any additional research, general preparation, trial, or other services as may be allowed by the court [Sacramento Super Ct Rules, Rule 9.11(C); see Sacramento Super Ct Rules, Rule 9.11(A)].

For foreclosure of a mortgage or trust deed, the same amount as computed under Sacramento Super Ct Rules, Rule 9.11(A) or (B) (set forth above) applies, increased by 10 percent [Sacramento Super Ct Rules, Rule 9.11(D)].

For foreclosure of an assessment or a bond lien relating to a public improvement, the same amount as computed under Sacramento Super Ct Rules, Rule 9.11(A) or (B) (set forth above) applies, except that the minimum fee is \$75 in an action involving one assessment or bond, and an additional \$20 for each additional assessment or bond being foreclosed in the same action [Sacramento Super Ct Rules, Rule 9.11(E)].

When a defendant is the prevailing party, the fee will be fixed by reasonable compensation computed on an hourly or per-day basis for research, general preparation, trial, or other services rendered [Sacramento Super Ct Rules, Rule 9.11(F)].

When the prevailing party is entitled to the recovery of a reasonable attorney's fee in an otherwise appropriate clerk's judgment, the clerk must include an attorney's fee computed in accordance with the schedule set forth above [Sacramento Super Ct Rules, Rule 9.11(G); see Sacramento Super Ct Rules, Rule 9.11(A)].

When a party claims fees in excess of those allowed by Sacramento Super Ct Rules, Rule 9.11, application for attorney's fees must be made to the court, supported by declarations setting forth the factual basis for the claimed fees. The fees will then be fixed by the court [Sacramento Super Ct Rules, Rule 9.11(H)].

25A.18[6] San Diego County Rules Provide Fee Schedule for Defaults. Whenever the obligation sued on provides for the recovery of a reasonable attorney's fee, the fee in each default case may be fixed pursuant to a detailed schedule [see San Diego Super Ct Rules, Rule 2.5.11].

When an attorney claims entitlement to a fee in excess of any of the scheduled amounts, the attorney may apply to the court and present proof to support the claim. The court will determine the reasonable fee amount according to proof [San Diego Super Ct Rules, Rule 2.5.11].

In contested matters, the court will determine the reasonable attorney's fees as proved by the prevailing party after trial in accordance with *CCP § 1021 et seq.*, *CC §§ 1717 and 1717.5*, and *Cal Rules Ct, Rule 3.1702* [San Diego Super Ct Rules, Rule 2.5.11].

25A.18[7] Party May Recover Attorney's Fees in Unlawful Detainer Action. Local court rules may provide for the recovery of attorney's fees in unlawful detainer cases [see, e.g., Alameda Super Ct Rules, Ch 4, App D (see 25.20[2]); San Diego Super Ct Rules Div II, Rule 2.5.11)].

In Sacramento County unlawful detainer actions for possession of residential property, except property governed by *CC § 798 et seq.* (mobilehome residency), the attorney's fees awarded by the court may not, under normal circumstances, exceed the following amounts [Sacramento Super Ct Rules, Rule 9.12]:

- \$200 in cases by default when the defendant has filed no answer pursuant to *CCP § 1170* (answer or demurrer).
- \$300 in cases uncontested at trial when the defendant has filed an answer.
- \$425 in cases contested at trial.

25A.18[8] Party May Recover Attorney's Fees in Compromise Settlement of Minor's Claim. Local court rules may provide for recovery of attorney's fees in connection with a petition to compromise a claim on behalf of a minor. For example, in San Diego County, at the time of the hearing, the court determines the amount of costs, expenses, and attorney's fees to be allowed from the proceeds of the settlement. Absent extraordinary circumstances, attorney's fees may not exceed 25 percent of the gross proceeds of the settlement [see San Diego County Rules Div II, Rule 2.4.6].

Legal Topics:

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

Civil Procedure Venue General Overview Civil Procedure Pretrial Judgments Default Default Judgments Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Governments Courts Rule Application & Interpretation Real Property Law Financing Mortgages & Other Security Instruments Foreclosures General Overview



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25A.19 Party Seeking Statutory or Contractual Attorney's Fees That Are Fixed by Formula Must Claim Fees As Costs in Cost Memorandum.

If a party is entitled to statutory or contractual attorney's fees that are fixed without the necessity of a court determination, the fees must be claimed in the memorandum of costs [*Cal Rules Ct, Rule 3.1702(e)*].



Cross Reference:

Discussion of costs, see Ch. 24, Costs.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Costs General Overview Legal Ethics Client Relations Attorney Fees General Overview



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25A.20 Party Seeking Attorney's Fees Based on Statute and Contract Must Bring Noticed Motion If Court Determination of Right to Fees and/or Amount Is Required.

25A.20[1] Cal Rules Ct, Rule 3.1702, Applies to Claims for Fees Based on Statute and Contract Except As Otherwise Provided by Statute. *Cal Rules Ct, Rule 3.1702*, applies to claims for statutory attorney's fees and claims for attorney's fees provided for in a contract, except as otherwise provided by statute [*Cal Rules Ct, Rule 3.1702(a)*; see *612 South LLC v. Laconic Limited Partnership* (2010) 184 CA4th 1270, 1284-1285, 109 CR3d 780 (requiring noticed motion allow for fair opportunity to litigate issues)].

25A.20[2] Party Must Serve and File Notice of Motion Within Time for Filing Notice of Appeal Unless Deadline Is Extended. *Cal Rules Ct, Rule 3.1702(b)* and (c) apply when the court determines entitlement to the fees, the amount of the fees, or both, whether the court makes that determination because the statute or contract refers to "reasonable" fees, because it requires a determination of the prevailing party, or for other reasons [*Cal Rules Ct, Rule 3.1702(a)*].



Cross Reference:

Attorney's fees on appeal under *Cal Rules Ct, Rule 3.1702*, see 25A.33.



Strategic Point:

Cal Rules Ct, Rule 3.1702, provides the time limits for motions for attorney's fees in all civil cases [*Carpenter v. Jack in the Box Corporation* (2007) 151 CA4th 454, 462-468, 59 CR3d 839] . Counsel should have fee documentation assembled in advance of any such motion. The timing requirement appears to be jurisdictional. It can be extended up to 60 days under *Cal Rules Ct, Rule 3.1702* (see 25A.20[3]), or if a notice of appeal has already been filed, then up until the time a memorandum of costs has to be filed. Failure to comply with the timing requirements may prevent consideration of the motion, and would seem, certainly, to militate against any equitable award. Any other motion outside of *Cal Rules Ct, Rule 3.1702* must be brought immediately. In the absence of specific guidance under a statute or Rule of Court, this type of motion should probably follow the timing requirements of *Cal Rules Ct, Rule 3.1702* even if not brought under that rule.

A notice of motion to claim attorney's fees 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)*]; *Carpenter v. Jack in the Box Corporation* (2007) 151 CA4th 454, 462-468, 59 CR3d 839] .

Example:

In one case, the plaintiff's appellate attorney's fees were incurred after rendition of the initial judgment in favor of defendants, that judgment was reversed, and the case was remanded with directions for the trial court to enter a new judgment in plaintiff's favor. As a result, plaintiff's appellate attorney's fees were incurred *before* the trial court's ultimate rendition of judgment in plaintiff's favor. Thus, *Cal Rules Ct, Rule 3.1702(b)(1)* applies and the applicable time limits are set forth in *Cal Rules Ct, Rules 8.104 and 8.108*, which govern the time for filing a notice of appeal following the rendition of judgment [*Yuba Cypress Housing Partners, Ltd. v. Area Dev. (2002) 98 CA4th 1077, 1085, 120 CR2d 273*] .

Unless a statute or *Cal Rules Ct, Rule 8.108*, provides otherwise, a notice of appeal from a judgment must be filed on or before the earliest of the following dates [*Cal Rules Ct, Rule 8.104*; see *Cal Rules Ct, Rule 8.104(d)* (what constitutes entry date of judgment)]:

- 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed.
- 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service.
- 180 days after entry of judgment.

 Cross Reference:

Notice of appeal, see California Forms of Pleading and Practice, Ch. 42, Appeal: Notice of Appeal (Matthew Bender).

Except as provided in *Cal Rules Ct, Rule 8.66* (appellate emergencies), a court may not extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal [*Cal Rules Ct, Rule 8.104(b)*].

A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment [*Cal Rules Ct, Rule 8.104(e)(1)*]. The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment [*Cal Rules Ct, Rule 8.104(e)(2)*].

Example:

In one case, plaintiff's motion for attorney's fees, filed a little over one month after the parties reached a stipulated judgment but almost two months before entry of the judgment, was timely under *Cal Rules Ct, Rule 3.1702(b)(1)* [*Yuba Cypress Housing Partners, Ltd. v. Area Dev. (2002) 98 CA4th 1077, 1086, 120 CR2d 273*] .

Cal Rules Ct, Rule 8.108 provides various circumstances in which the time to appeal is extended [see Advisory Committee Comment to *Cal Rules Ct, Rule 8.108*].

**Cross Reference:**

Notice of appeal, see California Forms of Pleading and Practice, Ch. 42, Appeal: Notice of Appeal (Matthew Bender).

When a party appeals from an appealable order rather than from a judgment, the term "judgment" is read to include "appealable order" [*Sanabria v. Embrey* (2001) 92 CA4th 422, 426, 111 CR2d 837] .

The 60-day time limit under *Cal Rules Ct, Rule 3.1702*, commences to run at notice of entry of judgment or at dismissal [*Carpenter v. Jack in the Box Corporation* (2007) 151 CA4th 454, 462-468, 59 CR3d 839] .

Example:

A voluntary dismissal immediately resolves the action as to the dismissed defendant, and entitles the dismissed defendant to costs and sometimes attorney's fees as the prevailing party [CCP § 1032(a)(4)]. Although a voluntary dismissal is generally not appealable, it is nevertheless effectively a judgment within the meaning of *Cal Rules Ct, Rule 8.104(a)*. Accordingly, *Cal Rules Ct, Rule 3.1702* governs, and the time for filing a motion for attorney's fees commences on service of the notice of entry of dismissal [*Sanabria v. Embrey* (2001) 92 CA4th 422, 427, 111 CR2d 837 ; see also *Boonyarit v. Payless Shoesource, Inc.* (2006) 145 CA4th 1188, 1192, 52 CR3d 241 (dismissal or judgment must be entered as predicate to costs award)].

25A.20[3] Parties May Stipulate to Deadline Extension. The parties may by stipulation filed before the expiration of the time allowed under *Cal Rules Ct, Rule 3.1702(b)(1)*, extend the time for filing a motion for attorney's fees (1) until 60 days after the expiration of the time for filing a notice of appeal; or (2) if a notice of appeal is filed, until the time within which a memorandum of costs must be served and filed under *Cal Rules Ct, Rule 8.278(c)* [*Cal Rules Ct, Rule 3.1702(b)(2)*].

Within 40 days after the clerk sends notice of issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under *Cal Rules Ct, Rule 3.1700* [*Cal Rules Ct, Rule 8.278(c)(1)*].

25A.20[4] Court May Extend Deadline in Absence of Stipulation or Beyond Stipulated Date. For good cause, the trial judge may extend the time for filing a motion for attorney's fees in the absence of a stipulation or for a longer period than allowed by stipulation [*Cal Rules Ct, Rule 3.1702(d)*].

25A.20[5] Court Has Broad Discretion to Excuse Late Filing Absent Prejudice to Opposing Party. The time limitation set out in *Cal Rules Ct, Rule 3.1702* is not jurisdictional in character. A trial court has broad discretion in allowing relief from a late filing when there is an absence of a showing of prejudice to the opposing party [*Gunlock Corp. v. Walk on Water, Inc.* (1993) 15 CA4th 1301, 1304, 19 CR2d 197] .

25A.20[6] Cal Rules Ct, Rule 3.1702, Does Not Govern Time for Bringing Motions for Fees for Post-Final Judgment Activities. *Cal Rules Ct, Rule 3.1702*, does not govern the time for bringing motions for fees arising from post-final judgment activities, such as litigation over modifications to a permanent injunction. The rule's drafters either did not consider such postjudgment fee motions or decided not to address them in the rule [*Crespin v. Shewry* (2004) 125 CA4th 259, 265, 22 CR3d 696] .

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleCivil ProcedureRemediesCosts &

Attorney FeesAttorney Expenses & FeesStatutory Awards



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IV. OPPOSING RECOVERY OF ATTORNEY'S FEES

2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.21

25A.21 CHECKLIST: Opposing Recovery of Attorney's Fees.

☐ Determine grounds for opposing motion for fees.

☐ Requested fees are excessive.

☐ Party not entitled to fees under private attorney general doctrine or other statutory scheme cited.

Authority:

CCP § 1021.5; see, e.g., *Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 144-148, 118 CR2d 569; *Levy v. Toyota Motor Sales U.S.A., Inc.* (1992) 4 CA4th 807, 814-816, 5 CR2d 770

Discussion:

See 25A.23[2][a] -[c]

☐ Contract disallows fees.

Authority:

See, e.g., *Frei v. Davey* (2004) 124 CA4th 1506, 1508, 22 CR3d 429

Discussion:

See 25A.23[2][d]

☐ Recovery of fees not allowed in tort action.

Authority:

Aozora Bank, Ltd. v. 1333 North Cal. Blvd. (2004) 119 CA4th 1291, 1295-1297, 15 CR3d 340

Discussion:

See 25A.23[2][e]

- ☐ Attorney's fees should be apportioned.

Authority:

See, e.g., *Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 144-148, 118 CR2d 569

Discussion:

See 25A.23[2][g]

- ☐ If opposing party was prevailing party in limited civil case, determine whether recovery was less than jurisdictional amount in small claims court.

Authority:

See CCP § 1033(b)(1)

Discussion:

See 25A.23[2][h]

**Warning:**

Failure to respond to motion may result in award of fees that may have been avoided.

Authority:

See, e.g., *City of Santa Paula v. Narula* (2003) 114 CA4th 485, 488, 8 CR3d 75

Discussion:

See 25A.23[1]

- ☐ Serve and file response papers.

Standard Procedure Checklist:

See 25A.03.

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Governments Courts Small Claims Courts



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25A.22 Options and Strategies.

A party facing liability for the opposing party's attorney's fees must be prepared to (1) object to any request or motion for fees in a timely manner, and (2) preserve any objection for the appellate record.

► **Cross References:**

Responding to motion for attorney's fees, see 25A.23, 25A.30, 25A.33.

Discussion of costs, see Ch. 24, Costs.

If the opposing party's entitlement to fees is based on its success as a prevailing party, counsel should consider challenging that status. For example, if many parties are involved in the litigation, the client may under the circumstances be aligned in interest with the party requesting fees, in which case the fees would not be allowed [*see CCP § 1032(b)*].

► **Cross References:**

Prevailing party, see 25A.07, 25A.23[2][f].

Strategic Points:



- Occasionally counsel may offer his or her own time expended and fees incurred in opposition to a motion for fees to demonstrate the unreasonableness of a fee request for a significantly greater amount. Counsel should therefore maintain detailed records of his or her own time in matters involving potential attorney's fee claims, whether seeking those fees or not. In taking this approach, counsel must be sure to redact from any records presented to the court and opposing counsel information that are privileged. Counsel opposing a fee motion in which a lodestar will be used in the calculation should conduct his or her own research regarding the appropriate basis for arriving at this multiplier.

Counsel should also be prepared, when appropriate, to challenge the characterization that "greater relief"

was granted to the party seeking fees than to the party or parties opposing the request for fees.

- A party opposing a motion for attorney's fees should be prepared to demonstrate that the work involved was not extraordinary and that the work should not have taken so long, as well as otherwise challenging the work performed. In addition, the rates should be challenged if possible. Although these are often not easy to do, an opposing party may be able to attack the description of the time entered at the time the work was performed, since many attorneys do not describe their time with sufficient particularity or specificity.

One overriding difficulty is that the opposing party will not have prevailed in the litigation. The opposition will look like "crying over spilt milk," or worse. To the extent that the opposition is seeking other motions, such as a motion for a new trial, a motion for judgment notwithstanding the verdict (JNOV), or other post trial motions, an opposition to a fee motion, other than on truly viable grounds such as a truly and demonstrably unreasonable amount of time or value, might not be advisable.



Cross References:

Motion JNOV, see Ch. 20, Motions for Judgment Notwithstanding the Verdict.

Motion for new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice Opposing Memoranda Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees



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25A.23 Responding to Motion to Recover Attorney's Fees.

25A.23[1] Failure to Respond to Motion for Fees May Result in Fee Award. Failing to respond to a motion for attorney's fees may result in the court's award of those fees. Moreover, acquiescence to a motion for fees may result in a fee award that may later be difficult to overturn [see *City of Santa Paula v. Narula* (2003) 114 CA4th 485, 488, 8 CR3d 75] .

Example:

In a case involving enforcement of a city ordinance, the city filed two motions for attorney's fees, with detailed billing statements. The defendant's opposition stated, among other things, that the city included billing time that had been covered by the first attorney fee order, but they otherwise had "no objection to the fees sought." In its response, the city denied there was duplication of time. At the hearing on the motion, defense counsel stated that it had "taken the position that the fees were correct." The trial court awarded the city attorney's fees and the appellate court upheld the award and amount of fees [*City of Santa Paula v. Narula* (2003) 114 CA4th 485, 489, 8 CR3d 75] .

Prerequisite:

This seems self evident. If there are truly viable grounds for opposing a fee award, or for reducing the amount sought, filing and serving response papers is crucial.

25A.23[2] Grounds for Opposing Motion for Fees Include Excessive Amount of Fees.

25A.23[2][a] Requested Fees Are Excessive. A party may oppose a motion for attorney's fees on the ground that the requested fees are excessive. A party seeking an award of fees is not necessarily entitled to compensation for the value of attorney services according to his or her own notion or to the full extent claimed [*Donahue v. Donahue* (2010) 182 CA4th 259, 271-274, 105 CR3d 723 (trial court must determine number of hours attorney reasonably expended)]. The party seeking fees has the burden of showing that the fees incurred were allowable, reasonably necessary to the conduct of the litigation, and reasonable in amount [*Levy v. Toyota Motor Sales U.S.A., Inc.* (1992) 4 CA4th 807, 815-816, 5 CR2d 770] .

Consider:

A party may want to ask for the adversary's complete time records to conduct a forensic audit into the reasonableness of the fees.

25A.23[2][b] Although Opposing Party Is Entitled to Attorney's Fees, It Is Not Entitled to Fees Under Private Attorney General Theory. A party's request for attorney's fees based on the private attorney general doctrine (CCP § 1021.5) may be opposed on the ground that the private attorney general doctrine does not apply in that case [*Levy v. Toyota Motor Sales U.S.A., Inc.* (1992) 4 CA4th 807, 814, 5 CR2d 770] .

Example:

Although the Song-Beverly Consumer Warranty Act (CC § 1790 *et seq.*) is designed to protect the public interest, it does not follow that every action brought under the Act will meet the standard set forth in CCP § 1021.5 [*Levy v. Toyota Motor Sales U.S.A., Inc.* (1992) 4 CA4th 807, 814, 5 CR2d 770] .

 Cross References:

Discussion of CCP § 1021.5, see 25A.11.

Song-Beverly Consumer Warranty Act, see California Forms of Pleading and Practice, Ch. 502, Sales: Warranties (Matthew Bender)

25A.23[2][c] Statutory Scheme Cited in Support of Fee Award Does Not Provide for Fees in This Case. Even if a statutory scheme provides for the award of fees, and the case is brought under that scheme, the statute may not provide for fees in a particular case [see *Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 144-148, 118 CR2d 569] .

Example:

In an antitrust action, the attorney's fee provision under the Cartwright Act (B&P § 16750(a)) provides a unilateral fees clause, referring to an award to a prevailing party who is "any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter." This provision's plain language does not create any reciprocal right on the part of a prevailing *defendant* to such an award of "a reasonable attorneys' fee together with the costs of the suit," as incurred in *defense* of an action [*Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 144-148, 118 CR2d 569] .

 Cross Reference:

Discussion of fees in antitrust action, see California Forms of Pleading and Practice, Ch. 565, Unfair Competition (Matthew Bender).

25A.23[2][d] Contract Disallows Fees in This Case. The recovery of attorney's fees may be opposed on the ground that in accordance with the parties' express agreement, the prevailing party is barred from recovering attorney's fees, for example, because the party refused a request to mediate [see, e.g., *Frei v. Davey* (2004) 124 CA4th 1506, 1508, 22 CR3d 429] .

25A.23[2][e] Attorney's Fees Are Generally Not Recoverable in Tort Actions. Attorney's fees are generally not available to prevailing parties in tort actions. If a tort action is brought in accordance with a particular statute, the statute may not provide for recovery of attorney's fees [*Aozora Bank, Ltd. v. 1333 North Cal. Blvd.* (2004) 119 CA4th 1291, 1295-1297, 15 CR3d 340 (bad faith waste action against partnership brought under CC § 2929 did not allow fees)].

25A.23[2][f] Party Seeking Fees Is Not Prevailing Party. If a party seeks recovery of attorney's fees on the ground that the party is the prevailing party and is otherwise entitled to fees, the fees will not be awarded if the party cannot be defined as the "prevailing party" [see CCP §§ 1032(b), 1033.5(a)(10)]. This ground for attacking fees is particularly effective in a complicated case with multiple parties and real parties in interest [*Nestande v. Watson* (2003) 111 CA4th 232, 241, 4 CR3d 18] .

 Cross Reference:

Discussion of prevailing party, see 25A.07, 25A.11[9].

25A.23[2][g] Attorney's Fees Should Be Apportioned. In a proper case, if the basis for the award of fees (e.g., a contract provision) allows it, attorney's fees may be apportioned [*Graciano v. Robinson Ford Sales, Inc. (2006) 144 CA4th 140, 157-159, 50 CR3d 273*]. For example, fees may be apportioned according to the separateness of defense efforts among multiple defendants who substantially prevailed in the case. In this type of case, the party seeking apportionment must make an adequate effort to discover the relevant division of work, and produce a sufficient trial record on that issue to withstand scrutiny on appeal [see, e.g., *Carver v. Chevron U.S.A., Inc. (2002) 97 CA4th 132, 144-148, 118 CR2d 569* (trial court had adequate factual basis to conclude that investigation and defense of corporate and individual defendants were closely related and involved same issues, and erred in failing to apportion fees)].

Example--Apportionment Not Allowed:

Attorney's fees awarded under the private attorney general doctrine should not be apportioned. An award of attorney's fees under *CCP* § 1021.5 is an obligation. When an obligation is imposed on several persons it is presumed to be joint [*CCP* § 1431]. Treating the *CCP* § 1021.5 obligation of more than one opposing party as joint is consistent with the purposes of that statute. If the obligation is apportioned in the sense that it is not joint, the successful party faces greater difficulty in collecting the judgment for fees, and some of the attorney's fees will not be recoverable if any opposing party is insolvent [*Friends of the Trails v. Blasius (2000) 78 CA4th 810, 838, 93 CR2d 193*].

 Cross Reference:

Private attorney general doctrine, see 25A.11.

25A.23[2][h] Fees As Costs in Limited Civil Case May Be Denied If Judgment Could Have Been Rendered in Small Claims Court. When a prevailing plaintiff in a limited civil case recovers less than the amount prescribed by law as the maximum limitation on the jurisdiction of the small claims court, costs may be limited or denied completely [see *CCP* § 1033(b)(1); see also Alameda Super Ct Rules, Rule 4.11].

 Cross References:

Discussion of costs, see Ch. 24, Costs.

Fees in cases that could have been brought in small claims court, see *California Forms of Pleading and Practice*, § 174.15 (Matthew Bender).

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice Opposing Memoranda Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees American Rule Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Reasonable Fees Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Evidence Procedural Considerations Burdens of Proof General Overview



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25A.24 Court May Not Condition Continuance on Payment of Fees.

When an application is made to the court or referee to postpone a trial, the payment of the expenses occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the continuance [*CCP* § 1024]. However, the trial court does not have discretion to award attorney's fees as a condition to a continuance under *CCP* § 1024 [*Levine v. Pollack* (1995) 37 CA4th 129, 139, 43 CR2d 491] .



Cross Reference:

Imposition of costs for continuance, see *Ch. 24, Costs*, 24.21.

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersContinuancesCivil
ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview



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25A.25 CHECKLIST: Appealing Award of Attorney's Fees.

☐ Determine grounds for appeal.

☐ Raise any objections that were raised and denied at trial.

Authority:

See, e.g., *Levy v. Toyota Motor Sales U.S.A., Inc.* (1992) 4 CA4th 807, 815-816, 5 CR2d 770

Discussion:

See 25A.23[2]

☐ If objection was not made at trial, issue may be waived on appeal.

Authority:

City of Santa Paula v. Narula (2003) 114 CA4th 485, 493, 8 CR3d 75

Discussion:

See 25A.23[1]

☐ Analyze whether determination regarding private attorney general fees was made in accordance with statutory requirements.

Authority:

CCP § 1021.5

Discussion:

See 25A.11

☐ Determine whether grounds for appeal exist based on manner in which award was determined, or other factors.

☐ Determine whether trial court considered all relevant factors, and/or made decision prematurely.

Authority:

See, e.g., *Dorman v. DWLC Corp.* (1995) 35 CA4th 1808, 1816-1817, 42 CR2d 459

Discussion:

See 25A.31

☐ Determine whether trial court clearly expressed basis for award.

Authority:

In re Vitamin Cases (2003) 110 CA4th 1041, 1052, 2 CR3d 358

Discussion:

See 25A.31[3]

☐ Determine appropriate standard of review.

☐ Abuse of discretion is typical standard of review.

☐ Determine whether grounds exist for abuse of discretion.

☐ De novo review is appropriate if statutory construction and question of law must be determined.

Authority:

Carver v. Chevron U.S.A., Inc. (2002) 97 CA4th 132, 142, 118 CR2d 569

Discussion:

See 25A.27, 25A.28

☐ If necessary, bring motion for attorney's fees on appeal after judgment.



Timing:

Serve and file motion within 40 days after the clerk sends notice of issuance of the remittitur.

Authority:

Cal Rules Ct, Rules 8.278(c)(1), 3.1702(c)(1)

Discussion:

See 25A.33



Timing:

Parties may stipulate to extend time.

Authority:

Cal Rules Ct, Rule 3.1702(c)(2)

Discussion:

See 25A.33[3]

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Civil
Procedure Appeals Reviewability Preservation for Review Civil Procedure Appeals Standards of Review Abuse of
Discretion Civil Procedure Appeals Standards of Review De Novo Review



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.26

25A.26 Options and Strategies.

A party appealing an award of attorney's fees should be prepared to raise issues that were already raised in trial, with specific objections preserved for appeal.

► **Cross Reference:**

Objections to fee award, see 25A.23[1], 25A.30, 25A.31.

In addition, counsel should consider challenging the manner in which the trial court decided the fee award. For example, if the trial court made the fee determination prematurely, and/or in the absence of all relevant factors, the award may be attacked on that basis, resulting in possible reversal [*see, e.g., Dorman v. DWLC Corp. (1995) 35 CA4th 1808, 1816-1817, 42 CR2d 459*].

► **Cross Reference:**

Trial court's basis for award, see 25A.31[2].

Counsel should be aware that the standard of review is usually that of abuse of discretion, and that an appellate court will generally defer to the decision of the trial court [*see Graham v. DaimlerChrysler Corp. (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140*]. Counsel should also determine whether the de novo standard applies to the particular case, that is, whether the appeal involves a construction of a statute and question of law [*see Van Slyke v. Gibson (2007) 146 CA4th 1296, 1299, 53 CR3d 491; Carver v. Chevron U.S.A., Inc. (2002) 97 CA4th 132, 142, 118 CR2d 569*]. The point being that conclusions of law regarding whether fees are available are reviewed de novo; findings of fact regarding the reasonableness of the fees or mixed questions of law and fact such as whether a substantial benefit was conferred are reviewed for an abuse of discretion.

► **Cross References:**

Discussion of abuse of discretion standard of review, see 25A.27.

Discussion of de novo standard of review, see 25A.28

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
Procedure Appeals Reviewability Preservation for Review Civil Procedure Appeals Standards of Review Abuse of
Discretion Civil Procedure Appeals Standards of Review De Novo Review



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25A.27 Standard of Review Is Typically Abuse of Discretion.

25A.27[1] Award of Attorney's Fees Normally Reviewed for Abuse of Discretion. On review of an award of attorney's fees after trial, the normal standard of review is abuse of discretion [*McGuigan v. City of San Diego* (2010) 183 CA4th 610, 622, 107 CR3d 554].

Under the abuse of discretion standard, the trial court's judgment may not be disturbed unless the appellate court is convinced that it is clearly wrong and constitutes an abuse of discretion. Reversal is required when there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied. A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error [*Mejia v. City of Los Angeles* (2007) 156 CA4th 151, 157-158, 67 CR3d 228] .

An experienced trial judge is normally the best judge of the value of professional services rendered in his or her court, and although a judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong [*Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 579, 21 CR3d 331, 101 P3d 140 (concerning contingency risk), citing *Ketchum v. Moses* (2001) 24 C4th 1122, 1131-1132, 104 CR2d 377, 17 P3d 735] .

25A.27[2] Determination of Abuse of Discretion Requires Finding That Decision Effected Injustice. One of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered [*Dorman v. DWLC Corp.* (1995) 35 CA4th 1808, 1815, 42 CR2d 459] .

25A.27[3] Burden Is on Appellant to Establish Abuse of Discretion. The burden is on the party complaining to establish an abuse of discretion. Unless a clear case of abuse is shown and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and divest the trial court of its discretionary power [*Dorman v. DWLC Corp.* (1995) 35 CA4th 1808, 1815, 42 CR2d 459] .

25A.27[4] Award of Private Attorney General Fees Is Reviewed for Abuse of Discretion. The award of private

attorney general fees is within the trial court's sound discretion. Thus, the award will be reversed only if it is clearly wrong or has no reasonable basis [*Kim v. Euromotors West/The Auto Gallery* (2007) 149 CA4th 170, 176, 56 CR3d 780 ; see *Graham v. DaimlerChrysler Corp.* (2004) 34 C4th 553, 578, 21 CR3d 331, 101 P3d 140] .

In reviewing the trial court's decision regarding the award of attorney's fees on the private attorney general theory, the appellate court pays particular attention to the trial court's stated reasons in denying or awarding fees and ascertains whether it applied the proper standards of law in reaching its decision. The pertinent question is whether the grounds given by the court are consistent with the substantive law of CCP § 1021.5 and, if so, whether their application to the facts of the case is within the range of discretion conferred on the trial courts under § 1021.5, read in light of the statute's purposes and policy [*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (2000) 79 CA4th 505, 511-512, 94 CR2d 205] .



Cross Reference:

Discussion of abuse of discretion standard, see *California Forms of Pleading and Practice*, § 41.12 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Appeals Standards of Review Abuse of Discretion Civil Procedure Appeals Standards of Review De Novo Review Evidence Procedural Considerations Burdens of Proof General Overview



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.28

25A.28 De Novo Review Is Appropriate When Requiring Determination of Statutory Construction and Question of Law.

De novo review of a trial court order is warranted when the determination of whether the criteria for an award of attorney's fees and costs have been satisfied amounts to statutory construction and a question of law [*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 CA4th 15, 20, 45 CR3d 633] . To determine whether an award of attorney's fees is warranted under a contractual attorney's fee provision, the reviewing court examines the applicable statutes and provisions of the contract [*Carver v. Chevron U.S.A., Inc.* (2002) 97 CA4th 132, 142, 118 CR2d 569] .

Example--De Novo Review:

In the de novo review, the appellate court determines whether the contract provision provides for an award of fees [see *Kangarlou v. Progressive Title Co.* (2005) 128 CA4th 1174, 1177, 27 CR3d 754] . The amount of fees awarded is still reviewed for an abuse of discretion.

➡ Cross Reference:

Discussion of de novo standard, see *California Forms of Pleading and Practice*, § 41.63 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees Statutory Awards Civil Procedure Appeals Standards of Review De Novo Review



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25A.29 Appellate Court May Review Entitlement to and Amount of Fee Award.

In an appeal from a postjudgment order awarding attorney's fees, the appellate court may review the entitlement to and the amount of the fees awarded [*City of Santa Paula v. Narula (2003) 114 CA4th 485, 492, 8 CR3d 75*] .

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
Procedure Appeals Appellate Jurisdiction State Court Review



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.30

25A.30 Failure to Raise Proper Objection to Fees Waives Issue on Appeal.

Failure to raise an objection to the recovery or amount of fees waives those issues on appeal [*City of Santa Paula v. Narula* (2003) 114 CA4th 485, 493, 8 CR3d 75 (party filed no declarations in opposition to fees and presented no proof that there was duplication of services; at hearing, party conceded that fees were correct; fees documented with itemized billing statements)].

An appellate court has no jurisdiction to hear an appeal of an attorney's fee award if the appellant fails to separately appeal an award of attorney's fees made after entry of the judgment [*Hill v. Ghamaty* (2006) 143 CA4th 1156, 1171, 50 CR3d 247] .

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
Procedure Appeals Appellate Jurisdiction State Court Review Civil Procedure Appeals Reviewability Preservation for
Review



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.31

25A.31 Grounds for Appeal of Fee Award Include Unclear Basis for Award.

25A.31[1] Grounds Stated in Opposition to Motion for Fees May Be Raised on Appeal. Grounds stated in opposition of an award of attorney's fees may be raised again on appeal [see, e.g., *Frei v. Davey* (2004) 124 CA4th 1506, 1508, 22 CR3d 429 (contract did not allow recovery of fees)].

Cross Reference:

Trial court's failure to consider all factors, see 25A.23[2].

25A.31[2] Grounds Include Trial Court's Failure to Adequately Consider All Factors. A party appealing an award of fees may assert that the court did not give adequate consideration to all of the relevant factors in deciding whether to allow costs and fees [see, e.g., *Dorman v. DWLC Corp.* (1995) 35 CA4th 1808, 1816-1817, 42 CR2d 459 (in commercial landlord-tenant case, court ruled on issue of fees and costs without having before it all of evidence necessary to make reasoned decision)].

25A.31[3] Grounds Include Unclear Basis for Award of Fees. When the record is unclear whether the trial court's award of attorney's fees is consistent with the applicable legal principles, the appellate court may reverse the award and remand the case to the trial court for further consideration and amplification of its reasoning [*In re Vitamin Cases* (2003) 110 CA4th 1041, 1052, 2 CR3d 358] .

Cross Reference:

Responding to motion for fees, see 25A.23.

Legal Topics:

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

Civil Procedure Pleading & Practice Motion Practice Opposing Memoranda Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil Procedure Appeals Appellate Jurisdiction State Court Review



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25A.32 Reversal of Underlying Judgment Requires Reversal of Connected Private Attorney General Fee Award.

When an appellate court reverses a judgment ordering issuance of a writ of mandate, the private attorney general fee award under *CCP* § 1021.5 must also be reversed [*National Parks & Conservation Assn. v. County of Riverside* (2000) 81 CA4th 234, 238, 96 CR2d 576 ; *California Grocers Ass'n Inc. v. Bank of Am.* (1994) 22 CA4th 205, 220, 27 CR2d 396] .



Cross Reference:

Discussion of private attorney general fees, see *California Forms of Pleading and Practice*, § 174.55 (Matthew Bender).

Legal Topics:

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

Civil Procedure Remedies Costs & Attorney Fees Attorney Expenses & Fees General Overview Civil
Procedure Remedies Writs Common Law Writs Mandamus Civil Procedure Appeals Remands



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25A.33 Bringing Motion for Attorney's Fees on Appeal After Judgment.

25A.33[1] Timing Requirements Apply When Court Determines Entitlement to Fees and/or Amount of Fees.

The provisions of *Cal Rules Ct, Rule 3.1702* apply when the court determines entitlement to the fees, the amount of the fees, or both, whether the court makes that determination because the statute or contract refers to "reasonable" fees, because it requires a determination of the prevailing party, or for other reasons [*Cal Rules Ct, Rule 3.1702(a)*].

25A.33[2] Notice of Motion Must Be Served and Filed Within Time for Serving and Filing Memorandum of Costs. A notice of motion to claim attorney's fees on appeal--other than the attorney's fees on appeal claimed under *Cal Rules Ct, Rule 3.1702(b)* (attorney's fees on appeal before judgment)--under a statute or contract requiring the court to determine entitlement to the fees, the amount of the fees, or both, 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)*].

Within 40 days after the clerk sends notice of issuance of the remittitur, a party claiming costs awarded by a reviewing court must serve and file in the superior court a verified memorandum of costs under *Cal Rules Ct, Rule 3.1700* [*Cal Rules Ct, Rule 8.278(c)(1)*].

Example:

The 40-day cut-off period applies to post-appeal motions for attorney's fees in family law cases [*In re Marriage of Freeman* (2005) 132 CA4th 1, 9, 33 CR3d 237] .



Strategic Point:

Cal Rules Ct, Rule 8.278 relates to claiming or opposing costs on appeal. *Cal Rules Ct, Rule 8.278(d)(2)* states: "Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702." As such, the 40-day period of Rule 8.278(c)(1) relates to costs on appeal. The timing requirements in *Cal Rules Ct, Rule 3.1702*, govern whether a motion for attorney's fees on appeal may be timely or not.



Cross Reference:

Further discussion of appeal procedure, see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview, Ch. 53, Appeal: Remittitur and Costs on Appeal (Matthew Bender).

25A.33[3] Parties May Stipulate to Extend Time to Bring Motion Up to 60 Days. The parties may by stipulation filed before the expiration of the time allowed under *Cal Rules Ct, Rule 3.1702(c)(1)*, extend the time for filing the motion up to an additional 60 days [*Cal Rules Ct, Rule 3.1702(c)(2)*].

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsRemands



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25A.34 Notice of Motion and Motion to Determine Prevailing Party on Contract and/or to Fix Amount of Attorney's Fees to Be Awarded As Costs.

Notice of Motion and Motion to Determine Prevailing Party on Contract and/or to Fix Amount of Attorney's Fees to Be Awarded As Costs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name]

Plaintiff, vs. _____ [name],
Defendant.

)
) NO. _____
) NOTICE OF MOTION AND
) MOTION _____ [TO
) DETERMINE PARTY
) PREVAILING ON CONTRACT
) and/or TO FIX AMOUNT OF
) ATTORNEY'S FEES
) AWARDABLE AS ITEM OF
) COSTS], SUPPORTING
) DECLARATION OF
) _____ [NAME] [, AND
) MEMORANDUM]
) Date: _____
) Time: _____
) Location: _____
) Judge: _____
) Date Action Filed: _____
) Trial Date: _____
)

To _____ [party, e.g., Defendant Mary Jones] 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., Plaintiff John Smith] will move for an order _____ [e.g., determining that he/she/it is the party prevailing on the contract for purposes of *Civil Code Section 1717* and is entitled under that section to an award of attorney's fees as an item of costs and/or fixing the amount of attorney's fees to which he/she/it is entitled as the party prevailing on the contract in this action]. This motion will be made on the ground that _____ [specify moving party, e.g., plaintiff John Smith] _____ [e.g., recovered the greater relief in this action on the contract and is therefore the party prevailing on the contract within the meaning of *Civil Code Section 1717* and/or has paid or incurred liability for attorney's fees to _____ (prosecute or defend) this action, which he/she/it is entitled, as the party prevailing on the contract, to recover as part of his/her/its costs of suit].

The motion is based on this notice of motion, on the declaration(s) of _____ [name(s)] and the supporting memorandum served and filed with this motion, on the records and file herein, 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:

CC § 1717

Related Form of Memorandum:

See California Points and Authorities, § 60.440 (Matthew Bender)



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25A.35 Notice of Motion and Motion to Recover Attorney's Fees on Private Attorney General Theory.

Notice of Motion and Motion to Recover Attorney's Fees on Private Attorney General Theory.
SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION AND MOTION FOR OR-
_____ [name]	)	DER AWARDING ATTORNEY'S FEES and/or TO
Plaintiff, vs. _____ [name],	)	FIX AMOUNT OF ATTORNEY'S FEES
Defendant.	)	[, SUPPORTING DECLARATION OF
	)	_____ NAME, AND MEMOR-
	)	ANDUM]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

To _____ [party claiming costs, 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 for an order awarding him/her/them
attorney's fees in the amount of \$_____ under Code of Civil Procedure Section 1021.5.

The motion will be made on the grounds that this action has resulted in the enforcement of an important right affecting the public interest, a significant benefit has been conferred on _____ [the general public *or* a large class of persons], [and] the necessity and financial burden of private enforcement are such as to make the requested award appropriate, [*if action involves recovery, add: and the fees should not, in the interest of justice, be paid out of the recovery*].

The motion is based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed with this motion, on the records and file herein, 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 § 1021.5

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 60.370 -60.386 (Matthew Bender)



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2-25A MB Practice Guide: Trial & Post-Trial Civil Proc 25A.36

25A.36 Order Awarding Attorney's Fees on Private Attorney General Theory.

Order Awarding Attorney's Fees on Private Attorney General Theory.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

_____ [name]	)	
Plaintiff, vs. _____ [name],	)	NO. _____
Defendant.	)	ORDER AWARDING ATTORNEY'S FEES TO
	)	_____ [NAME OF SUCCESSFUL
	)	PARTY]

The motion of _____ [specify successful party, e.g., Plaintiff John Smith] for an order awarding him/her/them attorney's fees under *Code of Civil Procedure Section 1021.5* came on regularly for hearing on _____ [date]. Plaintiff appeared by counsel _____ [name]; defendant appeared by counsel _____ [name].

On proof being made to the satisfaction of the court that this action has resulted in the enforcement of an important right affecting the public interest in that _____ [specify], and that a significant benefit has been conferred on _____ [the general public or a large class of persons]; that the necessity and financial burden of private enforcement are such as to make this award of attorney's fees appropriate; [if money or property recovered in action, add: and that the attorney's fees should not in the interest of justice be paid out of the recovery;] and that therefore the motion should be granted,

IT IS ORDERED that the motion be and hereby is granted, and that _____ [specify successful party, e.g., Plaintiff John Smith] is/are entitled to receive reasonable attorney's fees from the _____ [specify opposing party, e.g., Defendant Mary Smith].

IT IS FURTHER ORDERED that \$_____ is a reasonable attorney's fee for the representation by

_____ [name of successful party's attorney, e.g., Plaintiff's Attorney Tom Doe] from the beginning of this action through _____ [date] _____ [if more than one attorney or firm, repeat for each, e.g., and that \$_____ is a reasonable attorney's fee for the representation by _____ (name of attorney or firm) from the beginning of this action through _____ (date)].

Date: _____

_____ [signature]

_____ [name]

Judge of the Superior Court

NOTES.

Authority:

CCP § 1021.5

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 60.370 -60.386 (Matthew Bender)



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Chapter 26 Entry of Judgment

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.syn

§ 26.syn Synopsis to Chapter 26: Entry of Judgment

26.01 Scope.

26.02 Objective and Strategy.

26.03 CHECKLIST: Obtaining Entry of Judgment by Confession.

26.04 Options and Strategies.

26.05 Defendant Confesses Liability.

26.05[1] Defendant Executes Statement Authorizing Judgment.

26.05[2] Defendant's Attorney Certifies Examination of Judgment and Advice to Defendant.

26.06 Plaintiff Files Defendant's Statement and Attorney's Certificate.

26.07 Clerk Enters Judgment.

26.08 CHECKLIST: Obtaining Entry of Judgment After Adverse Party Failed to Appear at Trial.

26.09 Options and Strategies.

26.10 Trial May Proceed to Judgment If Absent Party Had Sufficient Notice of Trial.

26.10[1] Court Clerk Must Serve Notice of Trial.

26.10[2] Any Party May Serve Notice of Trial.

26.10[3] Party Seeking to Proceed Must Prove That Absent Party Had Notice of Trial.

26.11 CHECKLIST: Obtaining Entry of Judgment on Submitted Controversy.

- 26.12 Options and Strategies.
- 26.13 Parties May Submit Controversy on Agreed Facts Without Filing Action.
- 26.14 Court Determines Case and Renders Judgment.
- 26.15 CHECKLIST: Obtaining Entry of Judgment After Bench Trial.
- 26.16 Options and Strategies.
- 26.17 After Bench Trial, Court Issues Tentative Decision.
- 26.17[1] Court Announces Tentative Decision.
- 26.17[2] Clerk Mails Tentative Decision.
- 26.18 Court Must Issue Statement of Decision If Requested by Party.
- 26.18[1] Any Party May Request Statement of Decision.
- 26.18[2] Any Party May Submit Proposals for Statement of Decision.
- 26.18[3] Court or Ordered Party Prepares Proposed Statement of Decision and Proposed Judgment.
- 26.18[3][a] Court Ordinarily Prepares Proposed Statement of Decision and Judgment.
- 26.18[3][b] Court May Order Party to Prepare Proposed Statement of Decision and Judgment.
- 26.18[4] Preparing Proposed Statement of Decision.
- 26.18[5] Preparing Proposed Judgment.
- 26.18[5][a] Format of Judgment.
- 26.18[5][b] Relief Granted.
- 26.18[5][c] Costs and Attorney's Fees.
- 26.18[5][d] Prejudgment Interest.
- 26.18[5][e] Postjudgment Interest.
- 26.18[6] Any Party May Object to Proposed Statement of Decision and Judgment.
- 26.18[7] Court May Conduct Hearing on Objections.
- 26.18[8] Court Adopts Statement of Decision and Judgment.
- 26.19 Court Renders Judgment If No Statement of Decision Is Requested.
- 26.19[1] Court or Designated Party Prepares Proposed Judgment.

26.19[1][a] Court Ordinarily Must Prepare Proposed Judgment.

26.19[1][b] Court May Require Party to Prepare Proposed Judgment.

26.19[2] Any Party May Object to Proposed Judgment.

26.19[3] Court May Conduct Hearing on Objections.

26.19[4] Court Signs and Files Judgment.

26.20 Clerk Enters Judgment.

26.20[1] Judgment Must Be Entered When Filed.

26.20[2] Traditional Method--Entry in Judgment Book.

26.20[3] Alternative Method--Entry by Filing of Judgment.

26.21 CHECKLIST: Entry of Judgment After Jury Trial.

26.22 Options and Strategies.

26.23 Entry of Verdict in Minutes of Court.

26.23[1] Entry of General Verdict.

26.23[2] Entry of Special Verdict.

26.24 Clerk Prepares and Enters Judgment on Verdict.

26.25 CHECKLIST: Giving Notice of Entry of Judgment.

26.26 Options and Strategies.

26.27 Prevailing Party Ordinarily Must Provide Notice of Entry of Judgment.

26.28 Clerk Provides Notice of Entry in Other Cases.

26.28[1] Clerk Must Provide Notice of Entry If Prevailing Party Is Unrepresented.

26.28[2] Clerk Must Provide Notice of Entry As Ordered by Court.

26.28[3] Clerk's Notice of Entry Need Not Be in Same Form As Notice by Party.

26.29 Prevailing Party Must Notify Attorney General If State Statute or Regulation Is Declared Unconstitutional.

26.30 Statement Confessing Judgment.

26.31 Attorney's Declaration in Support of Statement Confessing Judgment.

26.32 Judgment by Confession.

26.33 Judgment on Agreed Case.

26.34 Request for Statement of Decision After Bench Trial.

26.35 Proposals As to Content of Statement of Decision After Bench Trial.

26.36 Proposed Statement of Decision After Bench Trial.

26.37 Objections to Proposed Statement of Decision After Bench Trial.

26.38 Judgment After Bench Trial.

26.39 Judicial Council Form JUD-100--Judgment.

26.40 Judicial Council Form CIV-130--Notice of Entry of Judgment or Order.



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Chapter 26 Entry of Judgment
I. STRATEGY

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.01

26.01 Scope.

This chapter covers:

- Entry of judgment by confession [see 26.03 -26.07; Forms: see 26.30 -26.32].
- Entry of judgment after one party failed to appear at trial [see 26.08 -26.10; Form: see 26.39].
- Entry of judgment on a submitted controversy (an agreed case) [see 26.11 -26.14; Form: see 26.33].
- Entry of judgment after a bench trial (trial by the court) [see 26.15 -26.20; Forms: see 26.34 -26.39].
- Entry of judgment after a jury trial [see 26.21 -26.24].
- Notice of entry of judgment [see 26.25 -26.29; Form: see 26.40].

Core Statute:

CCP § 594

Detailed Discussion:

Coverage of judgments generally, see Ch. 19, Introduction to Judgments.

Coverage of judgment notwithstanding the verdict, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

Coverage of motions to vacate, modify, or set aside judgments, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment; Ch. 28, Correcting and Modifying Judgment; and Ch. 29, Setting Aside Judgments and Orders.

Coverage of default judgments (entered on the defendant's failure to answer the complaint), see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.44 -36.64.

Coverage of stipulated judgments (i.e., consent judgments entered pursuant to settlement), see *Matthew*

Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 28.09.

Coverage of judgments entered pursuant to formal compromise offers under *CCP* § 998, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 37.74.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultFailure to Pursue the CauseCivil ProcedurePretrial JudgmentsJudgment by ConfessionCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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Chapter 26 Entry of Judgment
I. STRATEGY

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.02

26.02 Objective and Strategy.

The entry of judgment is a significant event in litigation. It generally marks the trial court's resolution of the parties' dispute, although some postjudgment maneuvering may still occur in the trial court. The entry of judgment triggers the running of time limits for pursuing certain postjudgment remedies, including various motions in the trial court [*see, e.g., CCP §§ 629 (motion for judgment notwithstanding verdict), 659 (motion for new trial)*] and review by the court of appeal [*see Cal Rules Ct, Rule 8.104(a)*].

Strategic Point:



After the jury or judge has returned a verdict, a losing defendant may have reason to try to settle the lawsuit before entry of judgment. Such defendants may have additional concerns about having a judgment recorded, and those concerns may have a greater impact than merely the financial cost of settling a particular lawsuit.



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 ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityTime Limitations



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Chapter 26 Entry of Judgment

II. OBTAINING ENTRY OF JUDGMENT BY CONFESSION

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.03

26.03 CHECKLIST: Obtaining Entry of Judgment by Confession.

☐ Before suit is filed, consider seeking entry of judgment by confession if prospective defendant is willing to admit liability for any of following claims:

- ☐ Claim for money due.
- ☐ Claim for money to become due.
- ☐ Claim of contingent liability.

Authority:

CCP § 1132(a)

Discussion:

See 26.04

☐ Have defendant consult with own attorney before deciding whether to confess judgment.

Authority:

CCP § 1132(b)

☐ If defendant is willing to confess judgment, have defendant execute statement, verified under oath, containing following:

- ☐ Authorization for entry of judgment for a specified sum.

☐ If judgment will be for money due, or to become due, concise statement of facts out of which debt arose, showing that sum confessed is justly due, or to become due.

☐ If judgment will be for purpose of securing plaintiff against contingent liability, concise statement of facts constituting liability, showing that sum confessed does not exceed that liability.

Authority:

CCP § 1133

Discussion:

See 26.05[1]

Form:

See 26.30

☐ Have defendant's attorney sign certificate (or declaration under penalty of perjury) establishing following:

☐ Attorney has examined proposed judgment.

☐ Attorney has advised defendant with respect to waiver of rights and defenses under confession of judgment procedure.

☐ Attorney has advised defendant to use confession of judgment procedure.

Authority:

CCP § 1132(b)

Discussion:

See 26.05[2]

Form:

See 26.31

☐ Prepare proposed judgment by confession, including in judgment award of \$30 court costs.

Authority:

CCP § 1134; Gov Code § 70626(b)(3)

Form:

See 26.32

☐ File defendant's verified statement and attorney's certificate (or declaration), along with proposed judgment by confession, and pay filing fee of \$30.

Authority:

CCP § 1134(a), (b); Gov Code § 70626(b)(3)

Discussion:

See 26.06

☐ Verify that clerk has entered judgment by confession.

Authority:

CCP § 1134

Discussion:

See 26.07

Legal Topics:

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

Civil ProcedurePretrial JudgmentsJudgment by ConfessionCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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Chapter 26 Entry of Judgment
II. OBTAINING ENTRY OF JUDGMENT BY CONFESSION

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.04

26.04 Options and Strategies.

The following kinds of judgments by confession may be entered by the superior court without an action being filed [CCP § 1132(a)]:

- A judgment for money due.
- A judgment for money to become due.
- A judgment to secure any person against contingent liability on behalf of a defendant.

A judgment by confession (sometimes called a "confession judgment" or a "confessed judgment") is effectively a private admission of liability for a debt without trial. Although not widely used in California, it can be an efficient means for a creditor to obtain a judgment without incurring major litigation expenses [see *Efstratis v. First N. Bank* (1997) 59 CA4th 667, 672, 69 CR2d 445]. Thus, if the debtor is willing to admit liability for the amount of the debt, the creditor should consider obtaining a judgment by confession.

Example:

A creditor may require a debtor to execute a judgment by confession as a precondition to an extension of credit [see, e.g., *Efstratis v. First N. Bank* (1997) 59 CA4th 667, 669-670, 69 CR2d 445].



Warning:

A defendant must have voluntarily, knowingly, and intelligently waived the due-process rights of notice and an opportunity to be heard before a court can enter a judgment by confession [*Isbell v. County of Sonoma* (1978) 21 C3d 61, 64, 66, 74, 145 CR 368, 577 P2d 188]. Accordingly, courts strictly construe the statutes authorizing judgments by confession [*Efstratis v. First N. Bank* (1997) 59 CA4th 667, 672, 69 CR2d 445].



Strategic Point:

Settling plaintiffs may also request that the settlement agreement provide that a complaint, confession of

judgment, and accompanying judgment can all be entered on notice that the defendant debtor has breached the settlement agreement. This is particularly useful in settlements requiring periodic payments.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsJudgment by ConfessionCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.05

26.05 Defendant Confesses Liability.

26.05[1] Defendant Executes Statement Authorizing Judgment. To support a judgment by confession, the defendant must sign a written statement, verified under oath, containing the following [CCP § 1133]:

- An authorization for the entry of judgment for a specified sum.
- If the judgment will be for money due, or to become due, a concise statement of the facts out of which the debt arose, showing that the sum confessed is justly due, or to become due.
- If the judgment will be for the purpose of securing the plaintiff against a contingent liability, a concise statement of the facts constituting the liability, showing that the sum confessed does not exceed the liability.

 Cross Reference:

Form, see 26.30.

26.05[2] Defendant's Attorney Certifies Examination of Judgment and Advice to Defendant. A judgment by confession may be entered only if an attorney independently representing the defendant signs a certificate (or declaration under penalty of perjury [see CCP § 2015.5]) that the attorney has done all of the following [CCP § 1132(b)]:

- Examined the proposed judgment.
- Advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure.
- Advised the defendant to use the confession of judgment procedure.

 Warning:

It is essential that there be a certificate or declaration signed by an attorney independently representing the defendant, so that the confessed judgment is shown clearly on its face to have been given voluntarily, knowingly, and intelligently after receiving independent legal advice [see *Isbell v. County of Sonoma* (1978) 21 C3d 61, 64, 145 CR 368, 577 P2d 188] . A judgment by confession is not valid if the supporting documentation is signed only by the defendant, even if the defendant is an attorney [*Efstratis v. First N. Bank* (1997) 59 CA4th 667, 674, 69 CR2d 445] . It is also invalid if the certificate or declaration is signed by an attorney who is shown to have represented both plaintiff and defendant, even if the defendant acknowledges the potential conflict [*Wax v. Infante* (1982) 138 CA3d 138, 140, 187 CR 686] , or if it is signed by an attorney purporting to represent the defendant but in fact representing another whose interests were at odds with those of the defendant [see *Rivercourt Co. v. Dyna-Tel, Inc.* (1996) 41 CA4th 1477, 1479-1482, 49 CR2d 279] .

**Cross Reference:**

Form, see 26.31.

Legal Topics:

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

Civil Procedure
Pretrial Judgments
Judgment by Confession



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2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.06

26.06 Plaintiff Files Defendant's Statement and Attorney's Certificate.

To obtain a judgment by confession, the plaintiff must file (1) the defendant's verified statement authorizing the judgment, and (2) the certificate that the defendant's attorney examined the proposed judgment and advised the defendant regarding the confession of judgment procedure [CCP §§ 1132(b), 1134(a)]. The plaintiff should also submit the proposed judgment.

► Cross References:

Discussion of defendant's verified statement, see 26.05[1].

Discussion of certificate of defendant's attorney, see 26.05[2].

Forms, see 26.30 -26.32.

At the time of filing, the plaintiff must pay a fee of \$30 as court costs, which will become part of the judgment [CCP § 1134(b); see CCP § 1134(a); Gov Code § 70626(b)(3)]. No fee will be collected by the court from the defendant [CCP § 1134(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment by Confession



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II. OBTAINING ENTRY OF JUDGMENT BY CONFESSION

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.07

26.07 Clerk Enters Judgment.

On the filing of the defendant's verified statement authorizing the judgment and the accompanying certificate or declaration of the defendant's attorney, the court clerk will enter a judgment of the court for the amount confessed, with costs consisting of the plaintiff's filing fee [*CCP* § 1134(a), (b)].

Cross References:

Discussion of plaintiff's filing of documents and payment of filing fee, see 26.06.

Forms, see 26.32.

Legal Topics:

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

Civil Procedure
Pretrial Judgments
Judgment by Confession
Civil Procedure Judgments
Entry of Judgments
General Overview
Governments
Courts
Clerks of Court



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Chapter 26 Entry of Judgment

III. OBTAINING ENTRY OF JUDGMENT AFTER ADVERSE PARTY FAILED TO APPEAR AT TRIAL

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.08

26.08 CHECKLIST: Obtaining Entry of Judgment After Adverse Party Failed to Appear at Trial.

☐ If court clerk has not served notice of trial at least 20 days before date set for trial (in unlawful detainer action, 10 days before date set for trial), serve notice of trial on adverse party.

Authority:

CCP § 594(a), (b)

Discussion:

See 26.10[2]

☐ Serve notice of trial by mail.

☐ Serve, along with notice of trial, notice of any relief client will seek at trial that adverse party has no reason to anticipate based on pleadings.

Authority:

Garamendi v. Golden Eagle Ins. Co. (2004) 116 CA4th 694, 705-708, 10 CR3d 724

Discussion:

See 26.10[3]

☐ Serve notice of trial not less than 15 days before date set for trial (in unlawful detainer action, 10 days before date set for trial).

☐ If adverse party does not attend trial:

- ☐ Establish that absent party had at least 15 days' notice of trial date (in unlawful detainer action, five days' notice), by either:

Authority:

CCP §§ 594(a), (b), 1013a(1)-(3)

Discussion:

See 26.10[3]

☐ Introducing into evidence court clerk's certificate of service of notice of trial.

☐ Submitting proof of service of notice of trial by any party.

☐ Submitting evidence that absent party served notice of trial at least five days before trial.

- ☐ Proceed with trial, and follow normal procedures to obtain entry of judgment.

Authority:

CCP § 594(a)

Discussion:

See 26.10[3]

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultFailure to Pursue the CauseGovernmentsCourtsClerks of Court



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Chapter 26 Entry of Judgment

III. OBTAINING ENTRY OF JUDGMENT AFTER ADVERSE PARTY FAILED TO APPEAR AT TRIAL

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.09

26.09 Options and Strategies.

If a party does not attend the trial, the case may proceed to dismissal, verdict, or judgment in the absence of that party, unless the court for good cause directs otherwise. If an issue of fact is to be tried, however, the absent party must have been given proper notice of the trial [CCP § 594(a)]. Accordingly, before trial, counsel should verify that the clerk has sent all parties the proper notice of the trial date; if not, counsel should send the notice [see CCP § 594(b)]. Once the proper notice has been sent, counsel should be prepared to proceed with the trial even if an adverse party fails to attend.

Judge's Perspective:

In most courts, once the trial date has been set, the clerk sends notice to all counsel or persons representing themselves. In San Diego County, the notices are mailed the day after the trial date is set.



Strategic Point:

This procedure is particularly useful in cases in which there are issues that counsel would like to apply in the future on a res judicata ground. However, counsel must be aware that some foreign jurisdictions will not enforce a judgment unless there was a trial. Other jurisdictions may permit review of the trial proceedings to determine whether the trial, and the result, comport with the enforcing jurisdiction's due process requirements.



Strategic Point--Plaintiff:

In low-dollar cases, the plaintiff may have the opportunity to proceed with trial in the absence of the adverse party. If this occurs, the plaintiff's counsel merely needs to prove up the elements of plaintiff's cause of action rather than calling every witness as if the adverse party were in attendance.

Distinguish:

The procedure by which a dismissal, verdict, or judgment may be entered in the absence of a party [see CCP § 594] is distinct from the procedure by which a default judgment is entered [see CCP § 585 et seq.]. A default and a default judgment generally may be entered when a defendant fails to appear in an action by filing an answer to the complaint. The entry of default is not authorized if an answer is on file,

whether or not the defendant attends when the action is called for a hearing. A judgment entered in such a case is not, therefore, a default judgment for failure to answer, but simply a judgment rendered in the absence of the defendant at the trial [*Wilson v. Goldman* (1969) 274 CA2d 573, 576, 79 CR 309] .



Cross Reference:

Discussion of default, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief.

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultFailure to Pursue the Cause



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Chapter 26 Entry of Judgment

III. OBTAINING ENTRY OF JUDGMENT AFTER ADVERSE PARTY FAILED TO APPEAR AT TRIAL

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.10

26.10 Trial May Proceed to Judgment If Absent Party Had Sufficient Notice of Trial.

26.10[1] Court Clerk Must Serve Notice of Trial. The clerk of the court generally must serve notice of the trial on each party, by mailing the notice not less than 20 days before the date set for trial [CCP § 594(b)].

Exception:

In an unlawful detainer action, if notice of trial is served by mail, the mailing must be made not less than 10 days before the date set for trial [CCP § 594(b)].



Cross Reference:

Discussion/forms, see Ch. 3, Notice of Trial.

26.10[2] Any Party May Serve Notice of Trial. If the required notice of trial is not served by the clerk, it may be served by mail by any party, not less than 15 days before the date set for trial [CCP § 594(b)].

Exception:

In an unlawful detainer action, if notice of trial is served by mail, the mailing must be made not less than 10 days before the date set for trial [CCP § 594(b)].



Cross Reference:

Discussion/forms, see Ch. 3, Notice of Trial.

26.10[3] Party Seeking to Proceed Must Prove That Absent Party Had Notice of Trial. If a party that has appeared in the case does not attend the trial, the case generally may proceed to dismissal, verdict, or judgment, provided that if an issue of fact is to be tried, it must be established that the absent party had 15 days' notice of trial [CCP § 594(a)].

Exceptions:

- A trial in an unlawful detainer action may proceed in the absence of a party if that party had five

days' notice of the trial [CCP § 594(a)].

- If the absent party has served notice of trial on the party seeking the dismissal, verdict, or judgment at least five days before the trial, the absent party will be deemed to have had sufficient notice [CCP § 594(a)].

If notice of trial has been served by the clerk, proof of service may be made by adducing any competent evidence, such as the clerk's certificate of service [CCP § 594(b); see CCP § 1013a(3)].

If notice of trial has been served by a party, proof of service may be made by adducing competent evidence, such as an affidavit or certificate of service executed in compliance with statutory requirements [CCP § 594(b); see CCP § 1013a(1), (2)].

Distinguish--Requirement of Proof of Notice Is Mandatory but Not Jurisdictional:

Although the statutory requirement of proof that the absent party had sufficient notice of trial is mandatory, it is not a jurisdictional prerequisite. Thus, if it is clear from the record that sufficient notice of trial was given, but proof of notice was simply not received into evidence, the error does not deprive the trial court of jurisdiction to proceed [*Jakoby v. Goddard (In re Marriage of Goddard) (2004) 33 CA4th 49, 54-60, 14 CR3d 50, 90 P3d 1209*].

Once it is established that the required notice of trial was timely served on the absent party, the case may proceed to trial, and ultimately a judgment may be entered as in other cases [CCP § 594(a)].



Warning:

If the defendant has filed an answer to the complaint, a trial conducted in the defendant's absence is not subject to the statutes governing default proceedings, such as the provision limiting damages in a default case to the amount demanded in the complaint or in the plaintiff's formal statement of damages sought [CCP § 580(a); *Garamendi v. Golden Eagle Ins. Co. (2004) 116 CA4th 694, 704-705, 10 CR3d 724* ; see CCP §§ 425.11, 425.115]. Nevertheless, constitutional due process requires that the absent defendant have advance notice of the relief the plaintiff will seek at trial, including the nature and amount of damages. Accordingly, a judgment entered in such a case will be void to the extent that it awards damages that the absent defendant had no reason to anticipate would be sought at trial [*Stein v. York (2010) 181 CA4th 320, 325-327, 105 CR3d 1* ; *David S. Karton, a Law Corp. v. Dougherty (2009) 171 CA4th 133, 150-151, 89 CR3d 506*].



Cross References:

Discussion of entry of judgment after bench trial, see 26.15 -26.20.

Discussion of entry of judgment after jury verdict, see 26.21 -26.24.

Coverage of limitation on damages recoverable in default judgment, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.47.

Discussion of default generally, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, Ch. 36, Defaults and Motions for Relief.

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry
of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultFailure to Pursue the Cause



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Chapter 26 Entry of Judgment
IV. OBTAINING ENTRY OF JUDGMENT ON SUBMITTED CONTROVERSY

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.11

26.11 CHECKLIST: Obtaining Entry of Judgment on Submitted Controversy.

☐ Before suit is filed, consider submitting controversy to court on agreed statement of facts ("agreed case") if both of following conditions exist:

- ☐ Parties agree on statement of facts on which resolution of controversy depends.
- ☐ Court would have jurisdiction of action to resolve controversy.

Authority:

CCP § 1138

Discussion:

See 26.13

☐ Prepare statement of agreed facts.

- ☐ Include allegations sufficient to establish court's jurisdiction over controversy.
- ☐ Have both parties or their attorneys sign agreed statement of facts.

Authority:

CCP § 1138

☐ Have parties execute affidavits showing following:

- ☐ Controversy is real.

- ☐ Proceedings are being pursued in good faith, to determine rights of parties.

Authority:

CCP § 1138

Discussion:

See 26.13

- ☐ If desired, prepare proposed judgment.

Form:

See 26.33

- ☐ File agreed statement of facts, along with parties' affidavits and any proposed judgment.

Authority:

CCP § 1138

Discussion:

See 26.13

- ☐ After court has rendered decision, verify that clerk has entered judgment.

Authority:

CCP §§ 1138, 1139

Discussion:

See 26.14

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.12

26.12 Options and Strategies.

If the parties agree on the facts on which the resolution of their dispute depends, they may avoid the expense and delay of ordinary litigation by using a special statutory procedure to submit the case on an agreed statement of facts (sometimes called submission on an "agreed case") [CCP § 1138 *et seq.*]. As a practical matter, parties to a dispute rarely agree on all the relevant facts, and this statutory procedure is seldom used.

** Judge's Perspective:**

On occasion, especially in lieu of cross motions for summary judgment, counsel will stipulate to all facts necessary to reach a resolution of a matter. After full briefing, the court issues a tentative opinion and hears argument before reaching a final decision.

** Warning:**

This statutory procedure may end up being more difficult and time-consuming than mediation or settlement negotiations, which avoid the uncertainty of a judicial resolution on submitted facts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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IV. OBTAINING ENTRY OF JUDGMENT ON SUBMITTED CONTROVERSY

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26.13 Parties May Submit Controversy on Agreed Facts Without Filing Action.

Parties to a dispute (in statutory terms, a "question in difference") that might be the subject of a civil action may submit the controversy to a superior court without filing an action, if all of the following conditions are satisfied [CCP § 1138]:

- The parties agree on a statement of the facts (in statutory terms, an "agreed case"; also called a "statement of the case") on which the controversy depends.
- The matter is submitted to a court that would have jurisdiction if an action had been brought.
- The parties submitting the case are interested, authorized, and capable of litigating the question as if an action had been filed [see *Bailey v. Johnson* (1898) 121 C 562, 562-563, 54 P 80] .
- The parties establish by affidavits (or declarations under penalty of perjury [CCP § 2015.5]) that the controversy is real and that the proceedings are being pursued in good faith, to determine the rights of the parties.

Example--Insufficient Affidavit:

An affidavit is insufficient if (1) instead of showing that the controversy is real, its language is that the "statement of the case" is a "real controversy"; and (2) instead of stating that the proceedings are in good faith, it states that one party's "contention" is in good faith [*White v. Clarke* (1896) 111 C 425, 428, 44 P 164] .



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2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.14

26.14 Court Determines Case and Renders Judgment.

If the parties have properly submitted a controversy on agreed facts, the court must hear and determine the case, and render judgment, as if an action had been filed [*CCP* § 1138; see *CCP* §§ 1139, 1140].



Cross Reference:

Discussion of entry of judgment after bench trial, see 26.20.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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Chapter 26 Entry of Judgment
V. OBTAINING ENTRY OF JUDGMENT AFTER BENCH TRIAL

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.15

26.15 CHECKLIST: Obtaining Entry of Judgment After Bench Trial.

- ☐ At conclusion of bench trial, verify that court has announced tentative decision, either:
- ☐ By oral statement made in open court at conclusion of trial and entered in minutes.
 - ☐ By written statement filed with clerk after trial.

Authority:
Cal Rules Ct, Rule 3.1590(a)

Discussion:
See 26.17[1]

- ☐ Unless court has announced tentative decision orally in open court in presence of all parties that appeared at trial, verify that clerk has served on all parties that appeared at trial:
- ☐ Copy of minute entry reflecting tentative decision.
 - ☐ Written tentative decision.

Authority:
Cal Rules Ct, Rule 3.1590(a)

Discussion:
See 26.17[2]

- ☐ Review court's tentative decision to determine whether it is acceptable to client.

- ☐ If tentative decision is not acceptable, request that court issue statement of decision.

Authority:

CCP § 632

Discussion:

See 26.18[1]

- ☐ Prepare request for statement of decision, including following:

Authority:

CCP § 632

Form:

See 26.34

- ☐ Specification of controverted issues as to which statement of decision is requested.

- ☐ Request that court explain factual and legal basis for its decision on each controverted issue listed in request.

- ☐ Submit request for statement of decision.

- ☐ Unless trial was concluded within one calendar day, or in less than eight hours over more than one day, file and serve request for statement of decision within 10 days after court announces tentative decision.

- ☐ If trial was concluded within one calendar day, or in less than eight hours over more than one day, make request for statement of decision before submission of matter for decision.

Authority:

CCP § 632; Cal Rules Ct, Rule 3.1590(n)

Discussion:

See 26.18[2]

- ☐ If any party has requested statement of decision:

- ☐ Prepare proposed statement of decision.

Authority:

CCP § 632

Discussion:

See 26.18[2]

Form:

See 26.35

☐ File and serve proposals as to content of statement of decision within 10 days after date of request for statement of decision.

Authority:

Cal Rules Ct, Rule 3.1590(e)

Discussion:

See 26.18[2]

☐ If ordered by court to prepare proposed statement of decision:

Authority:

Cal Rules Ct, Rule 3.1590(a), (f)

Discussion:

See 26.18[3][b], [4]

☐ Prepare proposed statement of decision and proposed judgment.

Authority:

Cal Rules Ct, Rule 3.1590(f)

Forms:

See 26.36, 26.38, 26.39

☐ Serve and submit to court proposed statement of decision and proposed judgment within 30 days after announcement or service of tentative decision.

Authority:

Cal Rules Ct, Rule 3.1590(f)

Discussion:

See 26.18[3][b]

☐ If another party is ordered by court to prepare proposed statement of decision:

☐ If ordered party has timely filed and served proposed statement of decision and proposed judgment that are objectionable:

Authority:

Cal Rules Ct, Rule 3.1590(g)

Discussion:

See 26.18[6]

☐ Prepare any appropriate objections.

Form:

See 26.37

☐ File and serve objections within 15 days after proposed statement of decision and judgment have been served.

☐ If ordered party has not timely filed and served proposed statement of decision and proposed judgment, consider either:

Authority:

Cal Rules Ct, Rule 3.1590(f)

☐ Preparing, serving, and submitting to court proposed statement of decision and proposed judgment.

Forms:

See 26.36, 26.38, 26.39

☐ Filing and serving motion for order that statement of decision be deemed waived.

☐ If no party has been ordered by court to prepare proposed statement of decision:

☐ Review proposed statement of decision and proposed judgment prepared and mailed by court.

☐ If court's proposed statement of decision or proposed judgment is objectionable:

Discussion:

See 26.18[6]

Authority:

Cal Rules Ct, Rule 3.1590(g)

☐ Prepare any appropriate objections.

Form:

See 26.37

☐ File and serve objections within 15 days after proposed statement of decision and judgment have been served.

☐ Attend any hearing on proposals for, or objections to, proposed statement of decision and proposed judgment.

Authority:

Cal Rules Ct, Rule 3.1590(k)

Discussion:

See 26.18[7]

☐ If no party requests or is ordered to prepare statement of decision, and written judgment is required:

☐ If ordered by court to prepare proposed judgment:

Authority:

Cal Rules Ct, Rule 3.1590(h)

Discussion:

See 26.19[1][b]

☐ Prepare proposed judgment.

Forms:

See 26.38, 26.39

☐ Serve and submit to court proposed judgment within 10 days after the date of the order by court to prepare proposed judgment.

☐ If statement of decision deemed waived, and written judgment is required:

☐ If ordered by court to prepare proposed judgment:

Authority:

Cal Rules Ct, Rule 3.1590(i)

Discussion:

See 26.19[1][b]

☐ Prepare proposed judgment.

Forms:

See 26.38, 26.39

- ☐ Serve and submit to court proposed judgment within 10 days after the date of the order by court to prepare proposed judgment.
- ☐ If not ordered by court to prepare proposed judgment, review proposed judgment prepared by court or another party.

Authority:

Cal Rules Ct, Rule 3.1590(j)

Discussion:

See 26.19[2]

- ☐ Prepare any appropriate objections.
- ☐ File and serve objections within 10 days after service of proposed judgment.
- ☐ Attend any hearing on proposed judgment.

Authority:

Cal Rules Ct, Rule 3.1590(k)

Discussion:

See 26.19[2]

- ☐ Verify that court has signed and filed statement of decision, if applicable, and judgment.

Authority:

CCP § 632; Cal Rules Ct, Rule 3.1590(l)

Discussion:

See 26.18[8], 26.19[4]

- ☐ Ascertain date on which court clerk entered judgment by either:

- ☐ Entering judgment in judgment book.

Authority:

CCP §§ 664, 668

Discussion:

See 26.20[2]

- ☐ Filing original judgment in court file, after either:

- ☐ Recording judgment on microfilm.
- ☐ Entering judgment in register of actions.
- ☐ Entering judgment in court's electronic data-processing system.

Authority:

CCP §§ 664, 668.5

Discussion:

See 26.20[3]

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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26.16 Options and Strategies.

The trial court's tentative decision at the conclusion of a bench trial does not necessarily signal the end of the litigation. A party dissatisfied with the tentative decision may request that the court issue a statement of decision [*CCP* § 632; *Cal Rules Ct*, *Rule 3.1590(a)*]. Any party may then submit proposals for the statement of decision and raise objections to the proposed statement of decision [*CCP* § 632; *Cal Rules Ct*, *Rule 3.1590(e)-(g)*]. If the prevailing party does not offer to prepare the statement of decision, and the court does not request that it do so, the losing party may wish to prepare the statement. This may result in the crafting of a statement of decision that is more favorably worded for the losing party.

Whether or not a statement of decision is requested, any party may object to the proposed judgment [*Cal Rules Ct*, *Rule 3.1590(g)*]. The court may conduct hearings on any and all of these objections before rendering its judgment [*Cal Rules Ct*, *Rule 3.1590(k)*].



Strategic Point:

Counsel should consider whether to object to the tentative decision and seek a hearing on that objection, or rather to request the opportunity to submit a proposed statement of decision and hearing on that as alternatives. If the tentative decision is objectionable, counsel may be able to affect the judgment without having to file and argue competing proposed statements of decision. On the other hand, this procedure may result in the opportunity (within time constraints) to argue both against an objectionable tentative decision and also in favor of a proposed statement of decision thereafter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Trials Bench Trials



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26.17 After Bench Trial, Court Issues Tentative Decision.

26.17[1] Court Announces Tentative Decision. On the trial of a question of fact by the court, the court must announce its tentative decision either (1) by an oral statement entered in the minutes, or (2) by a written statement filed with the clerk [*Cal Rules Ct, Rule 3.1590(a)*].

In its tentative decision, the court may [*Cal Rules Ct, Rule 3.1590(c)*]:

- State that it is the court's proposed statement of decision, subject to a party's objection under *Cal Rules Ct, Rule 3.1590(g)*;
- Indicate that the court will prepare a statement of decision;
- Order a party to prepare a statement of decision; or
- Direct that the tentative decision will become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision.

Distinguish:

The announcement of the tentative decision does not constitute a judgment and is not binding on the court [*Cal Rules Ct, Rule 3.1590(b)*]. Thus, the court may change its tentative decision on its own motion at any time before entry of judgment, whether or not the parties have requested a statement of decision or filed any objections or motions [*Horning v. Shilberg* (2005) 130 CA4th 197, 202-203, 29 CR3d 717] .

Consider:

The court may bifurcate the case and try one or more factual issues separately from the rest of the case. In such a case, a tentative decision will be announced for each trial [*Cal Rules Ct, Rule 3.1591*].



Cross References:

Discussion of statement of decision, see 26.18.

Discussion of bifurcation, see *Ch. 1, Preparing for Trial*, 1.15 et seq.

26.17[2] Clerk Mails Tentative Decision. Unless the announcement of the court's tentative decision is made in open court in the presence of all parties that appeared at the trial, the clerk must serve on all parties that appeared at the trial a copy of the minute entry or written tentative decision [*Cal Rules Ct, Rule 3.1590(a)*].



Timing:

The clerk's mailing of the tentative decision must be accomplished "immediately" [*Cal Rules Ct, Rule 3.1590(a)*].



Strategic Point:

Although the term "immediately" seems clear, counsel should telephone the court and inquire as to the status of the decision if counsel has not received it approximately two weeks after the announcement of the decision.

If, after the initial announcement of a tentative decision, the court modifies or changes its announced tentative decision, the clerk must serve a copy of the modification or change on all parties that appeared at trial [*Cal Rules Ct, Rule 3.1590(b)*].

Legal Topics:

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



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26.18 Court Must Issue Statement of Decision If Requested by Party.

26.18[1] Any Party May Request Statement of Decision. Any party that appeared at the trial may request that the court issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted factual issues at trial [CCP § 632].

The request for a statement of decision must specify the controverted issues as to which the party is requesting a statement of decision [CCP § 632].

Distinguish:

A statement of decision may be requested only on the trial of a question of fact [see CCP § 632], and it is unavailable when the only issue tendered to the trial court is an issue of law [*Enterprise Ins. Co. v. Mulleague* (1987) 196 CA3d 528, 539-540, 241 CR 846] .



Strategic Point:

In the absence of a statement of decision, a reviewing court will presume that every fact essential to the judgment was proved and found by the trial court [*Gibbs v. American Savings & Loan Assn.* (1990) 217 CA3d 1372, 1375, 266 CR 517] . Accordingly, if the tentative decision is favorable to the client, counsel should not request a statement of decision; then, if the adverse party fails to request a statement of decision, any review by a court of appeal will be limited to determining whether there is any evidence, contradicted or uncontradicted, to support the judgment [see *Gibbs v. American Savings & Loan Assn.* (1990) 217 CA3d 1372, 1375, 266 CR 517] .

Example--Defective Request for Statement of Decision:

Although required to provide a statement of decision on request, the court is not required to issue written findings of fact or conclusions of law [CCP § 632]. Therefore, a request for a statement of decision that seeks detailed evidentiary findings is defective and does not require a response by the court [*Olen Commercial Realty Corp. v. County of Orange* (2005) 126 CA4th 1441, 1451-1452, 24 CR3d 609] .

**Timing:**

A request for a statement of decision generally must be made within 10 days after the court announces its tentative decision, as measured from the date on which the clerk places the tentative decision in the mail (not when it is postmarked) [CCP § 632; *Staten v. Heale* (1997) 57 CA4th 1084, 1088-1089, 68 CR2d 35]. In determining whether a request is "made" within the statutory 10-day period, the court refers to the date the request is received and filed, as distinguished from the date on which it is mailed [*Staten v. Heale* (1997) 57 CA4th 1084, 1090-1091, 68 CR2d 35].

**Exception--Timing:**

If the trial was concluded within one calendar day, or in less than eight hours over more than one day, a request for a statement of decision must be made before the submission of the matter for decision [CCP § 632]. For this purpose, a bench trial is deemed to commence at the beginning of any party's opening statement or, if there is no opening statement, when the oath or affirmation is administered to the first witness or the first evidence is introduced [CCP § 581(a)(6)].

**Trap:**

If the court bifurcates the case and tries one or more factual issues separately from the rest of the case, the time for requesting a statement of decision for each trial will be measured separately [see *Cal Rules Ct, Rule 3.1591*; *Earp v. Earp* (1991) 231 CA3d 1008, 1012, 283 CR 43]. Therefore, counsel should not wait until the conclusion of the last trial before requesting a statement of decision on an issue tried earlier.

**Judge's Perspective:**

Some courts streamline the rendering of statements of decision in the following way. The court obtains a stipulation from counsel that after all the evidence has been received and after final argument, the court may announce its statement of decision from the bench. The parties agree that the transcription of the reporter's transcript will become the statement of decision. This procedure usually results in rendition of a timely and final statement of decision and avoids delays inherent in having one side or the court draft a statement of decision, receiving objections and setting additional hearings to resolve disputes. There is also an advantage to the court's rendering a statement of decision when the details are fresh in the judge's memory.

**Cross Reference:**

Form, see 26.34.

26.18[2] Any Party May Submit Proposals for Statement of Decision. After a party has requested a statement of decision, any party may make proposals as to the content of the statement [CCP § 632].

**Timing:**

Any proposals as to the content of the statement of decision must be made within 10 days after the date of request for a statement of decision [Cal Rules Ct, Rule 3.1590(e)]. The court may, by written order, extend this deadline and at any time before the entry of judgment may, for good cause shown and on such terms as may be just, excuse a noncompliance with the deadline [Cal Rules Ct, Rule 3.1590(m)].

**Exception--Timing:**

If the trial was completed within one day, the normal 10-day period for submitting proposals for the statement of decision is inapplicable [Cal Rules Ct, Rule 3.1590(n)]. In such a case, the request for a

statement of decision must be made before the submission of the matter for decision, and the statement of decision may be made orally on the record in the presence of the parties [CCP § 632].

Cross References:

Timing of request for statement of decision, see 26.18[1].

Discussion of objections to proposed content of statement of decision, see 26.18[6].

Form of proposals for statement of decision, see 26.35.

26.18[3] Court or Ordered Party Prepares Proposed Statement of Decision and Proposed Judgment.

26.18[3][a] Court Ordinarily Prepares Proposed Statement of Decision and Judgment. If one of the parties requests a statement of decision, the court ordinarily must prepare and serve the proposed statement of decision and a proposed judgment on all parties that appeared at the trial [*Cal Rules Ct, Rule 3.1590(f)*].



Timing:

The statement of decision must be prepared and served within 30 days of announcement or service of the tentative decision [*Cal Rules Ct, Rule 3.1590(f)*]. The court may, by written order, extend this deadline and at any time before the entry of judgment may, for good cause shown and on such terms as may be just, excuse a noncompliance with the deadline [*Cal Rules Ct, Rule 3.1590(m)*].

Distinguish:

The court may bifurcate the case and try one or more factual issues separately from the rest of the case. In such a case, a tentative decision will be announced for each trial and, when requested, separate statements of decision will be issued. However, a proposed judgment ordinarily will not be prepared until the all issues are tried, except when the circumstances make an interlocutory judgment or a separate judgment proper [*see Cal Rules Ct, Rule 3.1591*].

Exception:

The court may require a party to prepare the proposed statement of decision, either by ordering the party in the court's tentative decision [*see Cal Rules Ct, Rule 3.1590(c)*] or by ordering the party after a request for a statement of decision has been made [*see Cal Rules Ct, Rule 3.1590(f)*].

Cross References:

Discussion of court's tentative decision, see 26.17[1].

Discussion of party's preparation of statement of decision, see 26.18[4].

26.18[3][b] Court May Order Party to Prepare Proposed Statement of Decision and Judgment. A party must prepare the proposed statement of decision if it was ordered to do so in the court's tentative decision [*Cal Rules Ct, Rule 3.1590(f)*; *see Cal Rules Ct, Rule 3.1590(c)*].

Cross Reference:

Discussion of court's tentative decision, see 26.17[1].

A party that has been ordered to prepare the statement of decision must serve and submit to the court a proposed statement of decision and a proposed judgment [*Cal Rules Ct, Rule 3.1590(f)*].

**Timing:**

A party's proposed statement of decision and proposed judgment must be served and submitted within 30 days after the announcement or service of the tentative decision [*Cal Rules Ct, Rule 3.1590(f)*]. The court may, by written order, extend this deadline and at any time before the entry of judgment may, for good cause shown and on such terms as may be just, excuse a noncompliance with the deadline [*Cal Rules Ct, Rule 3.1590(m)*].

**Warning:**

If the proposed statement of decision and judgment are not timely served and submitted by the party ordered by the court, any other party that appeared at the trial may within 10 days thereafter either (1) prepare, serve, and submit to the court a proposed statement of decision and judgment; or (2) move the court for an order that the statement of decision be deemed waived [*Cal Rules Ct, Rule 3.1590(f)*].

**Cross References:**

Discussion of preparation of proposed statement of decision, see 26.18[4].

Discussion of preparation of proposed judgment, see 26.18[5].

Forms, see 26.36, 26.38, 26.39

26.18[4] Preparing Proposed Statement of Decision. A statement of decision must explain the factual and legal basis for the court's decision as to each of the principal controverted issues at trial [*CCP § 632*].

A statement of decision generally need not address all of the legal and factual issues raised by the parties; it need only state the grounds on which the court's decision rests, without necessarily specifying the particular evidence considered by the court in reaching its decision [*Yield Dynamics, Inc. v. Tea Systems Corporation (2007) 154 CA4th 547, 558, 66 CR3d 1*]. In general, therefore, a statement of decision need set forth only ultimate findings, rather than evidentiary ones, because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them [*Muzquiz v. City of Emeryville (2000) 79 CA4th 1106, 1125, 94 CR2d 579*].

**Cross Reference:**

Form, see 26.36.

26.18[5] Preparing Proposed Judgment.

26.18[5][a] Format of Judgment. The form of a judgment is not critical, provided that in substance it shows distinctly and explicitly that the matter has been determined in favor of one of the litigants or that the rights of the parties in litigation have been adjudicated [*Oppenheimer v. Deutchman (1958) 161 CA2d 501, 503, 326 P2d 883* ; see *CCP § 577*].

Consider:

The Judicial Council has issued a general form of judgment for optional use; counsel may either fill in the form or use it as a guide to preparing a judgment [California Judicial Council Form JUD-100]. Local rules of court may specify requirements for judgments prepared by counsel [see, e.g., Los Angeles Super Ct Rules, Rules 3.0, 8.96; Sacramento Super Ct Rules, Rule 9.16].

**Cross Reference:**

Forms, see 26.38, 26.39.

A proposed judgment should identify the parties by their full names as they appear in the pleadings [*see, e.g.*, Los Angeles Super Ct Rules, Rule 8.96; Sacramento Super Ct Rules, Rule 9.16(A), (B)].

Example--Judgment Debtor's Name:

Incorrect spelling of the judgment debtor's name may hinder enforcement of the judgment. For example, a recorded abstract of judgment containing an incorrect spelling of the judgment debtor's name will not impart constructive notice of a judgment lien [*see Orr v. Byers (1988) 198 CA3d 666, 672, 244 CR 13*].

Example--Death of Party Before Judgment:

If a party dies after trial and before judgment, the court may nevertheless render judgment in the case [CCP § 669].

Any information necessary to the judgment should be set forth in full in the judgment itself. The proposed judgment should not refer to pleadings or other documents for necessary information [*see CCP § 577; see, e.g.*, Siskiyou Super Ct Rules, Rule 5.04.A(4); Judicial Council Form JUD-100].



Cross Reference:

Form, *see* 26.39.

26.18[5][b] Relief Granted. The proposed judgment should identify the party in whose favor the judgment is rendered [*see CCP § 577*]. If the proposed judgment is in favor of the plaintiff (or other claimant, such as a defendant who asserted a cross-claim), it should specify the relief granted, such as a money judgment for a specified amount, expressed in dollars and cents [CCP § 577.5]. If the judgment is in favor of the defendant (or other defending party, such as the plaintiff against whom a cross-claim was asserted), the judgment should specify that the plaintiff (or other claimant) is to take nothing under his or her claim.

Example:

If a cross-claim (e.g., by a defendant) is established in an amount that exceeds the claim of the party against whom the cross-claim was asserted (e.g., the plaintiff), a judgment for the excess amount must be rendered in favor of the party asserting the cross-claim [CCP § 666].

Exception:

A judgment on a claim based on an obligation or loss expressed in or measured by foreign money must be stated in an amount of the money of the claim, except that costs are to be awarded in United States dollars [CCP § 676.7(a), (c), (f); *see CCP § 676.1(5)-(8)*].

The judgment generally may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issues litigated by the parties [CCP § 580(a)].

Example--Multiple Parties:

If there are multiple parties on a side, the judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. Also, the judgment may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves [CCP § 578; *Corder v. Corder (2007) 41 C4th 644, 654-655, 61 CR3d 660, 161 P3d 172*]. Also, in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, if a several judgment is proper [CCP § 579].



Warning:

A judgment that affects an interest in real property should set forth the full legal description of the property, together with the name and address of the transferee. A proposed judgment that describes real

property by address only may be rejected by the court [see, e.g., Madera Super Ct Rules, Rule 504.4].

Exceptions:

The relief granted in a limited civil case may not include any of the following [CCP § 580(b)]:

- Monetary relief exceeding \$25,000, exclusive of attorney's fees, interest, and costs [see CCP § 85].
- A permanent injunction.
- A determination of title to real property.
- Enforcement of an order under the Family Code.
- Declaratory relief, except as specifically authorized for limited civil cases [see CCP § 86].



Cross Reference:

Discussion of limited civil cases, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 15, Reclassification of Cases.

26.18[5][c] Costs and Attorney's Fees. If a judgment will include an award of costs and attorney's fees, and the amount has not yet been fixed, the amount of the award may be left blank for future determination [*Grant v. List & Lathrop* (1992) 2 CA4th 993, 996, 3 CR2d 654 ; see, e.g., Sacramento Super Ct Rules, Rule 9.16(C)].

26.18[5][d] Prejudgment Interest. If the judgment will include prejudgment interest as part of a damages award [see CC § 3287 et seq.], the proposed judgment should specify the rate of interest and the date on which interest began accruing, but the amount of interest accrued to the date of the judgment should be left blank. The court clerk will compute and insert the exact amount of interest accruing to the date on which the judgment is entered [see *Cal Rules Ct, Rule 3.1802*].

Consider:

Prejudgment interest is not a cost, but an element of damages. Therefore, prejudgment interest should be awarded in the judgment on the basis of a request made before the entry of judgment, rather than as part of the plaintiff's bill of costs. A general prayer in the complaint for "such other and further relief as may be proper" is sufficient to constitute a request for an award of prejudgment interest [*North Oakland Med. Clinic v. Rogers* (1998) 65 CA4th 824, 828-829, 76 CR2d 743] . In a case involving a claim for liquidated contractual damages, the appropriate interest award ordinarily will be included in the judgment as part of damages, without further court proceedings [see CC § 3287(a)]. In a case involving a claim for unliquidated contractual damages, the court must determine a date before the entry of judgment on which interest began to accrue [CC § 3287(b)]. Similarly, in a claim for damages not arising under a contract, the trier of fact has discretion to award prejudgment interest as part of damages [CC § 3288]. In any case, if a party contends that the court's tentative decision (or, in a jury case, the verdict) incorrectly omits or includes prejudgment interest, the party must raise that issue in a post-decisional motion made no later than the time for filing a motion for new trial [see *North Oakland Med. Clinic v. Rogers* (1998) 65 CA4th 824, 830, 76 CR2d 743 ; see CCP §§ 657(5), 659].



Cross Reference:

Timing of motion for new trials, see Ch. 21, *Motion for New Trial*, 21.06.

Exception:

Prejudgment interest on a claim based on an obligation or loss expressed in or measured by foreign money is a matter of the substantive law governing the right to recovery under California conflict-of-laws rules [CCP § 676.9(a); see CCP § 676.1(5)-(7)].

26.18[5][e] Postjudgment Interest. A judgment need not expressly provide for postjudgment interest; by statute, interest at an annual rate of 10 percent generally accrues on the principal amount of every money judgment from the date of entry until the judgment is satisfied [CCP § 685.010; see *Cal Const*, art XV, § 1; CCP §§ 676.9(c), 685.020(a), 685.030].

Exceptions:

- Unless the judgment provides otherwise, if a money judgment is payable in installments, postjudgment interest on each installment begins to accrue on the date the installment becomes due [CCP § 685.020(b)].
- The compensation awarded in a judgment in an eminent domain proceeding draws interest at an "apportionment rate" calculated by the state controller based on earnings of the Surplus Money Investment Fund [CCP §§ 1268.310, 1268.350]. The interest begins to accrue on the earliest of (1) the entry of judgment, (2) the date the plaintiff takes possession of the condemned property, or (3) the date after which the plaintiff is authorized to take possession of the condemned property [CCP § 1268.310].
- An unsatisfied judgment against a public entity accrues interest at an annual rate of 7 percent [see *Gov Code* § 970.1(b); see also *Cal Const*, art XV, § 1].

Consider--Postjudgment Interest Not Compounded:

Postjudgment interest generally is not compounded. However, it will accrue on the entire amount of a judgment, including any prejudgment interest that was included in the judgment [see *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2008) 168 CA4th 185, 191, 85 CR3d 350 (renewing judgment compounds interest on judgment because interest accrues on total renewed judgment, including accrued interest on date of filing application for renewal)].

Distinguish--Interest on Judgment That Exceeds 998 Offer:

If a defendant rejects a plaintiff's offer to compromise under CCP § 998, and the plaintiff obtains a judgment more favorable than the terms of the offer, CC § 3291 provides that the judgment will bear 10-percent interest from the date of the first Section 998 offer that is exceeded by the judgment "until the satisfaction of judgment." Interest under CCP § 3291 is not treated as prejudgment interest, however, and it is not to be included in the judgment [*Hess v. Ford Motor Co.* (2002) 27 C4th 516, 531-532, 117 CR2d 220, 41 P3d 46] . Moreover, once the judgment is entered, CCP § 3291 does not provide for the accrual of interest in addition to the regular postjudgment interest [*Mendez v. Kurten* (1985) 170 CA3d 481, 486-487, 215 CR 924] . In effect, CCP § 3291 provides that in cases within the scope of that provision, the 10-percent postjudgment interest rate [see CCP § 685.010(a)] will accrue from the date of the qualifying Section 998 offer, rather than from the date of the entry of the judgment [see *Hess v. Ford Motor Co.* (2002) 27 C4th 516, 530-533, 117 CR2d 220, 41 P3d 46 ; see also *Mendez v. Kurten* (1985) 170 CA3d 481, 487, 215 CR 924 (combining regular postjudgment interest with CCP § 3291 interest would violate *Cal Const*, art XV, § 1 prohibition of postjudgment interest greater than 10 percent)]. In addition, each defendant is not required to pay the interest; the defendants are jointly and severally liable for it [*Cadlo v. Metalclad Insulation Corp.* (2009) 172 CA4th 1040, 1046-1047, 91 CR3d 653] .

Consider:

When a successful plaintiff tenders more than one CCP § 998 offer and the plaintiff subsequently recovers a judgment in excess of either offer, prejudgment interest awarded pursuant to CCP § 3291 begins to run from the date of the first offer [*Ray v. Goodman* (2006) 142 CA4th 83, 87-92, 47 CR3d 659].

26.18[6] Any Party May Object to Proposed Statement of Decision and Judgment. Any party may serve and file objections to the proposed statement of decision or judgment [*Cal Rules Ct, Rule 3.1590(g)*].

The primary purpose of objections to a proposed statement of decision is not to reargue the merits, but to bring to the court's attention a lack of conformity between the tentative decision announced by the court and the proposed statement of decision. A subsidiary purpose of objections is to identify issues presented during trial that were not addressed in the tentative decision [*Heaps v. Heaps* (2004) 124 CA4th 286, 292-293, 21 CR3d 239] .

Example--Improper Objection:

In one case, a party's objections sought to reargue the merits and to raise an issue that was not mentioned in the pleadings or at any time before closing arguments at trial. The court of appeal held that the trial court's signing of the statement of decision before the expiration of the time for objections was not reversible error. The error in prematurely signing the statement of decision was harmless, because the objecting party was not prejudiced by the court's failure to consider the improper objections [*Heaps v. Heaps* (2004) 124 CA4th 286, 292-293, 21 CR3d 239] .



Timing:

Any objection must be served and filed within 15 days after the proposed statement of decision and judgment have been served [*Cal Rules Ct, Rule 3.1590(g)*]. The court may, by written order, extend this deadline and at any time before the entry of judgment may, for good cause shown and on such terms as may be just, excuse a noncompliance with the deadline [*Cal Rules Ct, Rule 3.1590(m)*].



Warning:

Generally, an appellate court will presume that the trial court made all factual findings necessary to support the judgment so long as substantial evidence supports those findings. However, if a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court, a reviewing court will not infer that the trial court decided in favor of the prevailing party as to those facts or on that issue [*CCP § 634; Ermoian v. Desert Hospital* (2007) 152 CA4th 475, 494-495, 61 CR3d 754] . Thus, a party that fails to bring an ambiguity to the trial court's attention forfeits the right to assert that deficiency on appeal; merely having requested a statement of decision is not sufficient to avoid this forfeiture [*In re Marriage of Arceneaux* (1990) 51 C3d 1130, 1133-1134, 275 CR 797, 800 P2d 1227] .



Cross Reference:

Form, see 26.37.

26.18[7] Court May Conduct Hearing on Objections. The court may order a hearing on proposals for, or objections to, the statement of decision [*Cal Rules Ct, Rule 3.1590(k)*].

26.18[8] Court Adopts Statement of Decision and Judgment. After resolving any objections, the court will issue its statement of decision and render its judgment [*see CCP § 632; Cal Rules Ct, Rule 3.1590*].

The statement of decision must be in writing unless the parties appearing at trial agree otherwise [*CCP § 632*].

Exception:

If the trial is concluded within one calendar day, or in less than eight hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties, even if a party has submitted detailed, written request for a statement of decision [*CCP* § 632; *Olen Commercial Realty Corp. v. County of Orange* (2005) 126 CA4th 1441, 1451-1452, 24 CR3d 609] . In such a case, a party's submission of a detailed request for a statement of decision does not affect the trial court's ability to make the statement orally.

After the court's statement of decision has been entered in its minutes, if the judge who heard the case is unavailable, the formal judgment conforming to the minutes may be signed by the presiding judge of the court or by a judge designated by the presiding judge [*CCP* § 635].

Distinguish:

Generally, the judge who hears the evidence should decide the case. Thus, if the judge becomes unavailable before issuing a statement of decision--even if a tentative decision has been filed--no other judge can issue a statement of decision or sign a judgment, and a new trial must be had [see *Leiserson v. City of San Diego* (1986) 184 CA3d 41, 48, 229 CR 22 ; *Armstrong v. Picquelle* (1984) 157 CA3d 122, 127-128, 203 CR 552] .



Cross Reference:

Discussion of new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral Overview



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26.19 Court Renders Judgment If No Statement of Decision Is Requested.

26.19[1] Court or Designated Party Prepares Proposed Judgment.

26.19[1][a] Court Ordinarily Must Prepare Proposed Judgment. If no party requests or is ordered to prepare a statement of decision and a written judgment is required, the court ordinarily must prepare and serve a proposed judgment on all parties that appeared at the trial [*Cal Rules Ct, Rule 3.1590(h)*].



Timing:

A proposed judgment prepared by the court must be served within 20 days after the announcement or service of the tentative decision [*Cal Rules Ct, Rule 3.1590(h)*].

Exception:

The court may order a party to prepare, serve, and submit the proposed judgment to the court [*Cal Rules Ct, Rule 3.1590(h)*].



Cross Reference:

Discussion of party's preparation of proposed judgment, see 26.18[5].

26.19[1][b] Court May Require Party to Prepare Proposed Judgment. If no party requests or is ordered to prepare a statement of decision and a written judgment is required, the court may order a party to prepare, serve, and submit the proposed judgment to the court [*Cal Rules Ct, Rule 3.1590(h)*].



Timing:

A party ordered to prepare a proposed judgment must serve and submit the proposed judgment within 10 days after the date of the order [*Cal Rules Ct, Rule 3.1590(h)*]. The court may, by written order, extend this deadline and at any time before the entry of judgment may, for good cause shown and on such terms as may be just, excuse a noncompliance with the deadline [*Cal Rules Ct, Rule 3.1590(m)*].



Cross References:

Discussion of elements of proposed judgment, see 26.18[5].

Forms of proposed judgment, see 26.38, 26.39.

26.19[2] Any Party May Object to Proposed Judgment. Any party may serve and file objections to the proposed judgment [*Cal Rules Ct, Rule 3.1590(j)*].



Timing:

A party's objections must be served and filed within 10 days after service of the proposed judgment [*Cal Rules Ct, Rule 3.1590(j)*]. The court may, by written order, extend this deadline and at any time prior to the entry of judgment may, for good cause shown and on such terms as may be just, excuse a noncompliance with the deadline [*Cal Rules Ct, Rule 3.1590(m)*].

26.19[3] Court May Conduct Hearing on Objections. The court may order a hearing on objections to the proposed judgment [*Cal Rules Ct, Rule 3.1590(k)*].

26.19[4] Court Signs and Files Judgment. After resolving any objections to the proposed judgment, the court must sign and file its judgment [*Cal Rules Ct, Rule 3.1590(l)*].



Timing:

The judgment must be signed and filed within 50 days after the announcement or service of the tentative decision, whichever is later, or, if a hearing was held under *Cal Rules Ct, Rule 3.1590(k)*, within 10 days after the hearing [*Cal Rules Ct, Rule 3.1590(l)*].



Warning:

If the court signs the proposed judgment before the expiration of 10 days after service of the proposed judgment, thus depriving the parties of the time to serve and file objections, the court's error is not reversible unless it prejudices a party [*In re Marriage of Steiner (2004) 117 CA4th 519, 524-525, 11 CR3d 671*] .

The signed, filed judgment constitutes the decision on which judgment will be entered [*Cal Rules Ct, Rule 3.1590(l)*].



Cross Reference:

Discussion of entry of judgment, see 26.20.

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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Chapter 26 Entry of Judgment
V. OBTAINING ENTRY OF JUDGMENT AFTER BENCH TRIAL

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.20

26.20 Clerk Enters Judgment.

26.20[1] Judgment Must Be Entered When Filed. The judgment must be entered by the court clerk, in conformity with the decision of the court, immediately on filing of the decision. Until entered, the judgment is not effective for any purpose [CCP § 664].

26.20[2] Traditional Method--Entry in Judgment Book. Traditionally, the entry of judgment is accomplished by the court clerk making a notation in a book known as the "judgment book" [see CCP § 668; *County of Los Angeles v. Ranger Ins. Co.* (1994) 26 CA4th 61, 63, 31 CR2d 257] .

Consider:

Although entry of judgment is required by statute to be made "immediately upon the filing of [the court's] decision" (or, in a jury case, "within 24 hours after the rendition of the verdict") [CCP § 664], entry of judgment under this method could occur on a day other than the day on which the clerk filed the original judgment in the superior court file, because this method involves the separate act of the clerk's making a notation in the judgment book [see *Palmer v. GTE Cal., Inc.* (2003) 30 C4th 1265, 1267 n2, 135 CR2d 654, 70 P3d 1067] .

Few counties, if any, maintain a traditional judgment book for entering judgments. Rather, most counties use the alternative microfilm, register, or electronic method of entry available under CCP § 668.5 [*Palmer v. GTE Cal., Inc.* (2003) 30 C4th 1265, 1267 n2, 135 CR2d 654, 70 P3d 1067] .

► Cross Reference:

Discussion of alternative method of entering judgment, see 26.20[3].

26.20[3] Alternative Method--Entry by Filing of Judgment. An alternative method of entry of judgment permits a county to dispense with the judgment book if, before filing the original judgment in the superior court file, the clerk records the judgment on microfilm or enters it either in the register of actions or in the court's electronic data-processing system [CCP § 668.5].

Distinguish:

In counties using this newer method, the date of filing the judgment with the clerk, as shown on the file stamp, constitutes the date of its entry [*CCP* § 668.5; *Palmer v. GTE Cal., Inc.* (2003) 30 *C4th* 1265, 1267 *n*2, 135 *CR2d* 654, 70 *P3d* 1067] . Thus, in contrast to what may occur under the traditional judgment-book system, a judgment's date of entry never differs from the date of filing. The California Supreme Court has noted that, "[g]iven the near universal adoption of the newer system, the concept of 'entry,' as distinct from filing, appears to have lost its utility, and its survival has become a frequent source of confusion Its complete removal from our system of civil procedure will, however, require an extensive statutory revision by the Legislature" [*Palmer v. GTE Cal., Inc.* (2003) 30 *C4th* 1265, 1267 *n*2, 135 *CR2d* 654, 70 *P3d* 1067] .



Cross Reference:

Discussion of traditional method of entering judgment in judgment book, see 26.20[2].

Legal Topics:

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

Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral
OverviewGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt Records



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Chapter 26 Entry of Judgment
VI. ENTRY OF JUDGMENT AFTER JURY TRIAL

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.21

26.21 CHECKLIST: Entry of Judgment After Jury Trial.

☐ If jury renders general verdict:

☐ Verify that clerk has entered verdict in minutes of court, including specification of time of trial and names of jurors and witnesses.

Authority:
CCP § 628

Discussion:
See 26.23[1]

☐ Verify that clerk has entered judgment within 24 hours of rendition of verdict.

Authority:
CCP § 664

Discussion:
See 26.24

☐ If jury renders special verdict:

☐ Verify that clerk has entered following in minutes of court:

Authority:
CCP § 628

Discussion:

See 26.23[2]

☐ Special verdict, including specification of time of trial and names of jurors and witnesses.

☐ Either:

☐ Court's judgment rendered on special verdict.

☐ Court's order reserving case for argument or further consideration.

☐ If court has reserved judgment pending argument or further consideration:

Authority:

CCP § 628

☐ Prepare, serve, and file argument.

☐ Attend any hearing ordered by court.

☐ Verify that clerk has entered judgment.

Authority:

CCP §§ 664, 668, 668.5

Discussion:

See 26.24

☐ Unless court has reserved judgment pending argument or further consideration, verify that judgment was entered within 24 hours of rendition of special verdict.

☐ If court ordered argument or further consideration before rendering judgment, ascertain date on which clerk entered judgment.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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26.22 Options and Strategies.

Once the court has received the jury's general or special verdicts, the preparation and entry of the judgment are performed by the court and clerk. Counsel's role in this process ordinarily is limited to verifying that the judgment has in fact been entered in compliance with the statutory requirements [see *CCP* § 628]. Additionally, any pretrial rulings on motions for summary adjudication of issues, if not dealt with in the verdict form, should be incorporated into the judgment by the prevailing party with the jury's verdict. In the case of a special verdict, however, the court may reserve the case for argument or further consideration prior to the entry of judgment [*CCP* § 628].

Strategic Point:



At this point in the trial, some courts will encourage the parties to engage in further settlement discussions, and facilitate a means of doing so.



Cross Reference:

Discussion of post-trial attacks on the jury verdict, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment; and Ch. 28, Correcting and Modifying Judgment.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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26.23 Entry of Verdict in Minutes of Court.

26.23[1] Entry of General Verdict. On receipt of a general verdict, the court clerk must enter the verdict in the minutes of the court, setting out the verdict at length. The entry must also specify the time of trial and the names of the jurors and witnesses [CCP § 628].

Because a general verdict encompasses all the issues and consists of a finding--and, if applicable, an award--in favor of the plaintiff or defendant, no further action by the court is required before judgment may be entered [see CCP §§ 624, 626; see also CCP § 664].

► **Cross References:**

Discussion of entry of judgment, see 26.24.

Discussion of general verdicts, see *Ch. 18, Jury Verdicts, 18.03 -18.10*.

26.23[2] Entry of Special Verdict. On receipt of a special verdict, the court clerk must enter the verdict in the minutes of the court, setting out the verdict at length. The entry must also specify the time of trial and the names of the jurors and witnesses [CCP § 628].

In addition, the entry of the special verdict must include either (1) the judgment rendered by the court on the special verdict, or (2) the court's order reserving the case for argument or further consideration prior to the entry of judgment [CCP § 628].

Consider:

The verdict entered in the minutes of the court and the actual judgment may be combined into one document.

Distinguish:

A special verdict is a verdict by which the jury finds only the facts, leaving the judgment to the court. A special verdict presents the jury's conclusions of fact as established by the evidence, so that nothing remains for the court but to draw conclusions of law [CCP § 624].

 Cross References:

Discussion of entry of judgment, see 26.24.

Discussion of special verdicts, see *Ch. 18, Jury Verdicts, 18.11 -18.22*.

Legal Topics:

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

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil
ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsEntry of JudgmentsGeneral
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VI. ENTRY OF JUDGMENT AFTER JURY TRIAL

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.24

26.24 Clerk Prepares and Enters Judgment on Verdict.

The court clerk ordinarily must prepare and enter judgment in conformity with the verdict within 24 hours after the rendition of the verdict, whether or not a motion for judgment notwithstanding the verdict is pending. Until entered, the judgment is not effective for any purpose [CCP § 664].

Exception:

The 24-hour deadline for entering judgment does not apply if the court orders the case reserved for argument or further consideration, or if the court grants a stay of proceedings [CCP § 664; see CCP § 628].

Traditionally, the entry of judgment is accomplished by the court clerk making a notation in a book known as the "judgment book" [see CCP § 668; *County of Los Angeles v. Ranger Ins. Co. (1994) 26 CA4th 61, 63, 31 CR2d 257*]. Few counties, if any, maintain a traditional judgment book for entering judgments. Rather, most counties use an alternative method of entry of judgment, under which a county may dispense with the judgment book if, before filing the original judgment in the superior court file, the clerk records the judgment on microfilm or enters it either in the register of actions or in the court's electronic data-processing system [CCP § 668.5; *Palmer v. GTE Cal., Inc. (2003) 30 CA4th 1265, 1267 n2, 135 CR2d 654, 70 P3d 1067*].

➡ Cross References:

Discussion of traditional method of entry of judgment, see 26.20[2].

Discussion of alternative method of entry of judgment, see 26.20[3].

Legal Topics:

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

Civil Procedure Trials Jury Trials General Overview Civil Procedure Judgments Entry of Judgments General Overview Governments Courts Clerks of Court Governments Courts Court Records



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Chapter 26 Entry of Judgment
VII. GIVING NOTICE OF ENTRY OF JUDGMENT

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.25

26.25 CHECKLIST: Giving Notice of Entry of Judgment.

☐ Counsel representing prevailing party who has submitted judgment, decree, or order for entry should notify other parties of entry unless one of following circumstances exists:

☐ No appeal lies from particular judgment, decree, or order involved.

Authority:
CCP § 664.5(c)

☐ Action is small claims proceeding.

Authority:
CCP § 664.5(a)

☐ Action is proceeding for dissolution of marriage, nullity of marriage, or legal separation.

Authority:
CCP § 664.5(a)

Discussion:
See 26.27

☐ To notify other parties of entry of judgment, prepare following documents:

☐ Notice of entry of judgment.

Form:

26.40

- ☐ Proof of service by mail.

Authority:*CCP § 664.5(a)***Discussion:**

See 26.27

- ☐ Mail copy of notice of entry of judgment to every other party that has appeared in action.

Authority:*CCP § 664.5(a)*

- ☐ Execute proof of service showing that copy of notice of entry of judgment has been mailed to every other party that has appeared in action.

Authority:*CCP § 664.5(a)*

- ☐ File following with court:

- ☐ Original notice of entry of judgment.
- ☐ Executed proof of service.

Authority:*CCP § 664.5(a)*

- ☐ Counsel not representing prevailing party should check court file to ascertain when notice of entry was served on parties, by either:

- ☐ Attorney for prevailing party.

Authority:*CCP § 664.5(a)*

- ☐ Clerk of court, if either:

- ☐ Prevailing party is not represented by counsel.

Authority:*CCP § 664.5(b)*

- ☐ Court ordered clerk to provide notice of entry.

Authority:*CCP § 664.5(d)***Discussion:***See 26.28[1], [2]*

☐ Counsel representing prevailing party in contested action or special proceeding in which court has declared state statute or regulation to be unconstitutional should notify attorney general.

☐ Prepare notice of entry of judgment.

Form:*See 26.40*

☐ Prepare proof of service on attorney general.

☐ Within 10 days after entry of judgment:

☐ Mail notice of entry of judgment, along with copy of judgment, to attorney general.

☐ File executed proof of service with court.

Authority:*CCP § 664.5(e); Cal Rules Ct, Rule 2.1100***Discussion:***See 26.29***Legal Topics:**

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

Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview



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26.26 Options and Strategies.

Giving notice of the entry of judgment is an important step, because the time limits for bringing and ruling on motions for a new trial and for judgment notwithstanding the verdict, and for filing a notice of appeal, start to run either on the date of the court clerk's service of notice of entry or on the date of service on the moving party of notice of entry of judgment [CCP §§ 629, 659, 660; *Cal Rules Ct, Rule 8.104(a)*; *Palmer v. GTE Cal., Inc. (2003) 30 C4th 1265, 1277, 135 CR2d 654, 70 P3d 1067*]. Thus, it is to the prevailing party's advantage to give prompt notice of entry of judgment to start the running of the time for such postjudgment procedures. This may be a consideration for the parties if settlement discussions are ongoing before the time the judgment is entered.

When both the court clerk and the prevailing party fail to serve notice of entry of judgment, a longer statutory period for filing the notice of appeal applies, i.e., rather than the 60-day period that would have run from notice of entry of the judgment, the appellant has 180 days from entry of judgment to file the notice of appeal [*Kimball Avenue v. Franco (2008) 162 CA4th 1224, 1228, 78 CR3d 352* (judgment not void when notice was not properly served)].

► Cross References:

Motion for new trial, see Ch. 21, Motion for New Trial.

Motion for judgment notwithstanding the verdict, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureAppealsReviewabilityTime Limitations



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26.27 Prevailing Party Ordinarily Must Provide Notice of Entry of Judgment.

A party submitting a judgment for entry (i.e., the prevailing party) in a contested action or special proceeding ordinarily must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding [CCP § 664.5(a)].

The party submitting the judgment for entry must also file with the court the original notice of entry of judgment, together with the proof of service by mail [CCP § 664.5(a)].

Any judgment, decree, or signed order from which an appeal lies is a "judgment" that triggers the foregoing duty to provide notice of entry [CCP § 664.5(c)].

► Cross Reference:

Form, see 26.40.

Distinguish:

In a county that has adopted the system of entering judgments by filing them, rather than by maintaining a separate "judgment book" [see CCP §§ 668, 668.5], a separate notice of entry need not be prepared, and a file-stamped copy of the judgment served on other parties will suffice as a written notice of entry [*Palmer v. GTE Cal., Inc.* (2003) 30 C4th 1265, 1277, 135 CR2d 654, 70 P3d 1067] .

► Cross Reference:

Discussion of judgment book and alternative system for entry of judgments, see 26.20[2], [3].

Exceptions:

The duty to provide notice of entry of judgment does not apply in any of the following proceedings [CCP § 664.5(a)]:

- Any action in which a prevailing party is not represented by counsel.
- A small claims action.

- A proceeding for dissolution of marriage, for nullity of marriage, or for legal separation.

 Cross Reference:

Discussion of notice of entry in action in which prevailing party is not represented by counsel, see 26.28[1].

Legal Topics:

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

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26.28 Clerk Provides Notice of Entry in Other Cases.

26.28[1] Clerk Must Provide Notice of Entry If Prevailing Party Is Unrepresented. If a prevailing party in a contested action or special proceeding is not represented by counsel, the clerk of the court must mail notice of entry of judgment to all parties who have appeared in the action or special proceeding [CCP § 664.5(b)]. The clerk must also execute a certificate of mailing of the notice of entry and place it in the court's file [CCP § 664.5(b)].

Any judgment, decree, or signed order from which an appeal lies is a "judgment" that triggers the foregoing duty to provide notice of [CCP § 664.5(c)].



Timing:

The clerk must mail notice of entry promptly on the entry of judgment [CCP § 664.5(b)].

26.28[2] Clerk Must Provide Notice of Entry As Ordered by Court. On order of the court in any action or special proceeding, the clerk of the court must mail notice of entry of any judgment or ruling, whether or not it is appealable [CCP § 664.5(d)].

26.28[3] Clerk's Notice of Entry Need Not Be in Same Form As Notice by Party. When the clerk is required to provide notice, notice need not be in same form as that mailed by a party. Thus, a copy of the minute order is sufficient when a final order is entered in the permanent minutes by court order [*Pacific City Bank v. Los Caballeros Racquet & Sports Club, Ltd.* (1983) 148 CA3d 223, 228, 195 CR 776] .

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewGovernmentsCourtsClerks of Court



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26.29 Prevailing Party Must Notify Attorney General If State Statute or Regulation Is Declared Unconstitutional.

In a contested action or special proceeding in which the court has declared a state statute or regulation to be unconstitutional, a copy of the judgment and a notice of entry of judgment must be mailed to the attorney general. Unless otherwise ordered by the court, the mailing to the attorney general must be done by the prevailing party, who must then file a proof of service with the court [*Cal Rules Ct, Rule 2.1100*; see *CCP § 664.5(e)*].

Consider:

It is unclear whether a failure to notify the attorney general as required by *Cal Rules Ct, Rule 2.1100* results in a penalty to the prevailing party.



Timing:

The mailing to the attorney general, and the filing of the proof of service, must be done within 10 days after the entry of judgment [*Cal Rules Ct, Rule 2.1100*].

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyConstitutionality of LegislationGeneral OverviewGovernmentsState & Territorial GovernmentsEmployees & Officials



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Chapter 26 Entry of Judgment
VIII. FORMS

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26.30 Statement Confessing Judgment.

Statement Confessing Judgment.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the	)	
Confession of Judgment by	)	
_____	)	No. _____
Defendant,	)	STATEMENT
	)	CONFESSING
In Favor of	)	JUDGMENT
_____	)	
Plaintiff.	)	
	)	
	)	

I, _____ [name], hereby confess judgment in the above-entitled cause in favor of Plaintiff,
_____ [name], in the sum of \$_____ and authorize entry of judgment against me for that sum.

[EITHER, if judgment is for debt due or to become due:]

This confession of judgment is for a debt _____ [justly due or to become due], arising out of the
following factual situation: _____ [describe facts giving rise to obligation].

[OR, if judgment will secure contingent liability:]

This confession of judgment is for the purpose of securing a contingent liability that arises out of the following facts:
_____ *[describe facts giving rise to contingent liability and showing that sum confessed does not exceed contingent liability]*.

[CONTINUE:]

VERIFICATION

I, _____ *[name]*, am the Defendant in the above-entitled cause. I have read the foregoing statement and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged 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.

Dated: _____

_____ *[signature]*

_____ *[name]*

Defendant

NOTES.

Authority:

CCP § 1133

Use of Form:

See 26.05[1]



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26.31 Attorney's Declaration in Support of Statement Confessing Judgment.

Attorney's Declaration in Support of Statement Confessing Judgment.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

In the Matter of the	)	
Confession of Judgment by	)	
_____ ,	)	No. _____
Defendant,	)	ATTORNEY'S DECLARATION
	)	IN SUPPORT OF STATEMENT
In Favor of	)	CONFESSING JUDGMENT
_____ ,	)	
Plaintiff.	)	
	)	
	)	

I, _____ [name], 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 _____ [name], the party confessing judgment in the above-entitled cause.

I have examined the proposed judgment and have advised _____ [name] with respect to the waiver of rights and defenses under the confession of judgment procedure and have advised her to utilize the confession of judgment procedure.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [signature]

_____ [name]

Attorney for Defendant, _____

NOTES.

Authority:

CCP § 1132(b)

Use of Form:

See 26.05[2]



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Chapter 26 Entry of Judgment
VIII. FORMS

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.32

26.32 Judgment by Confession.

Judgment by Confession.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the	)	
Confession of Judgment by	)	
_____,	)	No. _____
Defendant,	)	ATTORNEY'S DECLARATION
vs.	)	IN SUPPORT OF STATEMENT
In Favor of	)	CONFESSING JUDGMENT
_____,	)	
Plaintiff.	)	
	)	
	)	

Pursuant to the statement confessing judgment statement on file herein, the above-entitled court ordered the following judgment to be entered in the above-entitled cause:

IT IS ADJUDGED that Plaintiff, _____ [name], recover from Defendant, _____ [name], the following:

1. Principal in the amount of \$_____;
2. Interest from _____ [date] to date in the amount of \$_____;
3. Costs in the amount of \$30.

Dated: _____

[Clerk or County Clerk] _____ [Name]

By _____ [signature]
Deputy Clerk

NOTES.

Authority:

CCP §§ 1132(a), 1134; Gov Code § 70626(b)(3)

Use of Form:

See 26.06



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Chapter 26 Entry of Judgment
VIII. FORMS

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.33

26.33 Judgment on Agreed Case.

Judgment on Agreed Case.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the	)	
Agreed Case Between	)	
_____	)	
Plaintiff,	)	No. _____
	)	JUDGMENT ON
and	)	AGREED CASE
_____	)	
Defendant.	)	
	)	
	)	

The above-named parties have submitted a controversy on an agreed case, duly verified by _____ [affidavit or declaration] as required by *Section 1138 of the Code of Civil Procedure*. The court, after examining the agreed case, after hearing _____ [name], attorney for Plaintiff, and _____ [name], attorney for Defendant, and after due deliberation, finds on the facts submitted and determines as a matter of law that _____ [Plaintiff or Defendant] _____ is entitled to judgment. Accordingly,

[EITHER:]

IT IS HEREBY ADJUDGED AND ORDERED that Plaintiff, _____ [name], have judgment against Defendant, _____ [name], in the sum of \$_____.

[OR:]

IT IS HEREBY ADJUDGED AND ORDERED that Plaintiff, _____ [name], take nothing.

[CONTINUE:]

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:
CCP § 1138

Entry of Judgment:
See 26.14



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VIII. FORMS

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.34

26.34 Request for Statement of Decision After Bench Trial.

Request for Statement of Decision After Bench Trial.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____	)	
Plaintiff,	)	No. _____
vs.	)	REQUEST FOR
_____	)	STATEMENT OF DECISION
Defendant.	)	
	)	
	)	

Plaintiff, _____, who appeared at the trial of the above-entitled action, hereby requests that the court issue a statement of decision explaining the factual and legal bases for its decision regarding the following controverted issues:

[Specify, e.g.:]

1. Whether Defendant, Mary Jones, breached a duty of care owed to Plaintiff.
2. Whether Plaintiff's claimed medical expenses were incurred as a result of Defendant's breach of duty].

[CONTINUE:]

Dated: _____

Respectfully submitted,

_____ [signature]

_____ [name]

Attorney for Plaintiff, _____

NOTES.

Authority:

CCP § 632



Timing:

See 26.18[1]



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26.35 Proposals As to Content of Statement of Decision After Bench Trial.

Proposals As to Content of Statement of Decision After Bench Trial.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____	)	
Plaintiff,	)	No. _____
vs.	)	PROPOSALS AS TO CONTENT
_____	)	OF STATEMENT OF DECISION
Defendant.	)	
	)	
	)	

Plaintiff, _____ [name], hereby makes the following proposals as to the content of the statement of decision:

1. That the factual and legal bases for the court's decision regarding the controverted issue of _____ [specify issue] be explained as follows:

a. The court based its decision on the following facts: _____ [set forth factual determinations explaining court's decision].

b. The legal basis for the court's decision is _____ [set forth legal determinations explaining court's decision].

[Set forth any additional issues to be included.]

Dated: _____

Respectfully submitted,

_____ [signature]

_____ [name]

Attorney for Plaintiff, John Smith

NOTES.

Authority:

CCP § 632; Cal Rules Ct, Rule 3.1590(e)



Timing:

See 26.18[2]



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VIII. FORMS

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.36

26.36 Proposed Statement of Decision After Bench Trial.

Proposed Statement of Decision After Bench Trial.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
Plaintiff,	)	No. _____
vs.	)	PROPOSED STATEMENT
_____	)	OF DECISION
Defendant.	)	
	)	
	)	

This cause came on regularly for trial on _____ [date], in Department _____ [number] of the above-entitled court, the Honorable _____, Judge, presiding, sitting without a jury, a jury having been duly waived. Plaintiff, _____ [name], appeared by his attorney, _____ [name]. Defendant, _____ [name], appeared by her attorney, _____ [name].

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The court, having considered the evidence and heard the arguments of counsel and being fully advised, issues the following statement of decision:

1. On the issue of _____ [specify issue], the court's decision is as follows: _____ [specify].

a. The court based its decision on the following facts: _____ [set forth factual determinations explaining court's decision].

b. The legal basis for the court's decision is _____ [*set forth legal determinations explaining court's decision*].

[*Set forth decisions on any additional issues.*]

Accordingly, judgment is hereby ordered to be entered as follows: _____ [*specify terms of judgment*].

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

CCP § 632; Cal Rules Ct, Rule 3.1590(f)



Timing:

See 26.18[3][b]

Contents of Form:

See 26.18[4]



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2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.37

26.37 Objections to Proposed Statement of Decision After Bench Trial.

Objections to Proposed Statement of Decision After Bench Trial.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____	)	
Plaintiff,	)	No. _____
vs.	)	OBJECTIONS TO PROPOSED
_____	)	STATEMENT OF DECISION
Defendant.	)	
	)	
	)	

Defendant, _____ [name], hereby objects to the proposed statement of decision submitted to the court by Plaintiff, _____ [name], as follows:

[Specify, e.g.:]

1. Defendant objects to the proposed statement of factual basis for the court's decision as to Issue No. 1 of Plaintiff's proposed statement of decision. Defendant's objection is based on the following grounds: the court's tentative decision established that any claim under the insurance policy had to be filed within 30 days of the loss, whereas the proposed statement of decision incorrectly specifies a 60-day period].

[Set forth objections on any additional issues.]

Dated: _____

Respectfully submitted,

_____ [signature]

_____ [name]

Attorney for Defendant, _____

NOTES.

Authority:

CCP § 632; Cal Rules Ct, Rule 3.1590(g)



Timing:

See 26.18[6]



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VIII. FORMS

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.38

26.38 Judgment After Bench Trial.

Judgment After Bench Trial.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
Plaintiff,	)	
vs.	)	No. _____
_____	)	JUDGMENT
Defendant.	)	
	)	
	)	

This cause came on regularly for trial on _____ [date], in Department _____ [number] of the above-entitled court, the Honorable _____, Judge, presiding, sitting without a jury, a jury having been duly waived. Plaintiff, _____ [name], appeared by his attorney, _____ [name]. Defendant, _____ [name], appeared by her attorney, _____ [name]. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and _____ [the court having filed its written statement of decision or a statement of decision not having been requested],

IT IS ORDERED, ADJUDGED, AND DECREED that

[If judgment is in favor of plaintiff, e.g.:]

Plaintiff, _____ [name], have judgment against Defendant, _____ [name], for the

following:

1. Damages in the sum of \$_____.
2. Prejudgment interest in the sum of \$_____, computed at _____ percent per annum from _____ [date].
3. Attorney's fees in the sum of \$_____.
4. Costs in the sum of \$_____.

[OR, if judgment is in favor of plaintiff, e.g.:]

Plaintiff, _____ [name], take nothing, with Defendant, _____ [name], to recover the following from Plaintiff:

1. Attorney's fees in the sum of \$_____.
2. Costs in the sum of \$_____.

[CONTINUE:]

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

Cal Rules Ct, Rule 3.1590(f), (h), (i)



Timing:

See 26.18[3][b], 26.19[1][b]

Contents of Form:

See 26.18[5]

Optional Judicial Council Form of Judgment:

See 26.39



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Chapter 26 Entry of Judgment
VIII. FORMS

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.39

26.39 Judicial Council Form JUD-100--Judgment.

Judicial Council Form JUD-100--Judgment.

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NOTES.

Authority:

CCP § 664; Cal Rules Ct, Rule 3.1590(f), (h), (i). California Judicial Council Form JUD-100, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Elements of Judgment:

See 26.18[5]

Use of Form:

See 26.18[5][a]



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Chapter 26 Entry of Judgment
VIII. FORMS

2-26 MB Practice Guide: Trial & Post-Trial Civil Proc 26.40

26.40 Judicial Council Form CIV-130--Notice of Entry of Judgment or Order.

Judicial Council Form CIV-130--Notice of Entry of Judgment or Order.

[Click here to view image.](#)

NOTES.

Authority:

CCP § 664.5(a). California Judicial Council Form CIV-130, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*].

Duty to Provide Notice:

See 26.27 -26.29



Timing:

See 26.29



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Chapter 27 Motion to Vacate Judgment and Enter Different Judgment

2-27 MB Practice Guide: Trial & Post-Trial Civil Proc 27.syn

§ 27.syn Synopsis to Chapter 27: Motion to Vacate Judgment and Enter Different Judgment

27.01 Scope.

27.02 Objective and Strategy.

27.03 CHECKLIST: Moving to Vacate Judgment and Enter Different Judgment.

27.04 Options and Strategies for Moving Party.

27.05 Party Aggrieved by Incorrect Decision of Law May Move to Set Aside and Enter New Judgment Under CCP § 663.

27.05[1] Judgment Must Be Based on Decision of Court or Special Verdict of Jury.

27.05[2] Judgment by Court Must Have Incorrect or Erroneous Legal Basis.

27.05[2][a] Incorrect Legal Conclusion May Be Inconsistent With Findings of Fact.

27.05[2][b] Incorrect Legal Conclusion May Be Inconsistent With Uncontroverted Facts.

27.05[2][c] Incorrect Legal Conclusion May Be Contrary to Express Statute.

27.05[2][d] Court May Incorrectly Consider Element As Settled Legal Doctrine.

27.05[3] "Aggrieved Party" Need Not Be Party of Record at Trial, but Judgment Must Materially Affect Substantial Right.

27.05[4] Party May Change Legal Theory Relied on During Trial.

27.05[5] Motion May Not Be Used to Challenge Sufficiency of Evidence.

27.06 Party Must Give Notice of Intention to Make Motion

27.06[1] Notice Provides Substantive Arguments for Motion.

27.06[2] Notice Must Be Served Before Entry of Judgment, 15 Days After Mailing of Judgment, or 180 Days After Entry of Judgment, Whichever Is Earliest.

27.07 Party Must Make Motion Before Appeal Entered and Under Same Time Limits Applied to Notice.

27.07[1] Motion Must Be Made Before Appeal Is Entered.

27.07[2] Time Limits Applied to Notice Also Applied to Motion.

27.07[3] Motion Need Not Await Final Judgment.

27.07[4] Court Must Adhere to Time Limits.

27.08 Hearing on Motion Held at Time Designated by Notice With Judge Who Presided at Trial

27.08[1] Hearing at Least 16 Court Days After Notice.

27.08[2] Motion to Vacate and Enter New Judgment Need Not Be Contemporaneous With Other Motions.

27.08[3] Judge Presiding at Trial Must Hear Motion.

27.08[4] Court Must Interpret Verdict From Its Language Considered in Connection With Pleadings, Evidence, and Instructions.

27.08[5] Court Limited to Determining Proper Judgment on Facts As Found at Trial.

27.09 CHECKLIST: Opposing a Motion to Vacate Judgment and Enter Different Judgment.

27.10 Options and Strategy for Opposing Party.

27.11 Opposing Party Can Argue Judgment Is Consistent With Facts or Special Verdict.

27.11[1] Judgment Is Consistent With Facts.

27.11[2] Judgment Is Consistent With Special Verdict.

27.12 Opposing Party Can Argue Motion Not Proper for Challenging Factual Bases for Decision or Interlocutory Judgment.

27.12[1] Motion Not Proper for Challenging Factual Bases.

27.12[2] Motion Not Proper for Challenging Interlocutory Judgment.

27.13 Party Has Nine Days Before Hearing to Submit Memorandum of Opposition.

27.14 CHECKLIST: Seeking Review of Order Granting or Denying Motion to Vacate and Enter Different Judgment.

27.15 Options and Strategy.

27.16 Order Granting Motion to Vacate Judgment Is Appealable As Special Order After Final Judgment.

27.17 Unclear Whether Order Denying Motion to Vacate Is Appealable.

27.17[1] California Supreme Court Holds Denial Is Nonappealable.

27.17[2] Clemmer Authority Questioned.

27.18 Person Not Party to Original Action May Gain Right to Appeal Through Motion to Vacate and Enter New Judgment.

27.19 On Appeal Party May Change Legal Theory Relied On at Trial.

27.20 Appellate Review Confined to Determination of Consistency Between Judgment and Findings of Fact.

27.21 Presumptions Favor Appellant and Original Court's Decision.

27.21[1] Uncertainty in Findings Resolved Against Appellant.

27.21[2] Presumption in Favor of Original Court's Decision.

27.22 Appellate Court Can Order Trial Court to Vacate Judgment and Enter New One.

27.23 Notice of Intention to Move and Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment.

27.24 Order Granting Motion to Vacate and Enter Another and Different Judgment.



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Chapter 27 Motion to Vacate Judgment and Enter Different Judgment
I. STRATEGY

2-27 MB Practice Guide: Trial & Post-Trial Civil Proc 27.01

27.01 Scope.

This chapter covers:

- The grounds for making a motion to vacate and enter new judgment [see 27.05].
- The notice requirements for the motion [see 27.06].
- The timing of making the motion [see 27.07].
- The hearing for the motion [see 27.08].
- The grounds for opposing the motion [see 27.11, 27.12].
- The timing for submitting a memorandum of opposition [see 27.13].
- Review of an order granting or denying the motion [see 27.16 -27.22].

Core Statutes:

CCP §§ 663, 663a; Cal Rules Ct, Rule 3.1602

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState Court Review



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Chapter 27 Motion to Vacate Judgment and Enter Different Judgment
I. STRATEGY

2-27 MB Practice Guide: Trial & Post-Trial Civil Proc 27.02

27.02 Objective and Strategy.

A trial court may correct its own inadvertence or clerical error on motion of an injured party, or on its own motion so that the judgment or order as entered will conform to the judgment or order directed [*CCP* § 473(d)]. However, a trial court may correct judicial errors only on a motion for new trial or on a motion under to vacate the order or judgment and enter a *completely different* one [*CCP* § 663]. These are completely different procedures; the difference between a clerical error and a judicial error is whether the error was made in rendering the judgment or in recording the judgment rendered [*People v. Anderson* (1976) 59 CA3d 831, 839, 131 CR 104] . *CCP* § 663 applies only to a decision of the court based on facts or to a special verdict of a jury.

► **Cross Reference:**

Discussion of setting aside judgments under *CCP* § 473, see Ch. 29, Setting Aside Judgments and Orders.

CCP § 663 provides a remedy to be used when a trial court draws incorrect conclusions of law or renders an erroneous judgment on the basis of uncontroverted evidence [*CCP* § 663]. It is not available to challenge the sufficiency of the evidence to support findings of fact or a jury verdict [*Simac Design, Inc. v. Alciati* (1979) 92 CA3d 146, 152-153, 154 CR 676] .

A motion to vacate a judgment under *CCP* § 663 does not contemplate merely the setting aside of the judgment, as does a motion for new trial or a motion for relief from default under *CCP* § 473. It expressly provides for vacating the judgment and entering a *different* judgment. Hence, an order of vacation, without directing entry of a new judgment, is void [*20th Century Ins. Co. v. Superior Court* (2001) 90 CA4th 1247, 1260, 109 CR2d 611] .

The process under *CCP* § 663 is not intended to afford relief to a third party in situations when the judgment is the result of a settlement that benefits to litigants at the expense of a third party; it is not a vehicle for intervening to correct a judgment when it is entered as the result of a settlement.

Unlike the vacating process, there are forms of relief available (nonsuit, new trial, motion for JNOV) that are substantively based. This vacating process can be important if a party does not want to appeal, and wants to avoid a determination that was not necessary to the case but that slipped into the judgment.

Judicial Perspective:

A motion to vacate judgment and enter different judgment is very rarely used, and is often joined with a motion for new trial. The court may interpret this motion as actually a motion for new trial [*see Shapiro v. Prudential Property & Casualty Co. (1997) 52 CA4th 722, 727-728, 60 CR2d 698*].

**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 ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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Chapter 27 Motion to Vacate Judgment and Enter Different Judgment
II. MOVING TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT

2-27 MB Practice Guide: Trial & Post-Trial Civil Proc 27.03

27.03 CHECKLIST: Moving to Vacate Judgment and Enter Different Judgment.

☐ Determine if judgment is one subject to motion to vacate:

- ☐ Judgment is based on decision by court or special verdict of jury.
- ☐ Decision inconsistent with findings of fact, uncontroverted facts, express statute, and/or settled legal doctrine.
- ☐ If movant is not a party to the action, judgment materially affects a substantial right.

Authority:
CCP § 663

Discussion:
See 27.05



Timing:

Determine timing and contents of notice of intention to make motion:

- ☐ Motion must be served 15 days after mailing of judgement, or 180 days after entry of judgment, whichever is earliest.
- ☐ Time extensions of *CCP § 1013* and *CCP § 1010.6* do not apply.
- ☐ Motion must be made before an appeal has been taken [*Schroeder v. Superior Court of*

California (1925) 73 CA 687, 690, 239 P 65] .

Authority:

CCP § 663a

Discussion:

See 27.06[2]

Form:

See 27.23

☐ Determine timing of motion and hearing

☐ 16 court days before the time appointed for hearing plus additional time for service by mail, unless the court prescribes a shorter time.

Authority:

CCP § 663a

Discussion:

See 27.07, 27.08[1]

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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II. MOVING TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT

2-27 MB Practice Guide: Trial & Post-Trial Civil Proc 27.04

27.04 Options and Strategies for Moving Party.

A party does not need to wait for a final judgment to make a motion to vacate and enter new judgment; it is enough that a court make a determination of law based on the facts before it.

The setting aside process under *CCP* § 663 is not commonly invoked, parties instead using a motion for JNOV or motion for new trial. It is possible a party would invoke this procedure after an adverse summary judgment ruling.



Strategic Point:

The main issue for a non-party is that to use the *CCP* § 663 procedure, they would be obliged to acknowledge the effect of the judgment, and forego the right to relitigate the issue. Again, this is likely a key reason why the procedure is not common.

The practitioner should also note that the motion itself is in essence made with the notice of the intention to make the motion: the notice contains the full argument for the motion, and nothing else is required to be filed before the hearing.

Consider:

Only a party may bring a motion for new trial; a non-party is limited to bringing just this motion.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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II. MOVING TO VACATE JUDGMENT AND ENTER DIFFERENT JUDGMENT

2-27 MB Practice Guide: Trial & Post-Trial Civil Proc 27.05

27.05 Party Aggrieved by Incorrect Decision of Law May Move to Set Aside and Enter New Judgment Under CCP § 663.

27.05[1] Judgment Must Be Based on Decision of Court or Special Verdict of Jury. A judgment or decree, when based on a decision by the court or the special verdict of a jury, on motion of the party aggrieved, may be set aside and vacated by the same court, and another, different judgment entered [CCP § 663]. If findings of fact by a referee are considered a special verdict under CCP § 645, the court has the power under CCP § 663 to set aside and vacate any judgment predicated thereon and enter another different judgment when the judgment or decree is not consistent with or not supported by facts found [*Estate of Bassi* (1965) 234 CA2d 529, 540-541, 44 CR 541] .

Distinguish:

A CCP § 663 motion is not available against a stipulated judgment because, by its own terms, Section 663 applies only to a decision of the court based on facts or to a special verdict of a jury, and a stipulated judgment does not rest on facts established by evidence [*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 CA4th 1, 84 CR2d 715] . A special verdict is a verdict in which the jury finds only the facts, leaving the judgment to the court, whereas a general verdict is one where the jury pronounces generally on all or any of the issues, in favor of the plaintiff or defendant [CCP § 624]. Therefore, a general verdict is not subject to a CCP § 663 motion because CCP § 625 provides that the jury's inconsistent findings control the general verdict and the court must give judgment accordingly.

► Cross Reference:

Discussion of special verdicts, see *Ch. 18, Jury Verdicts* 18.11 et seq.

27.05[2] Judgment by Court Must Have Incorrect or Erroneous Legal Basis.

27.05[2][a] Incorrect Legal Conclusion May Be Inconsistent With Findings of Fact. A CCP § 663 motion may be made if the court draws an incorrect legal conclusion or renders an erroneous judgment on the facts found by it to exist [see *Alameda v. Carleson* (1971) 5 C3d 730, 738, 97 CR 385, 488 P2d 953] .

**Strategic Point:**

Findings of fact are facts found by the trier of fact, which must stand up appeal under a sufficient evidence to support the finding standard. Uncontroverted facts are facts to which there has been a stipulation, or for which no contradictory facts were offered, and cannot stand if there is a difference (a summary judgment standard). Uncontroverted facts may or may not support the ultimate decision reached by the trier of fact. *CCP* § 663 requires that the judgment can be set aside and must be amended and corrected if it is "not consistent with or not supported by the facts." Note that neither "findings of fact" nor "uncontroverted facts" is used in the statute. If the judgment is based on a jury verdict, and the judgment is wrong because it is inconsistent, then the "findings" don't support the judgment [*Alameda v. Carleson* (1971) 5 C3d 730, 738, 97 CR 385, 488 P2d 953] . Thus, there could be a difference that should be highlighted between judgments entered by the trier of fact (bench trial with findings and a judgment) and a judgment entered by the court following a jury trial in which the court is bound by the facts found if a new trial motion would fail.

**Cross Reference:**

Discussion of uncontroverted facts, see 27.05[2][b].

The purpose of the motion is not to review the sufficiency of the evidence, but rather the application of law. This is one reason that it is not a very attractive procedure for a non-party, because it requires conceding the effect of the judgment without being able to challenge its factual predicates.

27.05[2][b] Incorrect Legal Conclusion May Be Inconsistent With Uncontroverted Facts. A *CCP* § 663 motion may be granted if the court's legal conclusions are inconsistent with the uncontroverted facts of the case [*Swanson v. Wheeler* (1952) 112 CA2d 43, 44-45, 245 P2d 699] .

Example:

The trial court found that there was an oral agreement between the parties in which the plaintiff was given the right to withdraw and recover his down payment of \$5,000. However, the defendant did not refund the down payment after the plaintiff withdrew. Despite these findings of fact, the trial court found for the defendant and denied the plaintiff's motion to vacate and enter new judgment. The appellate court, in remanding the case with directions to grant the plaintiff's motion, noted the factual findings clearly showed that the plaintiff was entitled to judgment and that a trial court may not, through purported construction, ignore clear and positive factual findings or supply those that are missing [*Swanson v. Wheeler* (1952) 112 CA2d 43, 44-45, 245 P2d 699] .

27.05[2][c] Incorrect Legal Conclusion May Be Contrary to Express Statute. A *CCP* § 663 motion may be granted if the court comes to a legal conclusion that is contrary to an express statutory provision [*Gibson v. Hammang* (1904) 145 C 454, 456, 78 P 953] .

Example:

In deciding in favor of plaintiffs to annul a land deed, the trial court did not allow reimbursement for plaintiff's costs despite a statute to the contrary. Plaintiffs moved to vacate the part of the judgment that disallowed costs and to enter judgment for costs under *CCP* § 663. In granting the motion on appeal and giving directions to award costs to plaintiff, the appellate court noted that a statute expressly stated that the reimbursement of costs was not discretionary, but mandatory in actions for the recovery of real property [*Gibson v. Hammang* (1904) 145 C 454, 456, 78 P 953] .

27.05[2][d] Court May Incorrectly Consider Element As Settled Legal Doctrine. A *CCP* § 663 motion may be granted when the court considers a specific element to be part of a settled legal doctrine when, in fact, it is not [*Crook*

v. Leinenweaver (1950) 100 CA2d 790, 792-794, 224 P2d 891] .

Example:

In an action to establish a boundary line, the trial court made findings favorable to the defendants but concluded the facts required a judgment in favor of the plaintiffs because there was no dispute between the parties that brought the case within the doctrine of an agreed boundary line. The defendants moved to vacate and enter new judgment, which the trial court denied. In reversing the order, the appellate court stated that the doctrine of an agreed boundary line is well settled and that an actual dispute or argument is not necessary in such cases. The lower court's conclusion was clearly erroneous because the matter of a dispute or argument was a false factor [*Crook v. Leinenweaver (1950) 100 CA2d 790, 792-794, 224 P2d 891] .*

27.05[3] "Aggrieved Party" Need Not Be Party of Record at Trial, but Judgment Must Materially Affect Substantial Right. For the motion to be granted, there must be an incorrect or erroneous legal basis for the court's decision, not consistent with or not supported by the facts, materially affecting the substantial rights of the party and entitling the party to a different judgment [CCP § 663]. A person who is initially a nonparty in proceedings but is aggrieved by a judgment may move to vacate the judgment under CCP § 663 [*Howard Contracting, Inc. v. G.A. MacDonald Constr. Co. (1998) 71 CA4th 38, 58, 83 CR2d 590] .* To be aggrieved, the party's interest must be immediate, pecuniary and substantial, and not merely a nominal or remote consequence of the judgment [*Howard Contracting, Inc. v. G.A. MacDonald Constr. Co. (1998) 71 CA4th 38, 58, 83 CR2d 590] .*

Example:

An insurer lacked standing, and the trial court properly denied the insurer's motion to vacate judgment obtained against the insured, when it was possible that the insurer would be bound by judgment but did not satisfy "aggrieved party" standard, when the insurer's incurring litigation costs as result of the insured's coverage action was not substantial right or interest affected by judgment and was at most nominal consequence of judgment, when the insurer's rights would only be injuriously affected if coverage were found, and when the insurer would not be bound by finding that the insured was liable if the insurer could show fraud or collusion in coverage action [*Tomassi v. Scarff (2000) 85 CA4th 1053, 1058, 102 CR2d 750] .*

27.05[4] Party May Change Legal Theory Relied on During Trial. A trial court may consider new legal challenges not previously raised before the verdict or judgment when the court is ruling on a motion to vacate [CCP § 663(1); *Hoffman-Haag v. Transamerica Ins. Co. (1991) 1 CA4th 10, 15-16, 1 CR 2d 805] .*

27.05[5] Motion May Not Be Used to Challenge Sufficiency of Evidence. A motion to vacate a judgment under CCP § 663 is a remedy to be used when a trial court draws incorrect conclusions of law or renders an erroneous judgment on the basis of uncontroverted evidence. It is not available to challenge the sufficiency of the evidence to support findings of fact or a jury verdict [*Simac Design, Inc. v. Alciati (1979) 92 CA3d 146, 153, 154 CR 676] .*

Distinguish:

If a party seeks reexamination of both legal and factual matters, CCP § 662 permits a court to grant alternative relief in lieu of granting a new trial; the court may change or add to the statement of decision and grant a partial new trial or vacate and set aside the statement of decision and judgment and reopen the case for further proceedings.



Cross Reference:

Discussion of motions for new trial, see Ch. 21, Motion for New Trial.

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury
TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil
ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From
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27.06 Party Must Give Notice of Intention to Make Motion

27.06[1] Notice Provides Substantive Arguments for Motion. The party moving to vacate and enter a new judgment must file with the clerk and serve on the adverse party a notice of intention to make the motion, designating the grounds on which the motion will be made, and specifying the particulars in which the legal basis for the decision is not consistent with or supported by the facts, or in which the judgment or decree is not consistent with the special verdict [CCP § 663a]. A motion is deemed to be made on the grounds stated in the written notice of motion on filing and service of the notice of motion [CCP § 1005.5].



Strategic Point:

Practically speaking, the notice of intention to make the motion is prepared like any other notice of motion, along with the motion to vacate. In some jurisdictions, the party serving the notice provides the time for hearing in the notice. In other jurisdictions, the court will notify the parties of the time for hearing. The practitioner should check local court rules.



Cross References:

Form of motion to set aside and vacate judgment and enter another and different judgment, see 27.23.

Discussion, forms and checklist for notice of motion to vacate and enter new judgment, see *California Forms of Pleading and Practice*, § 371.90 *et seq.* (Matthew Bender).

27.06[2] Notice Must Be Served Before Entry of Judgment, 15 Days After Mailing of Judgment, or 180 Days After Entry of Judgment, Whichever Is Earliest. The notice of a motion to vacate and enter new judgment must be served by the earliest of four possible deadlines [CCP § 663a]:

- Before the entry of judgment;
- Within 15 days of the earliest of the date of mailing of notice of entry of judgment by the clerk of the court pursuant to CCP § 664.5 or service on the clerk any party of written notice of entry of judgment; or

- Within 180 days after the entry of judgment.


Warning:

The time extension under *CCP* §§ 1013 and 1010.6 for exercising a right or doing an act when service is by mail, fax, express, overnight or electronic delivery does not apply to extend the time for serving a notice of motion to vacate and enter new judgment [*CCP* § 663a]. However, the time extension under *CCP* § 1005(b) for the notice of hearing when service is by mail does apply [see *CCP* § 1005(a)(13)].


Cross References:

Form of motion to set aside and vacate judgment and enter another and different judgment, see 27.23.

Discussion, checklists and forms relating to the procedure on motions requiring notice, see *California Forms of Pleading and Practice*, § 372.21 (Matthew Bender).

Discussion and forms of proof of services, see *California Forms of Pleading and Practice*, Ch. 518, Service of Summons and Papers (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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27.07 Party Must Make Motion Before Appeal Entered and Under Same Time Limits Applied to Notice.

27.07[1] Motion Must Be Made Before Appeal Is Entered. A motion to vacate and enter new judgment must be made before an appeal has been taken [*Schroeder v. Superior Court of California* (1925) 73 CA 687, 690, 239 P 65] .

27.07[2] Time Limits Applied to Notice Also Applied to Motion. An application for an order is a motion [CCP § 1003; see CCP § 1005.5]. Therefore, the time limits imposed on filing a notice of intention to make the motion necessarily impose the same limit on the motion itself [*Arambula v. Union Carbide Corp.* (2005) 128 CA4th 333, 26 CR3d 854] .

27.07[3] Motion Need Not Await Final Judgment. In authorizing a motion to vacate a judgment for incorrect or erroneous conclusions of law not consistent with, or not supported by, the findings of fact, CCP § 663 permits the motion to be made whenever the trial judge draws an incorrect legal conclusion or renders an erroneous judgment on the facts found to exist [*County of Alameda v. Carleson* (1971) 5 C3d 730, 738, 97 CR 385, 488 P2d 953] .

27.07[4] Court Must Adhere to Time Limits. The court lacks power to vacate a judgment and enter a new judgment once the time limits of CCP § 663a have elapsed, even when the parties consent to granting the motion [*County of Inyo v. City of Los Angeles* (1984) 160 CA3d 1178, 1183, 1184, 207 CR 425] . The court may not use the provisions of CCP § 473 to extend the time for filing a motion to vacate judgment [*Advanced Bldg. Maint. v. State Comp. Ins. Fund* (1996) 49 CA4th 1388, 1394, 57 CR2d 310] .

Legal Topics:

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

Civil Procedure Judgments Relief From Judgment Motions to Vacate Civil Procedure Appeals Appellate Jurisdiction Final Judgment Rule Civil Procedure Appeals Reviewability Time Limitations



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27.08 Hearing on Motion Held at Time Designated by Notice With Judge Who Presided at Trial

27.08[1] Hearing at Least 16 Court Days After Notice. The date of the hearing is generally set forth in the notice. *CCP § 1005(b)* requires that a notice of motion be given at least 16 court days before the time appointed for hearing plus additional time for service by mail, unless the court prescribes a shorter time [*CCP § 1005(b)*].

Cross Reference:

Discussion of giving notice, see 27.06[1].

27.08[2] Motion to Vacate and Enter New Judgment Need Not Be Contemporaneous With Other Motions. Neither a motion for judgment notwithstanding the verdict [*CCP § 629*] nor a motion for new trial [*CCP § 657*] is required to be heard at the same time as a motion to vacate judgment and enter new judgment [*see CCP §§ 663, 663a*].



Strategic Point:

These motions are often made and heard at the same time as a motion to vacate, despite the absence of a requirement to do so.

Cross References:

Discussion of motion for JNOV, see Ch. 20, Motion for Judgment Notwithstanding the Verdict.

Discussion of motion for new trial, see Ch. 21, Motion for New Trial.

27.08[3] Judge Presiding at Trial Must Hear Motion. The judge who presided at trial must hear the motion to vacate a judgment and enter another and different judgment unless the judge is dead, unable to hear the motion, or absent from the county on the date set for hearing [*Cal Rules Ct, Rule 3.1602*]. In that case, the motion may be heard and determined by another judge of the same court [*Cal Rules Ct, Rule 3.1602*]. If the parties agree, the motion may be heard anywhere in the state by the judge who presided at trial [*CCP § 166(a)(2); Gov Code § 69741.1*].

27.08[4] Court Must Interpret Verdict From Its Language Considered in Connection With Pleadings,

Evidence, and Instructions. The court must interpret the challenged verdict from its language considered in connection with the pleadings, evidence and instructions [*Shapiro v. Prudential Prop. & Cas. Co.* (1997) 52 CA4th 722, 729, 60 CR2d 698] .

27.08[5] Court Limited to Determining Proper Judgment on Facts As Found at Trial. On hearing the motion, the court has no power to consider or determine any matter except what judgment should be entered on the facts as found [*Dolan v. Superior Court* (1920) 47 CA 235, 241, 190 P 469] . The court cannot reopen the case and receive further evidence or reexamine the evidence before it [see *Gossman v. Gossman* (1942) 52 CA2d 184, 196, 126 P2d 178] .

Legal Topics:

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

Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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27.09 CHECKLIST: Opposing a Motion to Vacate Judgment and Enter Different Judgment.

☐ Determine if memorandum of opposition can be filed based on:

☐ Judgment is consistent with the facts.

Authority:

Brown v. Jones (1935) 11 CA2d 30, 31, 52 P2d 962

Discussion:

See 27.11[1]

☐ Judgment is consistent with special verdict.

Authority:

CCP § 663

Discussion:

See 27.11[2]

☐ Motion is not proper for challenging factual bases.

Authority:

Jones v. Clover (1937) 24 CA2d 210, 211-212, 74 P2d 517

Discussion:

See 27.12[1]

☐ Motion not proper for challenging interlocutory judgment.

Authority:

Remington v. Davis (1951) 108 CA2d 251, 253, 238 P2d 662

Discussion:

See 27.12[2]

- ☐ Determine timing for filing memorandum of opposition.

Authority:

CCP § 1005(b); Cal Rules Ct, Rule 3.1300(a)

Discussion:

See 27.13

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders



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27.10 Options and Strategy for Opposing Party.

Although not expressly authorized by statute or by the California Rules of Court, practice permits counsel for the adverse party to oppose the *CCP* § 663 motion by filing a memorandum of points and authorities in opposition to it. More important, failure to oppose a motion results in a waiver on appeal of any objection to the resulting order [see *Bell v. American Title Ins. Co. (1991) 226 CA3d 1589, 1602, 277 CR 583*].



Cross Reference:

Discussion and memoranda in opposition to motion to vacate and enter new judgment, see *California Points and Authorities*, §§ 155.330, 155.331 (Matthew Bender).

Legal Topics:

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

Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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27.11 Opposing Party Can Argue Judgment Is Consistent With Facts or Special Verdict.

27.11[1] Judgment Is Consistent With Facts. If the judgment rendered in an action is the correct legal conclusion to be drawn from the facts found by the court, a motion to set aside and vacate a judgment and enter another and different judgment is properly denied [*see Brown v. Jones (1935) 11 CA2d 30, 31, 52 P2d 962*].

27.11[2] Judgment Is Consistent With Special Verdict. A motion to set aside and vacate a judgment and enter another, different judgment will not be granted if the judgment or decree is consistent with the special verdict of the jury [*see CCP § 663*].

Legal Topics:

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

Civil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureJudgmentsGeneral OverviewCivil
ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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27.12 Opposing Party Can Argue Motion Not Proper for Challenging Factual Bases for Decision or Interlocutory Judgment.

27.12[1] Motion Not Proper for Challenging Factual Bases. A motion to set aside and vacate a judgment and enter another, different judgment is a remedy to correct a court's incorrect or erroneous legal bases for the decision; it is not available to challenge the court's factual bases for the decision [*see Jones v. Clover (1937) 24 CA2d 210, 211-212, 74 P2d 517*].

27.12[2] Motion Not Proper for Challenging Interlocutory Judgment. A motion to vacate and enter new judgment is not applicable to an interlocutory judgment [*see Remington v. Davis (1951) 108 CA2d 251, 253, 238 P2d 662*].

► Cross Reference:

Discussion of interlocutory judgments and a listing of the types of actions in which there is a statutory provision for an interlocutory judgment, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders



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27.13 Party Has Nine Days Before Hearing to Submit Memorandum of Opposition.

All papers opposing a noticed motion must be filed with the court and a copy served on each party at least nine court days before the hearing [*CCP § 1005(b)*; *Cal Rules Ct, Rule 3.1300(a)*].

► Cross References:

Discussion of rules applicable to extension of time for filing opposition, see *27.06[2]*.

General discussion of procedure for noticed motions and their opposition, see *California Forms of Pleading and Practice*, § 372.21 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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27.14 CHECKLIST: Seeking Review of Order Granting or Denying Motion to Vacate and Enter Different Judgment.

☐ Determine if appeal is of order:

☐ Granting the motion to vacate and enter new judgment

Authority:
CCP § 663

Discussion:
See 27.16

☐ Denying the motion to vacate and enter new judgment

Authority:
Clemmer v. Hartford Ins. Co. (1978) 22 C3d 865, 890, 151 CR 285, 587 P2d 1098 ; Howard v. Lufkin (1988) 206 CA3d 297, 300-301, 253 CR 422

Discussion:
See 27.17

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState Court Review



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27.15 Options and Strategy.

There is some controversy about whether an order denying a motion to vacate under *CCP* § 663 may be appealed. However, the right to appeal an order granting a motion to vacate is directly codified in *CCP* § 663a. The practitioner should note that the legal theory relied on at trial can be changed on appeal, and that an aggrieved party not originally a part of the action can appeal the judgment or an order after making a motion to vacate.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState Court Review



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27.16 Order Granting Motion to Vacate Judgment Is Appealable As Special Order After Final Judgment.

An order granting the motion may be reviewed on appeal in the same manner as a special order made after a final judgment [CCP § 663a].

 Cross Reference:

Discussion of appeal of special orders, see *California Forms of Pleading and Practice*, § 42.12 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState
Court Review



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27.17 Unclear Whether Order Denying Motion to Vacate Is Appealable.

27.17[1] California Supreme Court Holds Denial Is Nonappealable. In *Clemmer v. Hartford Ins. Co.* (1978) 22 C3d 865, 890, 151 CR 285, 587 P2d 1098, the California Supreme Court contradicted, without explanation, a longstanding, judicially created allowance for appeal of a denial of a motion to vacate and enter new judgment. Generally, an order denying a motion to vacate a judgment is nonappealable [*Howard v. Lufkin* (1988) 206 CA3d 297, 300-301, 253 CR 422]. The underlying rationale is that the prior judgment should be reviewed on an appeal from the judgment itself, rather than on an appeal from the denial of the motion to vacate [*Payne v. Rader* (2009) 167 CA4th 1569, 1576, 85 CR3d 174].

► **Cross Reference:**

Discussion of variety of motions to vacate, see 27.05.

27.17[2] Clemmer Authority Questioned. Although denial of motions to vacate are generally nonappealable [see *City of Los Angeles v. Glair* (2007) 153 CA4th 813, 820-823, 63 CR3d 280], courts have created an exception to this rule for nonappealability for motions to vacate a judgment pursuant to CCP § 663 termed a "statutory motion" [see *Socol v. King* (1949) 34 C2d 292, 296-297, 209 P2d 577; *Carr v. Kamins* (2007) 151 CA4th 929, 933, 60 CR3d 196]. One court of appeal characterized the *Clemmer* pronouncement [see 27.17[1]] as dicta, and held that the denial of a statutory motion under CCP § 663 is an appealable order [*Howard v. Lufkin* (1988) 206 CA3d 297, 302-303, 253 CR 422].

Distinguish:

When a postjudgment order resolves constitutional issues concerning the judgment involved, it is appealable [*County of Los Angeles v. Thompson* (1985) 172 CA3d 18, 20, 218 CR 101].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Judgments Relief From Judgment Motions to Vacate Civil Procedure Appeals Appellate Jurisdiction State Court Review



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27.18 Person Not Party to Original Action May Gain Right to Appeal Through Motion to Vacate and Enter New Judgment.

Any aggrieved party may appeal from an adverse judgment [CCP § 902]. Generally however, only parties of record may appeal; consequently one who is denied the right to intervene in an action ordinarily may not appeal from a judgment subsequently entered in the case [*People v. Hy-Lond Enters., Inc. (1979) 93 CA3d 734, 745, 155 CR 880*] . Instead, that party may appeal from the order denying intervention. Nevertheless, one who is legally aggrieved by a judgment may become a party of record and obtain a right to appeal *the judgment itself* by moving to vacate the judgment pursuant to CCP § 663 [*People v. Hy-Lond Enters., Inc. (1979) 93 CA3d 734, 745, 155 CR 880*] . One is considered "aggrieved" whose rights or interests are injuriously affected by the judgment. Appellant's interest must be immediate, pecuniary, and substantial, and not nominal or a remote consequence of the judgment [*People v. Hy-Lond Enters., Inc. (1979) 93 CA3d 734, 745, 155 CR 880*] .



Warning:

Making a CCP § 663 motion does not extend the time within which to appeal from the original judgment [*Spotton v. Superior Court (1918) 177 C 719, 171 P 801*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePartiesInterventionRight to InterveneCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState Court Review



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27.19 On Appeal Party May Change Legal Theory Relied On at Trial.

On appeal a party may change the legal theory relied on at trial, as long as the new theory presents a question of law to be applied to undisputed facts in the record [*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 CA4th 10, 15-16, 1 CR2d 805] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState
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27.20 Appellate Review Confined to Determination of Consistency Between Judgment and Findings of Fact.

On appeal from an order pursuant to *CCP* § 663 the review is confined to a determination of whether the conclusions of law and the judgment are consistent with and supported by the findings of fact [*Newbury v. Civil Serv. Comm'n.* (1940) 42 CA2d 258, 259, 108 P2d 745] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState Court Review



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27.21 Presumptions Favor Appellant and Original Court's Decision.

27.21[1] Uncertainty in Findings Resolved Against Appellant. On appeal from an order denying a motion under *CCP* § 663, any uncertainty in the findings must be resolved against the appellant and strongly construed in favor of the respondent [*Westervelt v. McCullough* (1924) 68 CA 198, 210, 228 P 734] .

Distinguish:

When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under *CCP* § 663, it may not be inferred on appeal or on a motion under *CCP* § 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue [*CCP* § 634].

27.21[2] Presumption in Favor of Original Court's Decision. In reviewing the grant of the motion pursuant to *CCP* § 663, the presumption is in favor of the court's action [*Moklofsky v. Moklofsky* (1947) 79 CA2d 259, 264, 179 P2d 628] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState Court ReviewEvidenceInferences & PresumptionsPresumptions



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27.22 Appellate Court Can Order Trial Court to Vacate Judgment and Enter New One.

When the appellate court determines that the trial court improperly denied a *CCP* § 663 motion, it can direct a lower court to do so on appeal [*see Shafer v. Lacy (1898) 121 C 574, 579-580, 54 P 72*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsAppellate JurisdictionState
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Cathcart Durie McGee Prather

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Chapter 27 Motion to Vacate Judgment and Enter Different Judgment
V. FORMS

2-27 MB Practice Guide: Trial & Post-Trial Civil Proc 27.23

27.23 Notice of Intention to Move and Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment.

Notice of Intention to Move and Motion to Set Aside and Vacate Judgment and Enter Another and Different Judgment.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[or other as appropriate]

_____[name],

Plaintiff,

vs.

_____[name],

Defendant.

)

)

)

)

)

)

)

)

NO. _____

NOTICE OF INTENTION TO MOVE AND MO-
TION TO SET ASIDE AND VACATE JUDGMENT
AND ENTER ANOTHER AND DIFFERENT
JUDGMENT UNDER CODE OF CIVIL PROCED-
URE SECTION 663

To _____ [specify party, e.g., Defendant Mary Jones] 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., Plaintiff] will move under *Code of Civil Procedure* Section 663 for an order:

1. To set aside and vacate the judgment entered on _____ [date];

[EITHER]

2. To amend and correct the statement of decision filed in this action on _____ [date]; and

[OR]

2. To correct the judgment or decree of the court that is not consistent with the special verdict, rendered by the jury on _____ [date]; and

[CONTINUE]

3. To enter another and different judgment.

[EITHER, for the ground of incorrect or erroneous legal basis for the decision]

The motion will be made on the ground that the legal basis for the decision filed by the court is _____ [incorrect and/or erroneous] in that it is not _____ [consistent with and/or supported by] the facts. These errors have materially affected the substantial rights of _____ [specify, e.g., Plaintiff] entitling him/her to a different judgment in that _____ [state facts showing how party was deprived of fair trial].

The following legal bases for the decision, for the reasons specified, are _____ [incorrect and/or erroneous] and not _____ [consistent with and/or supported by] the facts:

1. _____ [Set out erroneous or incorrect legal bases, identifying them by paragraph, page, and line number in statement of decision, and specify reasons why they are erroneous or incorrect.]

The statement of decision should be amended and corrected as follows:

1. _____ [Specify changes desired in statement of decision.]

[OR, if judgment or decree is neither consistent with nor supported by the special verdict]

The motion will be made on the ground that the _____ [judgment or decree] is not _____ [consistent with or supported by] the special verdict of the jury. This error materially affected the substantial rights of _____ [specify, e.g., Plaintiff] entitling him/her to a different judgment in that _____ [state facts showing how party was deprived of fair trial].

The _____ [judgment or decree] of the court that _____ [specify contents of judgment or decree] is not _____ [consistent with or supported by] the special verdict of the jury that stated the following: " _____ " [incorporate verbatim copy of jury's special verdict]. The _____ [judgment or decree] is _____ [inconsistent with or unsupported by the verdict] because:

1. _____ [Set out reasons why judgment or decree is neither consistent with nor supported by the special verdict.]

[CONTINUE]

The following _____ [judgment or decree] should be entered:

1. _____ [Specify desired judgment or decree]

This motion will be based on this notice and on the supporting memorandum served and filed herewith, and on all the papers and records of this action.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [moving party's status and name]

NOTES.

Authority:

CCP § 663

Grounds:

See 27.06

Related Form of Order:

See 27.24

Related Forms of Memoranda:

See California Points and Authorities, §§ 155.20, 155.21, 155.30 -155.32 (Matthew Bender)



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Chapter 27 Motion to Vacate Judgment and Enter Different Judgment
V. FORMS

2-27 MB Practice Guide: Trial & Post-Trial Civil Proc 27.24

27.24 Order Granting Motion to Vacate and Enter Another and Different Judgment.

Order Granting Motion to Vacate and Enter Another and Different Judgment.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[or other as appropriate]

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)
)
)
)
)
)
)

NO. _____

ORDER SETTING ASIDE AND VACATING
JUDGMENT AND DIRECTING ENTRY OF AN-
OTHER AND DIFFERENT JUDGMENT

The motion of _____ [specify moving party, e.g., Plaintiff John Smith] for an order setting aside and vacating the judgment entered in favor of _____ [specify adverse party, e.g., Defendant Mary Jones] on _____ [date], by this court and directing the entry of another and different judgment, on the ground _____ [specify, e.g., that the legal basis for the decision filed by the court is incorrect and erroneous in that it is not consistent with the facts of the case or that the judgment made by the court, entered on _____ [date], is not consistent with the special verdict rendered], came on regularly for hearing before 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 ought to be granted, IT IS ORDERED that the motion be, and hereby is, granted and the judgment entered is vacated and set aside.

[Where the statement of the decision is to be amended and corrected add IT IS FURTHER ORDERED that the

statement of decision which read " _____," is hereby changed to read " _____"
(*specify changes*)).

IT IS FURTHER ORDERED that the following judgment be entered: _____ [*recite other and different judgment*].

Dated: _____

Judge of the Superior Court [signature]

NOTES.

Authority:

CCP § 663; see CCP § 1015

Grounds:

See 27.06

Related Form of Motion:

See 27.23

Related Forms of Memoranda:

See California Points and Authorities, §§ 155.20, 155.21, 155.30 -155.32 (Matthew Bender)



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Chapter 28 Correcting and Modifying Judgment

2-28 MB Practice Guide: Trial & Post-Trial Civil Proc 28.syn

§ 28.syn Synopsis to Chapter 28: Correcting and Modifying Judgment

28.01 Scope.

28.02 Objective and Strategy.

28.03 CHECKLIST: Making Motion to Correct or Modify Judgment.

28.04 Options and Strategies for Moving Party.

28.05 Determine If Clerical Error Exists.

28.05[1] Clerical Error Is Error in Recording Judgment.

28.05[2] Omission or Mistake in Judgment Is Clerical.

28.05[3] Misdescription in Judgment Is Clerical.

28.05[4] Inadvertent Error by Trial Judge in Signing Faulty Judgment Is Clerical.

28.05[5] Ambiguity Requiring Clarification Is Clerical.

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28.06 Court Has Inherent and Statutory Authority to Correct Clerical Errors.

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28.08 Motion and Correction Can Be Made at Any Time by Any Party.

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28.08[2] Injured Party Can Make Motion to Correct.

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28.09 Nunc Pro Tunc Order Antedates Corrected Judgment to When It Should Have Been Entered.

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28.13 Options and Strategies for Opposing Party.

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28.16 CHECKLIST: Seeking Review of Order Granting or Denying Motion to Correct or Modify Judgment.

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28.19 Clerical Nature of Error Properly Shown by Any Competent Evidence.

28.20 Reviewing Court Is Unlikely to Disturb Correction Supported by Evidence and Declaration.

28.21 Appeal May Be Made at Any Time.

28.22 Notice of Motion and Motion to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc.

28.23 Order to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc.



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Chapter 28 Correcting and Modifying Judgment
I. STRATEGY

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28.01 Scope.

This chapter covers:

- Making a motion to correct or modify a judgment [*see 28.03 -28.12*].
- Opposing a motion to correct or modify a judgment [*see 28.13 -28.16*].
- Seeking review of a motion to correct or modify a judgment [*see 28.17 -28.21*].

Core Statute:

CCP § 473(d)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Judgments Entry of Judgments Nunc Pro Tunc Relief Governments Courts Court Records



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Chapter 28 Correcting and Modifying Judgment
I. STRATEGY

2-28 MB Practice Guide: Trial & Post-Trial Civil Proc 28.02

28.02 Objective and Strategy.

A motion to correct a clerical error under *CCP* § 473(d) is used to correct what was a mere inadvertence or error in recording the judgment, not to contest the intended terms of the judgment. In other words, counsel is formally pointing out that the recorded terms of the judgment do not agree with the outcome indicated when the judgment was initially declared. It is a method to correct clerical errors. This is a limited tool that leaves much to the discretion of the trial judge.

Such a motion may be used by the prevailing party to attempt to avoid any ambiguity in the judgment when juxtaposed with special verdicts or verdicts on special interrogatories, and therefore to protect the judgment on appeal. However, to the extent such a motion highlights a problem otherwise not otherwise apparent, it may be better left alone. Obvious problems such as decimal point errors in the amount of damages are clear candidates. Arguing that omission of the word "not" in front of the word "liable" was inadvertent is unlikely to succeed.

 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:

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Chapter 28 Correcting and Modifying Judgment
II. MAKING MOTION TO CORRECT OR MODIFY JUDGMENT

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28.03 CHECKLIST: Making Motion to Correct or Modify Judgment.

☐ Determine if clerical error exists.

☐ Clerical error is error in recording judgment, including:

☐ Omission or mistake in judgment.

☐ Misdescription in judgment.

☐ Inadvertence in signing faulting judgment.

☐ Ambiguity in judgment.

Authority:

People v. Anderson (1976) 59 CA3d 831, 839, 131 CR 104

Discussion:

See 28.05[1] -[5]

☐ Error in judgment recorded is judicial error, and not correctable under *CCP* § 473(d).

Authority:

Estate of Eckstrom (1960) 54 C2d 540, 545, 7 CR 124, 354 P2d 652

Discussion:

See 28.05[6]

☐ Determine timing of motion.

☐ No limit on passage of time.

Authority:

Estate of Goldberg (1938) 10 C2d 709, 717, 76 P2d 508

Discussion:

See 28.08[1]

☐ Court can correct clerical error before or after final determination of appeal.

Authority:

LaMar v. Superior Court (1948) 87 CA2d 126, 129, 196 P2d 98

Discussion:

See 28.08[2]

☐ Nunc pro tunc order antedates judgment.

Authority:

Martin v. Martin (1970) 2 C3d 752, 760-761, 87 CR 526, 470 P2d 662

Discussion:

See 28.09

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefGovernmentsCourtsCourt Records



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II. MAKING MOTION TO CORRECT OR MODIFY JUDGMENT

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28.04 Options and Strategies for Moving Party.

The procedure and remedies for an alleged error in the judgment hinge on the characterization of the error. A clerical error can be corrected at any time, sua sponte by the court or on a motion from one of the parties, even years after the case has closed. A judicial error can be only corrected on a motion for new trial or on a motion to vacate and enter new judgment. The practitioner seeking to persuade the court that the error was merely clerical must therefore be aware of how to properly characterize the error, and be sure that the error is in fact clerical and not judicial.



Warning:

Arguing that a matter is a clerical error when it is clearly something more crucial is dangerous. However, if the judgment relates to the establishment of an easement, the misdescription becomes evident much later, and no prejudice can be shown to the party against whom the error is corrected, then the judgment should be corrected.



Cross Reference:

Discussion of vacating and entering new judgment, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:

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II. MAKING MOTION TO CORRECT OR MODIFY JUDGMENT

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28.05 Determine If Clerical Error Exists.

28.05[1] Clerical Error Is Error in Recording Judgment. The distinction between a clerical error and a judicial error depends not on who made the error, but on whether the error was the deliberate result of judicial reasoning and determination. The distinction turns on whether the error was made in rendering the judgment (judicial error) or in recording the judgment rendered (clerical error) [*People v. Anderson* (1976) 59 CA3d 831, 839, 131 CR 104] .

Example:

The amount of an award relating for an action involving an automobile accident should have been \$15,000. Instead, a judgment of \$150,000 was entered because of the inadvertence or mistake of the judge and defendant's attorney in failing to note the correct amount. The court granted defendant's motion to modify the judgment to \$15,000 [In *Pettigrew v. Grand Rent-A-Car* (1984) 154 CA3d 204, 204-212, 201 CR 125] .

► **Cross Reference:**

Discussion of specific types of clerical errors, see 28.05[2] -[5].

Distinguish:

An amendment of a judgment that does not amend the already-entered judgment to make it conform to the decision the court actually rendered, but rather attempts to amend by modifying and enlarging the original judgment is beyond the court's power. The court may not make the judgment express anything not embraced in the court's decision, even though the proposed amendment contains matter that ought to have been included [*Estate of Eckstrom* (1960) 54 C2d 540, 544, 7 CR 124, 354 P2d 652] .

► **Cross References:**

Form of motion to correct clerical error in judgment and to amend judgment nunc pro tunc, see 28.22.

Discussion of weight given to trial judge's description of intention, see 28.18.

Discussion of vacating and entering new judgment, see Ch. 27, Motion to Vacate Judgment and Enter

Different Judgment.

28.05[2] Omission or Mistake in Judgment Is Clerical. In many instances, a trial court may properly correct and amend a judgment to include matters inadvertently omitted from the judgment, including:

- An omission in the determination of an account and decree of distribution [*Estate of Soboslay* (1935) 4 C2d 177, 179, 47 P2d 714] .
- A failure to include a direction that one party pay another party's attorney's and accountant's fees [*Denton v. Denton* (1971) 18 CA3d 708, 714-716, 96 CR 136] .
- A failure to expressly name the defendants, and to state their liability to the plaintiff [*Lang v. Superior Court* (1961) 198 CA2d 16, 18, 18 CR 67] .
- A failure to fill in blank spaces in the judgment [*Lang v. Superior Court* (1961) 198 CA2d 16, 18 CR 67] .
- A failure to include a party's name [*Kohlstedt v. Hauseur* (1937) 24 CA2d 60, 61, 74 P2d 314] .
- A failure to credit the defendant with payment of damages before judgment [*Campbell v. Southern Pac. Co.* (1978) 22 C3d 51, 62-63, 148 CR 596, 583 P2d 121] .

28.05[3] Misdescription in Judgment Is Clerical. The trial court can correct and amend a judgment containing a misdescription of the name of the person or the property to be affected by the judgment [*Chula v. Superior Court* (1962) 57 C2d 199, 206, 18 CR 507, 368 P2d 107] .

28.05[4] Inadvertent Error by Trial Judge in Signing Faulty Judgment Is Clerical. When the judgment signed does not express the actual judicial intention of the court, but is contrary to that decision, the signing of the judgment is clerical error [*Zisk v. Roseville* (1976) 56 CA3d 41, 47, 127 CR 896] .

Example:

When the judge inadvertently signed a judgment prepared by counsel that did not reflect the decision of the court due to a typographical error in the drafting of the judgment, the error was deemed clerical [*Wilson v. Wilson* (1948) 88 CA2d 382, 385] .

28.05[5] Ambiguity Requiring Clarification Is Clerical. A trial court may properly correct and amend a judgment to clarify it by removing a superfluous word when the removal does not alter the meaning or effect of the original [*Estate of Careaga* (1964) 61 C2d 471, 474, 39 CR 215, 393 P2d 415] .

Example:

A decree regarding the distribution of an estate was not materially changed by the deletion of the word "such." Furthermore, the will was not ambiguous, and clearly provided for the remainder of each life estate to vest in the life tenant's children per stirpes. Because the court found that the order merely struck out a superfluous word and clarified the original decree, the trial court's order was affirmed [*Estate of Careaga* (1964) 61 C2d 471, 477-478, 39 CR 215, 393 P2d 415] .

28.05[6] Error in Judgment Recorded Is Judicial Error. When there is no mistake in the entry of the judgment, in that it expresses in apt and definite terms the conclusion at which the trial court arrived during the trial of the action, the error in question is not clerical, but rather judicial, if committed as a result of the court's (1) misconstruing the evidence, (2) misapplying the law [*Estate of Eckstrom* (1960) 54 C2d 540, 545, 7 CR 124, 354 P2d 652] , (3) misplacing its reliance on the presentation of counsel [*Lankton v. Superior Court* (1936) 5 C2d 694, 696, 55 P2d

1170] , or (4) enlarging the original decree [*Bowman v. Bowman* (1947) 29 C2d 808, 813, 178 P2d 751] .

Example:

Even though the judge stated that he intended to render a decision in accord with a particular document, when the evidence disclosed that he did not actually read the document, the error was termed judicial rather than clerical because at the time of signing the decree the judge could not have had in mind an interpretation of the decree that he then failed to embody or record [*Estate of Harris* (1963) 200 CA2d 578, 590, 19 CR 510] .

Distinguish:

When the judgment as signed did not express the actual judicial intention of the court but was contrary to that intention, the signing of the purported judgment was a clerical error rather than a judicial error [*Zisk v. Roseville* (1976) 56 CA3d 41, 47, 127 CR 896] .



Cross Reference:

Checklists, discussion, and forms for motion to vacate and enter new judgment, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateGovernmentsCourtsCourt Records



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II. MAKING MOTION TO CORRECT OR MODIFY JUDGMENT

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28.06 Court Has Inherent and Statutory Authority to Correct Clerical Errors.

A court has inherent power to vacate and correct its judgments that, because of clerical error, are improvidently or inadvertently made, as well as statutory power under *CCP § 473(d)* to correct clerical errors [*Pettigrew v. Grand Rent-A-Car (1984) 154 CA3d 204, 209, 201 CR 125*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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28.07 Court Has Duty to Correct Clerical Errors.

Courts not only have power to correct clerical errors in their judgments, but are under an affirmative and manifest legal duty to do so [*In re Roberts* (1962) 200 CA2d 95, 98, 19 CR 147] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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28.08 Motion and Correction Can Be Made at Any Time by Any Party.

28.08[1] No Limit on Passage of Time. Courts have the power to correct clerical errors in their judgments at any time, regardless of how much time has passed since the error was made or the judgment entered [*Estate of Goldberg* (1938) 10 C2d 709, 717, 76 P2d 508] .

Example:

A hearing and the resulting order nunc pro tunc correcting a clerical error in a decree of final distribution of an estate 35 years after the original entry was valid [*Estate of Goldberg* (1938) 10 C2d 709, 717, 76 P2d 508] .

28.08[2] Injured Party Can Make Motion to Correct. The court may, on motion of the injured party, correct clerical mistakes in its judgment as entered to conform to the judgment or order directed [CCP § 473(d)].

28.08[3] Court Can Correct Clerical Error on Own Motion. Motions to correct or amend judgments with respect to clerical errors may be made under the court's inherent power to correct judgments without notice and on the court's own motion [*In re Roberts* (1962) 200 CA2d 95, 97, 19 CR 147] .



Strategic Point:

On discovering a clerical error in a judgment, counsel should notice the motion at the earliest possible date to avoid any later challenges as to procedures and timeliness [see *Estate of Costa* (1955) 37 C2d 154, 157, 231 P2d 17] .

28.08[4] Court Can Correct Clerical Error Before or After Final Determination of Appeal. Courts have the power to correct clerical errors in their judgments either before or after an appeal has been finally determined if the correction does not affect substantial rights of the parties [*LaMar v. Superior Court* (1948) 87 CA2d 126, 129, 196 P2d 98] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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28.09 Nunc Pro Tunc Order Antedates Corrected Judgment to When It Should Have Been Entered.

28.09[1] Court Has Inherent Power to Antedate Judgment. All courts have the inherent power to enter orders for judgments nunc pro tunc (a judgment relating back to the time when it should have been entered) so that the judgment will be held effective prior to the date on which it was actually entered [*Martin v. Martin* (1970) 2 C3d 752, 760-761, 87 CR 526, 470 P2d 662] . An order may be made correcting a judgment nunc pro tunc as of its original date to make it conform to the judicial decision actually made regardless of the lapse of time [*LaMar v. Superior Court* (1948) 87 CA2d 126, 129-130, 196 P2d 98] .

 Cross Reference:

Discussion of timing, see 28.08[1].

28.09[2] Nunc Pro Tunc Is Exercised to Avoid Injustice and Protect Rights of Litigants. The general rule is that the inherent power of the court to enter a judgment nunc pro tunc (a judgment relating back to the time when it should have been entered) will be exercised only to avoid injustice to preserve the rights of the litigants [*Young v. Gardner-Denver Co.* (1966) 244 CA2d 915, 919, 53 CR 522] . Accordingly, the entry of such a judgment is granted or refused in view of the circumstances of a particular case. The only grounds for antedating a judgment are [*Young v. Gardner-Denver Co.* (1966) 244 CA2d 915, 919, 53 CR 522] :

1. The preservation of the legitimate fruits of the litigation that would otherwise be lost to the prevailing party;
2. The correction of a deficiency in the recording of a previous decision to express the true intention of the court as of the earlier date; or
3. The correction of a clerical error.

Nunc pro tunc orders may not make the judgment express anything not embraced in the court's original decision, even though the proposed amendment contains matters that ought to have been included [*In re Marriage of Padgett* (2009) 172 CA4th 830, 851-855, 91 CR3d 475] .

Example:

The trial court retroactively entered a judgment 27 days earlier than the date on which the judgment was actually rendered, because the delay was not attributable to the plaintiff but to the court's unavailability. But for the unavailability, the court would have entered the judgment on the earlier date [*Scalice v. Performance Cleaning Sys.* (1996) 50 CA4th 221, 238-239, 57 CR2d 711] .

**Warning:**

When a plaintiff has died during a jury trial before the jury is instructed and the verdict rendered, so that his or her claim for noneconomic damages has abated, the trial court may not enter judgment nunc pro tunc as of the time before the plaintiff's death in an effort to save the claim. Nor may the trial court do so in a bifurcated jury trial when a verdict in the final phase of the trial has not been rendered, because no verdict has been rendered determining all facts necessary for judgment [*Williamson v. Plant Insulation Co.* (1994) 23 CA4th 1406, 1414-1418, 28 CR2d 751 ; see also *Cadlo v. Metalclad Insulation Corporation* (2007) 151 CA4th 1311, 1317-1324, 61 CR3d 104] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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28.10 Court Can Modify Conclusions of Law and Announced Judgment Only Until Entry of Judgment.

Until the entry of judgment, the trial court retains the power to amend or change the conclusions of law so as to point to a different judgment, as well as enter a different judgment from the first judgment announced. The change may be made by a judge other than the judge who tried the case [*Kelly v. Sparling Water Co. (1959) 52 C2d 628, 633, 343 P2d 257*]
.

Legal Topics:

For related research and practice materials, see the following legal topics:

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Chapter 28 Correcting and Modifying Judgment
II. MAKING MOTION TO CORRECT OR MODIFY JUDGMENT

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28.11 After Entry of Judgment, Judicial Error May Be Corrected Only on Motion for New Trial or on Motion to Vacate Judgment and Enter Different Judgment.

Although the trial court can correct its own inadvertence or clerical error, it can correct judicial error after entry of judgment only on a motion for new trial or on a motion under CCP § 663 to vacate the order or judgment and enter a different one [*Greene v. Superior Court (1961) 55 C2d 403, 405-406 10 CR 817, 359 P2d 249*] .



Cross Reference:

Checklist, discussion, and forms, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate



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III. OPPOSING MOTION TO CORRECT OR MODIFY JUDGMENT

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28.12 CHECKLIST: Opposing Motion to Correct or Modify Judgment.

☐ Determine defense to motion to correct.

☐ There is no error.

Authority:

Estate of Eckstrom (1960) 54 C2d 540, 548, 7 CR 124, 354 P2d 652

Discussion:

See 28.14

☐ Error, if any, was judicial, not clerical.

Authority:

Estate of Eckstrom (1960) 54 C2d 540, 548, 7 CR 124, 354 P2d 652

Discussion:

See 28.15

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefGovernmentsCourtsCourt Records



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28.13 Options and Strategies for Opposing Party.

Because the grounds for making a motion to modify and correct a judgment are limited, the grounds for opposition are similarly limited. Opposing counsel can argue either that the original judgment was free of error and not subject to modification, or that the purported error is judicial and thus that the motion is procedurally improper.

An important reason for arguing that the error is judicial, not clerical, in nature, is the timing. If a judicial error is not timely raised, it is deemed waived, whereas a clerical error may be raised at any time. Arguing that an error is judicial, not clerical, obviously does not make it so. Counsel seeking to have a judgment modified or corrected must evaluate the circumstances giving rise to the mistakenly worded, or mistakenly entered, judgment. If the error is judicial in nature, it should be presented as such.

Strategic Point:



The issue in these cases is what specifically to point out as the error in the judgment. The question is not of a loss being turned into a win, but rather making sure that the judgment reflects the result properly.



Cross Reference:

Discussion of vacating judgment, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Pleading & Practice Pleadings Time Limitations General Overview Civil Procedure Judgments Entry of Judgments Nunc Pro Tunc Relief Governments Courts Court Records



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28.14 Opposing Party May Assert Absence of Error.

An order or judgment made by a court is presumed to be correct, and what was intended, in the absence of contrary evidence [*Estate of Eckstrom* (1960) 54 C2d 540, 548, 7 CR 124, 354 P2d 652] . In addition, the burden of proving that an error in a judgment is a clerical error is on the party seeking the correction [*Smith v. Smith* (1958) 157 CA2d 658, 662, 321 P2d 886] . Therefore, opposing counsel can argue that the judgment or order as entered is as was intended by the court, and free of error.

 Cross Reference:

Discussion of judicial and clerical errors, see 28.05.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefEvidenceInferences & PresumptionsPresumption of RegularityEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewGovernmentsCourtsCourt Records



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28.15 Opposing Party May Assert Error Was Judicial and Not Clerical.

The trial court has no authority, under the guise of amending a clerical error, to correct a judicial error [*Estate of Eckstrom* (1960) 54 C2d 540, 545, 7 CR 124, 354 P2d 652] . Therefore, opposing council can argue that the error was judicial and not clerical.



Warning:

The judge's declaration of intent in signing an order is important in determining whether an error is clerical or judicial [*Estate of Doane* (1964) 62 C2d 68, 71, 41 CR 165, 396 P2d 581] .



Cross Reference:

Discussion of judicial error, see 28.05[6].

Legal Topics:

For related research and practice materials, see the following legal topics:

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2-28 MB Practice Guide: Trial & Post-Trial Civil Proc 28.16

28.16 CHECKLIST: Seeking Review of Order Granting or Denying Motion to Correct or Modify Judgment.

☐ Determine timing of review.

☐ Clerical error in judgment can be appealed at any time.

Authority:

Estate of Goldberg (1938) 10 C2d 709, 717, 76 P2d 508

Discussion:

See 28.21

☐ Determine proper evidence on review.

☐ Trial court has broad power to characterize error.

Authority:

Minardi v. Collopy (1957) 49 C2d 348, 352-353, 316 P2d 952

Discussion:

See 28.18

☐ Show clerical nature of error with competent evidence and declaration of trial judge.

Authority:

In re Roberts (1962) 200 CA2d 95, 97-98, 19 CR 147

Discussion:

See 28.19

Legal Topics:

For related research and practice materials, see the following legal topics:

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28.17 Options and Strategies.

A reviewing court will give great weight to the trial judge's characterization of the nature of the error; however, any competent evidence is sufficient to establish the error as clerical. Therefore, unless the error was clearly a result of judicial reasoning, opposing counsel will find it difficult to have the trial judge's initial determination overturned on appeal. Be mindful that if the judgment follows a jury trial, the judgment must match up with the jury's verdict.

Legal Topics:

For related research and practice materials, see the following legal topics:

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28.18 Trial Court Has Broad Power to Determine If Error Is Clerical.

It is primarily for the trial judge to determine if a decision or order misstated the judge's real intention or was inadvertent, and the judge's conclusion as to that question will not be lightly set aside [*Minardi v. Collopy* (1957) 49 C2d 348, 352-353, 316 P2d 952] .

In determining whether an error is clerical or judicial, the reviewing court will give great weight to the judge's declaration of his or her intent in signing the order [*Estate of Doane* (1964) 62 C2d 68, 71, 41 CR 165, 396 P2d 581] . Judgments are presumed to be correct [*Deocampo v. Ahn* (2002) 101 CA4th 758, 783-784, 125 CR2d 79] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureAppealsStandards of ReviewGeneral OverviewEvidenceInferences & PresumptionsPresumption of RegularityGovernmentsCourtsCourt Records



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28.19 Clerical Nature of Error Properly Shown by Any Competent Evidence.

The clerical nature of the error in recordation of the judgment can be shown by any competent evidence, including the trial judge's statement based on his or her own recollection, the affidavit of a shorthand reporter, or the rough notes entered by the judge on the original docket [*In re Roberts* (1962) 200 CA2d 95, 97-98, 19 CR 147] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefEvidenceProcedural ConsiderationsPreliminary
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28.20 Reviewing Court Is Unlikely to Disturb Correction Supported by Evidence and Declaration.

When the trial judge's declaration as to the clerical nature of the mistake is supported by other competent evidence, a reviewing court will be unlikely to disturb the trial court's order correcting and amending the judgment [*Bastajian v. Brown* (1941) 19 C2d 209, 215, 120 P2d 9] .



Warning:

In determining whether an error is clerical or judicial, the reviewing court will place great weight on the judge's declaration of his or her intent in signing the order [*Estate of Doane* (1964) 62 C2d 68, 71, 41 CR 165, 396 P2d 581] .

Legal Topics:

For related research and practice materials, see the following legal topics:

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28.21 Appeal May Be Made at Any Time.

Because courts have the power to correct clerical errors in their judgments at any time under *CCP* § 473(d), an appeal can likely be brought at any time absent prejudice to a third party relying on the judgment, such as a bona fide purchaser of property inaccurately described in a judgment [see *Estate of Goldberg (1938) 10 C2d 709, 717, 76 P2d 508*].

Strategic Point:



In a post-trial situation involving the entry of multiple judgments, or a final judgment that includes post-judgment trial proceedings such as the determination and award of attorney's fees, counsel should try to correct or modify the judgment to include *all* matters, and therefore to permit a unified appeal from all issues, or alternatively to ensure to file appeals, and notices of appeal, from each specific issue rather than from the "judgment" generally.[see *Colony Hill v. Ghamaty (2006) 142 CA4th 1408, 1413, 48 CR3d 798*].



Cross Reference:

Discussion of appeal process, see California Forms of Pleading and Practice, Ch. 40, Appeal: An Overview, et seq. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

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28.22 Notice of Motion and Motion to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION FOR ORDER TO
Defendant.	)	CORRECT CLERICAL
	)	ERROR IN JUDGMENT
	)	AND AMEND JUDGMENT
	)	NUNC PRO TUNC
	)	

To _____ [party, e.g., Defendant Mary Jones] and 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 _____ of this court, located at _____ [address], Plaintiff will, and hereby does, move the court for an order amending nunc pro tunc the judgment rendered in the above-entitled cause and entered on _____ [date], in the following manner and upon the following grounds:

1. _____ [E.g., That portion of the judgment beginning with the words "Defendant" on page 2, line 10, and continuing through the words "\$10,000" on page 2, line 13, which reads as follows: "Defendant shall pay Plaintiff \$10,000" be amended to read as follows: "Defendant shall pay Plaintiff \$100,000" on the grounds that Defendant was

found liable for an action in negligence resulting in \$100,000 of damage to Plaintiff].

2. _____ [Continue stating remaining portions of judgment, if any, which should be amended, together with the grounds therefor].

The motion will be based on this notice of motion, on the declaration of Plaintiff, on 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.

Dated: _____

_____ [firm name, if any]

By _____ [signature]

_____ [typed name]

Attorney for _____ [party]

NOTES.

Authority:

CCP § 473(d)

Grounds:

See 28.05

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 131.20, 131.23, and 131.43 (Matthew Bender)



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28.23 Order to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc.

Order to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER CORRECTING
_____	)	CLERICAL ERROR AND
Defendant.	)	AMENDING JUDGMENT
	)	NUNC PRO TUNC
	)	

The motion of Plaintiff for an order that the judgment in the above-entitled cause be amended nunc pro tunc as of the date of entry thereof came on regularly to be heard 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 ought to be granted and that the judgment heretofore entered on _____ [date], in _____ [specify location in judgment book], is not in conformity with the decision of the court as intended and that such clerical error should be corrected in order that the judgment will conform to the court's decision in this cause,

IT IS HEREBY ORDERED that _____ [e.g., Paragraph(s) 10-13 of the judgment reading as follows "Defendant shall pay Plaintiff \$10,000" be and hereby is/are amended and corrected nunc pro tunc as of the date of entry of the judgment to read as follows: "Defendant shall pay Plaintiff \$100,000"].

Dated: _____

Judge of the Superior Court

NOTES.

Authority:

CCP § 473(d)

Grounds:

See 28.05

Related Forms of Memoranda:

See California Points and Authorities, §§ 131.20, 131.23, and 131.43 (Matthew Bender)



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Chapter 29 Setting Aside Judgments and Orders

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§ 29.syn Synopsis to Chapter 29: Setting Aside Judgments and Orders

29.01 Scope.

29.02 Objective and Strategy.

29.02[1] Options for Attacking Judgments and Orders.

29.02[2] Strategy for Setting Aside Judgments and Orders.

29.03 Determine If Relief Is Sought From Judgment or Order.

[1] Authority for Relief Applies to Both Judgments and Order, but Nature of Relief Will Be Different.

29.03[2] Judgment Is Final Determination of Parties' Rights.

29.03[3] Order Is Direction of Court or Judge.

29.03[4] Type and Date of Entry Distinguishes Judgment From Order.

29.03[4][a] Judgment Generally Entered in Judgment Book.

29.03[4][b] Order Is Either Entered in Minutes or Filed in Court File.

29.04 Review Five Primary Authorities for Setting Aside Judgments and Orders.

29.04[1] CCP § 473(b) Provides Relief for Mistake, Inadvertence, Surprise and Excusable Neglect and for Relief From Default.

29.04[2] CCP § 473(d) Provides Relief From Void Judgments and Orders.

29.04[3] Case Authority Supports Court's Inherent Equitable Jurisdiction to Set Aside Judgment or Order Obtained by

Fraud or Mistake.

29.04[4] Defendant's Military Service May Be Basis for Setting Aside Default Judgment.

29.04[5] CCP § 473.1 Provides for Relief When Court Assumes Attorney's Practice.

29.05 Determine Limitation Periods and Remedies Available Depending on Grounds Alleged--Comparison Table.

29.06 Determine Whether to Bring Direct or Collateral Attack.

29.06[1] Direct Attack Is Brought Against Judgment or Order Regarding Issue Currently Before Court.

29.06[2] Collateral Attack Is Brought Against Judgment or Order From Another Proceeding.

29.06[3] Availability of Direct and Collateral Attacks and Examples.

29.07 Review Policy Considerations in Choosing Discretionary Relief and Frame Relief As Serving Highest Policy Goal.

29.07[1] Policy Generally Favors Trial on Merits.

29.07[2] Policy Also Favors Judicial Economy.

29.08 Determine If Seeking Relief May Be Made From Multiple Authorities and Avoid Mixing Grounds That May Waive Certain Rights.

29.08[1] Seeking Relief on Multiple Grounds Requires Compliance With Each Ground's Procedural Requirements.

29.08[2] Combined Relief From Judgment or Order Void on Its Face for Lack of Personal Jurisdiction and on Other Grounds May Result in General Appearance.

29.09 Determine Effect of Time to Appeal on Relief Sought.

29.09[1] Appeal Generally Removes Trial Court Jurisdiction to Consider Setting Aside Judgment or Order.

29.09[2] Appeal Period Extended While Seeking to Set Aside Judgment.

29.10 CHECKLIST: Setting Aside Judgments and Orders Under CCP § 473(b) Due to Mistake, Inadvertence, Surprise, and Excusable Neglect, and Related Equitable Relief.

29.11 Options and Strategies for Moving Party.

29.11[1] Scope of Available Relief From Party's or Party's Attorney's Fault.

29.11[1][a] Distinguish Discretionary Relief From Mandatory Relief Under CCP § 473(b).

29.11[1][b] Discovery Statutes Are Sole Relief When Addressed by Statute and Not CCP § 473(b).

29.11[1][c] Four Grounds for Discretionary Relief Under CCP § 473(b).

29.11[1][d] Mandatory Relief From Defaults, Default Judgments, and Dismissals Under CCP § 473(b) Is Only

Available Based on Attorney's Affidavit of Fault.

29.11[1][e] Extrinsic Fraud or Mistake May Be Combined With CCP § 473(b) Motion.

29.11[2] Strategies for Relief Based on Party's or Party's Attorney's Fault Under CCP § 473(b).

29.11[2][a] Necessity of Excusable Acts.

29.11[2][b] Wider Range of Relief If Party's Attorney at Fault.

29.11[2][c] Showing Multiple Grounds Based on Party's and/or Party's Attorney's Fault.

29.12 Distinguishing Discretionary Statutory Relief Under CCP § 473(b) From Equitable Relief.

29.12[1] Equitable Relief Is Narrower, Requiring Showing of Denial of Day in Court.

29.12[2] Extent of Court's Discretion on Proper Showing.

29.12[2][a] Statutory Relief Is Within Sound Discretion of Court.

29.12[2][b] Exercise of Discretion Under CCP § 473(b) Must Conform to Spirit of Statute.

29.12[3] Equitable Relief Applies Also to Mistake of Adverse or Third Party, but Not to Attorney Mistakes of Law, While Discretionary Statutory Relief Under CCP § 473(b) Applies Only to Act of Party or Counsel.

29.12[4] Equitable Relief Requires Showing of Meritorious Case, Whereas Discretionary Relief Only Requires Prima Facie Showing of Merit.

29.13 Who May Apply Differs for Discretionary Statutory Relief and Equitable Relief.

29.13[1] Party, Party's Counsel, or Party's Insurer May Seek Discretionary Statutory Relief Under CCP § 473(b).

29.13[2] Who May Seek Equitable Relief.

29.13[2][a] Party or Person in Privity With Party May Make Motion or Bring Action for Equitable Relief.

29.13[2][b] Third Party May Make Motion or Bring Action for Equitable Relief.

29.13[2][c] Court May Make Motion for Equitable Relief.

29.14 Time for Seeking Relief Differs for Discretionary Statutory Relief and Equitable Relief.

29.14[1] Motion for Discretionary Relief Under CCP § 473(b).

29.14[1][a] Time for Filing Motion for Discretionary Relief Under CCP § 473(b) Generally Is Reasonable Time, Not Exceeding Six Months From Entry of Judgment or Order.

29.14[1][b] Courts of Appeal Split on Whether Proposed Pleading May Be Filed After Six-Month Limitation Period.

29.14[2] Time for Filing for Relief From Failure to File Expert Witness Information Under Discovery Statutes Is

Promptly After Discovery of Party's Mistake, Inadvertence, Surprise, or Neglect.

29.14[3] Time for Filing for Equitable Relief From Party's Extrinsic Mistake by Motion Differs From Time for Filing Separate Action.

29.14[3][a] Time for Filing Motion for Equitable Relief Is Reasonable Time From Entry of Judgment or Order or Discovery of Party's Extrinsic Mistake.

29.14[3][b] Three-Year Statute of Limitation Generally Applies to Action for Equitable Relief From Extrinsic Mistake.

29.15 Moving for Relief Under CCP § 473(b).

29.15[1] Noticed Motion Specifying Requested Relief Must Be Filed.

29.15[2] Documents Accompanying CCP § 473(b) Motion Must Include Affidavits, Notice of Hearing, and Memorandum.

29.15[3] Setting Aside Judgment or Order Due to Party's Excusable Mistake, Inadvertence, Surprise, or Neglect May Require Filing Sufficient Proposed Pleadings.

29.15[4] Setting Aside Dismissal Due to Attorney's Fault Requires Filing Attorney's Affidavit of Fault.

29.15[5] Notice of Motion, Motion, and Accompanying Papers Must Be Filed With Court and Served on Adverse Party.

29.15[6] Hearing on Application.

29.16 Burden of Proof Is on Aggrieved Party.

29.17 Grounds Requiring Party's Act to Be Excusable.

29.17[1] Mistake, Inadvertence, or Surprise As Well As Neglect Generally Must Be Excusable for Discretionary Statutory Relief.

29.17[2] Extrinsic Mistake Generally Must Also Be Excusable for Equitable Relief.

29.17[3] Mistakes by Attorney Are Only Excusable If Anyone Could Have Made Them.

29.18 Setting Aside Judgment or Order on Grounds of Party's Mistake.

29.18[1] Mistake Must Be Excusable.

29.18[2] Relief From Mistake of Fact.

29.18[2][a] Mistake of Fact When Party Understands Facts to Be Other Than They Are.

29.18[2][b] Courts Routinely Vacate Judgments Based on Clerical Mistakes of Fact Made by an Attorney or His or Her Staff.

29.18[2][c] Lack of Actual Mistake of Fact Bars Relief.

29.18[3] Relief From Mistake of Law Only Permitted Under CCP § 473(b).

29.18[3][a] Mistake of Law That Is Reasonable Is Grounds for Discretionary Relief Under CCP § 473(b).

29.18[3][b] Mistake of Law Must Be Excusable.

29.18[3][c] Mistake of Law Must Prevent Party From Presenting Case in Court or Arise From Complex and Debatable Issue.

29.18[3][d] Mere Ignorance of Law Due to Negligence in Ascertaining It Does Not Constitute Excusable Mistake of Law.

29.18[3][e] Mistake of Law Does Not Have to Be Mutual.

29.18[3][f] Mistake of Law Bars Equitable Relief.

29.19 Setting Aside Judgment or Order on Grounds of Party's Inadvertence.

29.19[1] Inadvertence Is Unheedfulness, Inattentiveness, or Negligence.

29.19[2] Inadvertence Must Be Excusable.

29.19[3] Legal Disability of Party May Be Excusable Inadvertence.

29.19[4] Mere Forgetfulness Is Not Excusable Inadvertence.

29.20 Setting Aside Judgment or Order on Grounds of Party's Surprise.

29.20[1] Party Must Not Foresee Surprise Through Ordinary Prudence.

29.20[2] Surprise Does Not Always Arise From Lack of Notice.

29.20[3] Circumstances That Should Have Alerted Party of Need to Defend Do Not Constitute Surprise.

29.21 Setting Aside Judgment or Order on Grounds of Party's Neglect.

29.21[1] Neglect Must Be Excusable.

29.21[2] Reasonable Reliance on Third Party to Defend May Be Excusable Neglect.

29.21[3] Reasonable Reliance on Misinformation May Be Excusable Neglect.

29.21[4] Illness of Party or Party's Attorney May Be Excusable Neglect.

29.21[5] Counsel Overburdened by Multitude of Circumstances May Be Excusable Neglect.

29.21[6] Inexcusability of Neglect Bars Relief.

29.21[7] Failure to Advance Legal Arguments Properly Is Inexcusable Neglect.

29.21[8] Repeated Clerical Errors May Be Inexcusable Neglect.

29.21[9] General Press of Business on Party's Attorney Is Inexcusable Neglect.

29.22 Relief From Judgment or Order Due to Attorney Abandonment.

29.22[1] Attorney Abandonment Is Grounds for Relief.

29.22[1][a] Attorney Abandonment Amounting to Positive Misconduct May Be Grounds for Relief.

29.22[1][b] Misconduct Must Obliterate Existence of Attorney-Client Relationship.

29.22[1][c] Client's Neglect Must Not Prejudice Adverse Party.

29.22[1][d] Relief Allowed From Discretionary Dismissal, but Not From Mandatory Dismissal.

29.22[1][e] Court Must Balance Protection of Client From Attorney With Making Attorney Suffer Consequences of Incompetence.

29.22[2] Relief Either Under CCP § 473(b) or in Equity.

29.23 Mandatory Relief From Dismissal Based on Attorney's Affidavit of Fault Under CCP § 473(b).

29.23[1] Mandatory Relief Due to Attorney's Mistake, Inadvertence, Surprise, or Neglect.

29.23[2] Attorney's Mistake, Inadvertence, Surprise, or Neglect Must Be Cause in Fact of Dismissal.

29.23[3] Dismissals From Which Relief Is Mandatory Must Be "Against" Client of Attorney Filing Affidavit.

29.23[4] Dismissals From Which Relief Is Mandatory Must Deprive Party of Day in Court.

29.23[5] Courts Differ on Whether Other Judgments May Be Set Aside on an Attorney's Affidavit of Fault.

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29.25[1] Distinguishing Between Statutory and Equitable Relief and Effect on Use of Case Law.

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29.26 Determining Whether Judgment or Order Is Void for Lack of Jurisdiction in Fundamental Sense.

29.26[1] Lack of Subject Matter or Personal Jurisdiction Is Lack of Jurisdiction in Fundamental Sense.

29.26[2] No Subject Matter Jurisdiction.

29.26[2][a] Court Must Lack Power to Adjudicate Matter in Question to Be Void.

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29.26[3] No Personal Jurisdiction.

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29.27 Determining Whether Judgment or Order Is Void for Being Issued in Excess of Jurisdiction by Granting Relief That Court Had No Power to Grant.

29.27[1] Judgment or Order Issued by Disqualified Judge Is Void.

29.27[2] Judgment or Order by Commissioner Without Proper Appointment May Be Void.

29.27[2][a] Hearing Matter Under General Reference Is Void.

29.27[2][b] Acting As Temporary Judge Without Stipulation of Parties Is Void.

29.27[3] Judgment or Order in Violation of Due Process Right of Party May Be Void.

29.27[4] Voluntary Judgment Entered by Attorney Without Plaintiff's Approval Is Void.

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29.27[7] Order Denying Relief From Judgment or Order May Be Void.

29.27[8] Judgment or Order in Contravention of Stay During Pendency of Bankruptcy Proceeding Is Void.

29.28 Judicial Error Solely in Exercise of Jurisdiction Does Not Render Judgment or Order Void.

29.29 Distinguishing Between Judgment or Order Void on Its Face From Void in Fact and Effect on Evidence.

29.29[1] Void on Its Face Is Based Only on Record, While Void in Fact Requires Extrinsic Evidence.

29.29[2] Judgment Roll Is Delimited by Statute.

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29.30[1][a] Any Party to the Judgment or Order May Make Attack.

29.30[1][b] Any Interested Party to the Judgment or Order May Make Attack.

29.30[1][c] Court May Make Motion in Pending Action.

29.30[2] Relief Not Barred by Res Judicata May Be Sought at Any Time.

29.30[3] Showing of Meritorious Defense or Case Not Required.

29.30[4] Extrinsic Evidence Generally May Not Be Presented in Collateral Attack.

29.30[5] Judgment or Order Void On Its Face May Be Set Aside by Collateral Attack As Well As Direct Attack.

29.31 Timing of Motion Setting Aside Judgment or Order Void in Fact and Evidentiary Issues.

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29.31[1][a] Motion Must Be Made Within Reasonable Time.

29.31[1][b] Two Statutory Limits Comprise "Reasonable Time."

29.31[1][c] Motion Not Made Within Reasonable Time Subject to Collateral Attack Rules.

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29.32 Preparing Motion to Set Aside Void Judgment or Order.

29.32[1] Moving to Set Aside Under CCP § 473(d).

29.32[1][a] Noticed Motion Specifying Relief May Be Filed by Any Party.

29.32[1][b] Documents Accompanying CCP § 473(d) Motion Differ for Setting Aside Judgment or Order Void on Its Face and Those Void in Fact.

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29.32[2] Moving to Set Aside Under Court's Inherent Power to Set Aside Judgment or Order Void on Its Face.

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29.33 Separate Collateral Action to Set Aside Judgment or Order Void on Its Face.

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29.34 CHECKLIST: Setting Aside Judgments or Orders In Equity Due to Fraud, Duress, or Extrinsic Mistake.

29.35 Options and Strategies for Moving Party.

29.35[1] Defining Extrinsic Fraud, Duress, or Extrinsic Mistake for Equitable Relief.

29.35[1][a] General Equitable Power Permits Granting Relief From Extrinsic Fraud, Duress, or Extrinsic Mistake.

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29.38 Time for Filing Motion for Equitable Relief Differs From Time for Filing Action.

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29.38[2] Time for Filing Action for Equitable Relief Generally Is Three Years From Entry of Judgment or Order or Discovery of Extrinsic Mistake.

29.38[2][a] Three-Year Statute of Limitation Generally Applies to Action for Equitable Relief From Extrinsic Mistake.

29.38[2][b] Three-Year Statute of Limitation Runs From Date of Discovery of Extrinsic Mistake.

29.39 Burden of Proof for Setting Aside Judgment or Order Under Equitable Principles Is on Moving Party.

29.40 Setting Aside Judgment or Order on Grounds of Extrinsic Fraud of Adverse or Third Party.

29.40[1] In General, Adverse or Third Party Commits Extrinsic Fraud by Keeping Aggrieved Party in Ignorance or Preventing Full Participation.

29.40[2] Fraudulent Failure to Give Notice May Be Extrinsic Fraud.

29.40[3] Fraudulent Representations by Adverse Party May Be Extrinsic Fraud.

29.40[4] Concealment of Facts From Party by Fiduciary or Person Confidential Relationship.

29.40[5] Concealment From Court of Party's Disability by Adverse Party Is Extrinsic Fraud.

29.40[6] Concealment of Party's Rights From Court or Party.

29.40[7] Fraudulent Change in Property Settlement Agreement May Be Extrinsic Fraud.

29.40[8] No Relief for Intrinsic Fraud by Adverse or Third Party.

29.40[8][a] Mistake or Fraud Is Intrinsic If Aggrieved Party Received Notice and Was Not Prevented From Presenting Claims.

29.40[8][b] Contribution by Aggrieved Party May Render Fraud of Adverse or Third Party Intrinsic.

29.41 Setting Aside Judgment or Order on Grounds of Duress of Adverse Party.

29.42 Setting Aside Judgment or Order on Grounds of Extrinsic Mistake Caused by Adverse or Third Party.

29.42[1] Relief for Extrinsic Mistake of Adverse or Third Party.

29.42[2] Moving Party Must Have Been Deprived of Opportunity to Present Case in Court.

29.42[3] No Relief From Intrinsic Mistake of Adverse or Third Party.

29.42[3][a] Mistake of Adverse or Third Party Within Proceeding Is Not Grounds for Equitable Relief.

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- 29.43 Preparing, Filing, and Serving Motion for Equitable Relief.
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- 29.45 CHECKLIST: Setting Aside Judgment on Basis of Military Service.
- 29.46 Options and Strategies for Moving Party.
- 29.47 Military Service Must Prejudice Defendant in Making Defense.
- 29.48 Only Judgments Rendered During Military Service or Within 30 Days Thereafter May Be Set Aside.
- 29.49 Only Service Members May Obtain Relief.
- 29.49[1] Only Service Members Are Entitled to Relief.
- 29.49[2] Officers and Enlisted Members in State or Federal Service May Be Service Members.
- 29.49[3] Reservists of United States Military Reserve May Be Service Members.
- 29.50 Military Service Must Be Full-Time Active Service.
- 29.51 Moving Party Must Have Meritorious or Legal Defense.
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- 29.52[1] Service Member or Legal Representative May File Motion.
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- 29.53 CHECKLIST: Setting Aside Judgment or Order When Court Assumed Jurisdiction Over Attorney's Practice
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- 29.55 Court Must Have Assumed Jurisdiction on Statutory Grounds.
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- 29.57 Moving for Relief.
- 29.57[1] Motion Does Not Require Affidavit of Merits.
- 29.57[2] Time in Which to File Motion for Relief.
- 29.57[2][a] Motion for Relief Generally Must Be Filed Within Reasonable Time, Not to Exceed Six Months.
- 29.57[2][b] Motion for Relief From Judgment or Order Determining Ownership or Possession of Property Subject to 90-Day Notice.

29.58 CHECKLIST: Opposing the Setting Aside of Judgments and Orders.

29.58[1] Opposing Setting Aside Void Judgments or Orders.

29.58[2] Opposing Motion for Relief Under CCP § 473(b).

29.58[3] Opposing Motions or Actions for Equitable Relief From Judgment or Order.

29.58[4] Opposing Relief From Judgment Due to Military Service.

29.58[5] Opposing Setting Aside Judgment or Order When Court Has Taken Jurisdiction Over Attorney's Practice.

29.59 Options and Strategy for Opposing Party.

29.60 Opposing Motion for Relief Under CCP § 473(b).

29.60[1] Opposing Discretionary Relief Under CCP § 473(b).

29.60[1][a] Grounds for Opposing Motion for Relief.

29.60[1][b] File Response to Notice of Motion for Relief.

29.60[2] Opposing Mandatory Relief Under CCP § 473(b).

29.60[2][a] Grounds for Opposing Motion for Relief.

29.60[2][b] File Response to Notice of Motion for Relief.

29.60[3] Seeking Attorney's Fees, Costs, and Penalties With Relief Under CCP § 473.

29.60[3][a] With Relief From Dismissal.

29.60[3][b] With Relief Based on Attorney Affidavit of Fault.

29.61 Opposing Setting Aside Judgment or Order Void on Its Face.

29.61[1] Grounds for Opposing Relief From Judgment or Order Void on Its Face.

29.61[2] File Response to Notice of Motion for Relief.

29.61[3] File Response to Action for Relief.

29.62 Opposing Direct Attacks on Judgment or Order Void in Fact.

29.62[1] Grounds for Opposing Relief From Judgment or Order Void in Fact.

29.62[2] File Response to Notice of Motion for Relief.

29.62[3] Present Extrinsic Evidence Contesting Alleged Defect.

29.63 Opposing Equitable Relief From Judgment or Order Due to Fraud, Duress, or Extrinsic Mistake.

29.63[1] Grounds for Opposing Request for Relief.

29.63[2] File Response to Request for Equitable Relief.

29.63[2][a] File Response to Notice of Motion for Equitable Relief.

29.63[2][b] File Response to Complaint for Equitable Relief.

29.64 Opposing Application for Relief From Judgment Prejudicing Defendant Due to Defendant's Military Service.

29.65 Opposing Setting Aside Judgment or Order When Court Has Taken Jurisdiction Over Attorney's Practice.

29.66 CHECKLIST: Seeking Review of Proceedings to Set Aside Judgments and Orders.

29.67 Options and Strategy.

29.68 Review of Decision Under CCP § 473(d) or Court's Inherent Power to Set Aside Void Judgment or Order.

29.68[1] Grant or Denial of CCP § 473(d) Motion Is Appealable.

29.68[2] Standard of Review.

29.69 Review of Decision Under CCP § 473(b).

29.69[1] Reconsideration.

29.69[2] Renewal.

29.69[3] Appellate Review.

29.69[3][a] Order Granting Relief Reviewable As Final Judgment or by Writ.

29.69[3][b] Order Denying Relief Generally Not Reviewable Except on Appeal From Final Judgment in Underlying Action.

29.69[3][c] Court Has Discretion to Consider Appeal As Petition for Writ of Mandate.

29.69[3][d] Standard of Appellate Review.

29.69[3][e] Burden of Establishing Error, and Presumption of Correctness of Order.

29.69[3][f] Seeking Appellate Review.

29.70 Review of Decisions on Motions and Actions for Equitable Relief Due to Fraud, Duress, or Extrinsic Mistake.

29.70[1] Grant or Denial, Except Denial of Motion, of Equitable Relief Is Appealable and May Be Subject to Writ Review.

29.70[2] Standard of Review Differs for Grant or Denial of Relief.

29.71 Notice of Motion and Motion for Order Vacating and Setting Aside Judgment, Order, Default, or Other Proceeding; Supporting Declarations; and Memorandum (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Moving Party's Attorney's Fault).

29.72 Declaration in Support of Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect).

29.73 Declaration in Support of Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Attorney's Fault).

29.74 Declaration in Opposition to Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect).

29.75 Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Moving Party's Attorney's Fault).

29.76 Notice of Motion and Motion to Set Aside Judgment or Order Void on Its Face.

29.77 Order Setting Aside Judgment or Order Void on Its Face.

29.78 Notice of Motion and Motion to Set Aside Judgment or Order Void in Fact.

29.79 Order Setting Aside Judgment or Order Void in Fact.

29.80 Notice of Motion and Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

29.81 Order Setting Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

29.82 Complaint in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

29.83 Judgment Setting Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

29.84 Notice of Motion and Motion for Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum (Based on Prejudice Due to Military Service).

29.85 Order Setting Aside Judgment or Order (Based on Prejudice Due to Military Service).

29.86 Notice of Motion and Motion for Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum (When Court Has Assumed Jurisdiction Over Attorney's Practice).

29.87 Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum (When Court Has Assumed Jurisdiction Over Attorney's Practice).



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Cathcart Durie McGee Prather

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Chapter 29 Setting Aside Judgments and Orders
I. STRATEGY

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.01

29.01 Scope.

This chapter covers:

- Objectives and strategy for attacking judgments and orders [see 29.02].
- Determining and selecting from available grounds for setting aside judgments and orders [see 29.03 et seq.].
- Making motions under *CCP* § 473(b) for relief from a judgment, dismissal, order, or proceeding taken through mistake, inadvertence, surprise, or excusable neglect, or based on an attorney's affidavit of fault [see 29.10 et seq; Forms: see 29.71 -29.75].
- Making motions under *CCP* § 473(d), and making motions and bringing actions directed to a court's inherent power at law, to set aside a void judgment or order [see 29.24 et seq.; Forms: see 29.76 -29.79].
- Making motions and bringing actions in equity for relief from a judgment or order due to fraud, duress, or extrinsic mistake [see 29.34 et seq.; Forms: see 29.80 -29.83].
- Making motions under *M&V Code* § 402(d) for relief from a judgment, order [see 29.45 et seq.; Forms: see 29.84, 29.85].
- Making motions under *CCP* § 473.1 for relief from a judgment, order, or proceeding when a court has assumed jurisdiction over the law practice of the party's attorney [see 29.53 et seq.; Forms: see 29.86, 29.87].
- Opposing the setting aside of judgments and orders [see Pleading and Practice et seq.; Form: see 29.74].
- Seeking review of decisions on request to set aside judgments and orders [see 29.66 et seq.].

Core Statutes:

CCP §§ 473, 473.1; M&V Code § 402(d)

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 JudgmentFraudCivil
ProcedureJudgmentsRelief From JudgmentIndependent Actions



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Chapter 29 Setting Aside Judgments and Orders
I. STRATEGY

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.02

29.02 Objective and Strategy.

29.02[1] Options for Attacking Judgments and Orders. Judgments and orders may be attacked by:

- Motion for reconsideration or renewed motion.
- Motion for judgment notwithstanding the verdict.
- Motion for new trial.
- Motion to vacate judgment and enter different judgment.
- Motion to correct or modify judgment.
- Motions and actions to set aside judgments and orders.
- Review by writ of certiorari.
- Appeal of the judgment or order to a higher court.
- Action in quo warranto.
- Action for writ of mandate.

The focus of this chapter is setting aside judgments and orders either by direct motion or collateral attack in a separate action.



Strategic Point--Reexamination:

Neither a motion for new trial nor a motion for reconsideration may lie in the trial court to secure a

reexamination of the decision on a motion [*San Francisco Lathing, Inc. v. Superior Court* (1969) 271 CA2d 78, 80-81, 76 CR 304] .

Strategic Point--Settlement:



Parties seeking to obtain relief from a settlement agreement or an order or judgment based on a settlement agreement may only have the option of setting aside the judgment or order due to their own excusable mistake, inadvertence, surprise, or neglect. In the absence of grounds for relief under CCP § 473, a settling defendant is entitled to rely on the finality of a filed voluntary dismissal. Nothing in CCP § 664.6 grants courts inherent authority to vacate judgments of dismissal on the bare allegation a settlement agreement has been breached [*Hagan Eng'g, Inc. v. Mills* (2003) 115 CA4th 1004, 1009, 9 CR3d 723] . Note that when a settlement was agreed to in open court on behalf of a corporate party by its insurer and third party representative, and not by a representative of the corporation, it could not be enforced by motion under CCP § 664.6 [*Elnekave v. Via Dolce Homeowners Assn.* (2006) 142 CA4th 1193].

Strategic Point--Dismissal:



Relief under CCP § 473(b) is available for the party's excusable mistake, inadvertence, surprise, or neglect to set aside a voluntary dismissal with prejudice [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 255, 121 CR2d 187, 47 P3d 1056 (contract law principles do not limit relief from accepted compromise under CCP § 998)], although relief under CCP § 473(b) based on an attorney's affidavit of fault is not available [*Huens v. Tatum* (1997) 52 CA4th 259, 264-265, 60 CR2d 438] .

Strategic Point--Entry of Judgment:



After judgment, the trial court has no jurisdiction to hear a reconsideration motion [*Betz v. Pankow* (1993) 16 CA4th 931, 937-938, 20 CR2d 841] . On the other hand, motions under CCP §§ 473, 473.1 and M&V Code § 402(d), as well as motions and actions under the court's inherent and equitable powers, may be brought within their limitations, after entry of judgment.

Strategic Point--Cumulative Remedies:



Seeking relief other than appeal in an ongoing action does not preclude seeking appeal as another form of relief, as long as the requirements of all are met. Motions for relief under CCP § 473(d) and for new trial, and appeal, are cumulative remedies, and one does not bar another, if each is timely [*Miller v. Lee* (1942) 52 CA2d 10, 125 P2d 627] . Counsel should file for as many forms of relief as the case warrants.



Warning--Appeals:

Counsel planning to take action that include an appeal should consider the effect of those actions on the time for appeal and the loss of trial court jurisdiction once an appeal is taken [see 29.09[2]]. Moving to set aside a judgment or order may itself confer the right to appeal. Unlike CCP § 473(b), which limits relief to parties or their legal representatives, an appeal from a judgment may under CCP § 902 be taken by any party aggrieved. A person not a party to the action as originally commenced or tried may become a party to the record, subsequent to the judgment, by moving to vacate, and thereby gain a right of appeal from the order denying the motion [*O'Dell v. Freightliner Corp.* (1992) 10 CA4th 645, 662, 12 CR2d 774] . Timing can be crucial in these instances. Once the time for appealing an order or judgment has

passed, a court may only set aside or modify the order or judgment if the judgment is void on the face of the record, or on the basis of its equitable jurisdiction to correct extrinsic fraud or mistake [*Estate of Beard* (1999) 71 CA4th 753, 774, 84 CR2d 276] .

Cross References:

Discussion of and forms for motions for reconsideration, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 29 Motions to Reconsider and Renewed Motions;

California Forms of Pleading and Practice, Ch. 374, Motions to Reconsider and Renewed Motions (Matthew Bender); and

California Points and Authorities, Ch. 158, Motions to Reconsider and Renewed Motions (Matthew Bender).

Further discussion of and forms for motions for judgment notwithstanding the verdict, see Ch. 20, Motion for Judgment Notwithstanding the Verdict;

California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender); and

California Points and Authorities, Ch. 155, Motions After Trial (Matthew Bender).

Further discussion of and forms for motions for new trial, see Ch. 21, Motion for New Trial;

California Forms of Pleading and Practice, Ch. 371, Motions after Trial (Matthew Bender); and

California Points and Authorities, Ch. 155, Motions After Trial (Matthew Bender).

Further discussion of and forms for motions to vacate judgment and enter different judgment, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment;

California Forms of Pleading and Practice, Ch. 371, Motions after Trial (Matthew Bender); and

California Points and Authorities, Ch. 155, Motions After Trial (Matthew Bender).

Further discussion of and forms for motions to correct or modify judgment, see Ch. 28, Correcting and Modifying Judgment;

California Forms of Pleading and Practice, Ch. 371, Motions after Trial (Matthew Bender); and

California Points and Authorities, Ch. 131, Judgments (Matthew Bender).

Further discussion of review by writ of certiorari, see California Forms of Pleading and Practice, Ch. 492, Review (Certiorari), Writ of (Matthew Bender).

Further discussion of appeals, see California Forms of Pleading and Practice, Chs. 40- 54 (Matthew Bender).

Further discussion of and forms for actions for quo warranto, see California Forms of Pleading and Practice, Ch. 483, Quo Warranto (Matthew Bender).

Further discussion of and forms for motions to correct or modify judgment, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition (Matthew Bender); or

California Points and Authorities, Ch. 150, Mandate and Prohibition (Matthew Bender).

29.02[2] Strategy for Setting Aside Judgments and Orders. The five primary methods for setting aside a judgment of order in this chapter are:

Authority	Description
CCP § 473(b)/Equity case law	Court issued a valid judgment or order; however party is seeking to set it aside because of mistake, inadvertence, surprise, or excusable neglect.
CCP § 473(d)/Equity case law	Court issued a void order. Order is either void on its face or void by a showing of extrinsic evidence.
Equity case law	Court issued what appears to be a valid order, but a party was denied a day in court or the ability to defend due to fraud, duress, or extrinsic mistake.
M&V Code § 403	Court issued a valid judgment or order, but the aggrieved party is a military servicemember due relief.
CCP § 473.1	Court issued a valid judgment or order, but it was issued after the court's assumed jurisdiction over an attorney's practice.

Consider--Frequency of Motions and Actions:

Setting aside a judgment or order under the last two authorities (military service or court's assumption of jurisdiction over attorney's practice) are rare circumstances. The majority of motions to set aside a judgment or order occur under the first three grounds; and of those the majority of motions are under *CCP § 473(b)* for relief due to mistake, inadvertence, surprise, or excusable neglect.

Consider--Relief From Default:

Setting aside entry of default or default judgment under *CCP § 473(b), (c)* is the most common ground for setting aside a judgment or order, and is not reviewed in this chapter.

 Cross Reference:

Discussion of relief from entry of default and default judgment, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 36.65 et seq.*

Moving to set aside judgments and orders requires understanding the matrix of issues that will determine the type and timing of the motion. The factors to consider are:

- Statutory versus equitable authority.
- Valid versus void judgments.
- Collateral versus direct attack.
- Discretionary versus mandatory setting aside of judgments and orders.
- Whether a meritorious defense is required.

- Effect of appeal.

Consider--Source of Confusion:

What makes the subject of setting aside judgments and orders confusing to counsel venturing into this area of law for the first time is that these factors overlap, with somewhat parallel frameworks, and court opinions do not use these terms of art consistently. To untangle the subject, start with the basis of authority. The court has both statutory and equitable authority to set aside judgments and orders. In the case of seeking relief due to mistake, inadvertence, surprise, or excusable neglect, the court has authority under both *CCP § 473(b)* and equitable case law. The same overlap occurs for relief from a void order, which is authorized under both *CCP § 473(d)* and equitable case law. These different authorities result in different time frames for seeking relief, whether relief is mandatory or discretionary depending on who is seeking it, and with different evidentiary requirement (e.g., equitable relief generally requires a showing of a meritorious defense). The only relief not supported by a code section is relief based on fraud, duress, or extrinsic mistake, which is based on the court's inherent authority to do equity.

Consider--Distinguish Three Most Common Types of Relief:

As noted, relief due to military service or assumption of attorney practice is rare. Of the remaining three most common methods for relief in this chapter, the following terms and scenarios may offer better clarity:

- *CCP § 473(b)*/Equity: The court performed its duties correctly and issued a valid judgment or order; however, a party or attorney failed to perform as it should due to mistake, inadvertence, surprise, or excusable neglect. The party or attorney is asking the court for a "do over" for a more just outcome based on the merits of the case.

- *CCP § 473(d)*/Equity: The court issued a void order, and a party can prove one of two things: (1) the judgment or order is void on its face and the court's own file can prove that the court committed an error in issuing the judgment (e.g., no proof of service of summons in file), or (2) the court issued a judgment or order on what it thought was a full understanding of the facts, but through evidence offered outside the court file the party can prove that the judgment or order is void in fact (e.g., court entered judgment against a corporation that was dissolved before the action was filed).

- Equity to Prevent Fraud: If a court issued a judgment or order based on one party's use of fraud, duress, or extrinsic mistake, effectively preventing the other party from having its day in court, the court is not going to allow itself to be a party to the fraud. Both the aggrieved party and the court have been wronged. The court's equitable powers will fashion a remedy, and may just consider an order to show cause for contempt.

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 ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureRemediesWritsCommon Law

WritsMandamus



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.03

29.03 Determine If Relief Is Sought From Judgment or Order.

[1] Authority for Relief Applies to Both Judgments and Order, but Nature of Relief Will Be Different. The authority for relief applies to both judgments and orders, and the authority is expressly written into the statute or described in the case law supporting the method of relief:

- *CCP § 473(b)* (mistake, inadvertence, surprise or excusable neglect: "judgment, dismissal, order, or other proceeding").
- *CCP § 473(d)* (clerical mistakes, void acts: "judgment or orders").
- *CCP § 473.1* (assuming attorney practice: "judgment or orders").
- Relief in equity: "judgment" [*see, e.g., Bennett v. Hibernia Bank* (1956) 47 C2d 540, 554, 305 P2d 20 (judgment of dismissal)], "order" [*see In re Marriage of Baltins* (1989) 212 CA3d 66, 87, 260 CR 403 (order setting aside property and support provisions)].

Exception:

M&V Code § 403, providing for relief from a default judgment due to the defendant's military service, includes only "judgment" in its language.

Consider:

Although the authority for relief may not distinguish between judgments and orders, the type of relief sought will be directly tailored to whether the act taken by the court is a judgment or order. Orders are more likely to take place during the course of litigation, and seeking relief from these orders, such as an order of a continuance, will be very different from seeking relief from a judgment. Issues of timing affect trial strategy, direct versus collateral attack, and the type of evidence presented or allowed, and will differ if the court's act is an order or a judgment.

29.03[2] Judgment Is Final Determination of Parties' Rights. A judgment is "the final determination of the

rights of the parties in an action or proceeding" [CCP § 577]. A similar definition applies to a judgment in a special proceeding [see CCP § 1064]. The finality of a judgment is determined by its substance or effect rather than its designation [*Estate of Lock* (1981) 122 CA3d 892, 896, 176 CR 358] .

Distinguish:

As a general test to be adapted to particular circumstances of individual case, when no issue is left for future consideration except fact of compliance or noncompliance with terms of first decree, the decree is final [*Olmstead v. West* (1960) 177 CA2d 652, 653-654, 2 CR 443] . Judgment is final only when it determines all of the rights of the parties and requires no further judicial action to give effect to its provisions [*Associated Convalescent Enters. v. Carl Marks & Co.* (1973) 33 CA3d 116, 121, 108 CR 782] .



Timing:

Judgment is not final, that is, safe from direct attack or review, until it has been affirmed in response to direct attack or review, or time for attacking or seeking review has expired [*In re Marriage of Van Dyke* (1985) 172 CA3d 145, 149, 218 CR 11] , unless judgment is satisfied sooner [*South Coast Reg'l Com. v. Gordon* (1978) 84 CA3d 612, 619, 148 CR 775] .

29.03[3] Order Is Direction of Court or Judge. An order is a "direction of a court or judge, made or entered in writing, and not included in a judgment" [CCP § 1003]. That provision applies likewise to an order in a special proceeding [CCP § 1064].

If anything further in the nature of a judicial action on the part of the court is essential to final determination of rights of parties, the decree (or order) is interlocutory [*Olmstead v. West* (1960) 177 CA2d 652, 654, 2 CR 443] .

Example:

Orders pertaining to pleadings or parties are considered interlocutory and therefore not final judgments [*Adoption of Lenn E.* (1986) 182 CA3d 210, 217, 227 CR 63] .

The effect of an order determines its character [*Sager v. O'Connell* (1951) 107 CA2d 391, 394, 237 P2d 59] . The court may resort to the notice of motion in construing an order [*Western Greyhound Lines v. Superior Court* (1958) 165 CA2d 216, 219, 331 P2d 793] .

29.03[4] Type and Date of Entry Distinguishes Judgment From Order.

29.03[4][a] Judgment Generally Entered in Judgment Book. The clerk of the court generally must enter judgments in the judgment book, kept with the records of the court [CCP § 668]. Alternatively, if the court does not use a judgment book, the judgment is entered on its filing with the clerk, who records it in one of the manners specified by statute [see CCP § 668.5].



Timing:

The entry date of a judgment is the date the judgment is filed under CCP § 668.5 or the date it is entered in the judgment book [Cal Rules Ct, Rule 8.104(d)(1); see CCP § 668.5].



Cross Reference:

Discussion of entry of judgments, see Ch. 26, Entry of Judgment.

29.03[4][b] Order Is Either Entered in Minutes or Filed in Court File. To be entered, an order must be either entered in the court's permanent minutes or signed by the judge and stamped filed [*Michael v. Aetna Life & Cas. Ins. Co.* (2001) 88 CA4th 925, 932, 106 CR2d 240 ; see *Deshrow v. Rhodes* (1969) 1 CA3d 733, 741, 82 CR 138 (essential

elements for, and steps taken in, entry of order in court's permanent minutes)].



Timing:

The entry date of an appealable order that is entered into the minutes is [*Cal Rules Ct, Rule 8.104(d)(2)*]:

- If the minute order does not direct that a written order be prepared, the date the order is entered into the permanent minutes of the court or the date it is entered in the judgment book.
- If the minute order directs that a written order be prepared, the date the signed order is filed.

The entry date of an appealable order not entered into the minutes is the date the signed order is filed [*Cal Rules Ct, Rule 8.104(d)(3)*]. A separate provision determines entry of decrees of distribution in probate cases [*see Cal Rules Ct, Rule 8.104(d)(4)*].



Cross Reference:

Entry of orders, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.62.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake



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29.04 Review Five Primary Authorities for Setting Aside Judgments and Orders.

29.04[1] CCP § 473(b) Provides Relief for Mistake, Inadvertence, Surprise and Excusable Neglect and for Relief From Default. *CCP § 473(b)* has two clauses. The first clause of *CCP § 473(b)* provides for discretionary relief from judgments or orders due to the party's or the party's attorney's mistake, inadvertence, surprise, or neglect that in most cases must be excusable. Similar provisions of the discovery act, namely, *CCP § 2031.300(a)* (relief from waiver of objection to request for inspection), *CCP § 2033.280(a)* (relief from waiver of objection to request for admissions), *CCP § 2034.720* (relief from waiver of objection to request for exchange of expert witness information) apply to judgments and orders resulting from discovery requests. Furthermore, the equitable doctrine of extrinsic mistake also applies to generally similar categories of the party's or party's attorney's mistakes, inadvertence, surprise, or neglect as those subject to discretionary relief under *CCP § 473(b)*.

Cross Reference:

Discussion of *CCP § 473(b)*, see 29.10 et seq.

The second clause of *CCP § 473(b)* provides for relief from entry of default and default judgment due to the party's or the party's attorney's mistake, inadvertence, surprise, or neglect that in most cases must be excusable.

Cross Reference:

Discussion of relief from entry or default or default judgment, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.65 et seq. (Matthew Bender).

29.04[2] CCP § 473(d) Provides Relief From Void Judgments and Orders. *CCP § 473(d)* provides for relief from void judgments or orders, whether that voidness appears on the face of the record or must be proven with extrinsic evidence. This provision codifies the inherent power of the court to set aside void judgments and orders, including those made under a lack of jurisdiction and those made in excess of jurisdiction.

Cross Reference:

Discussion of *CCP § 473(d)*, see 29.24 et seq.

CCP § 473(d) also provides for correction of clerical in a judgment or order, on both the motion of an injured party or the court's own motion. However, this is not relief in the sense of setting aside the judgment. Rather, that statutory language is for the purpose of conforming the judgment or order to court's intent [see *Zisk v. Roseville* (1976) 56 CA3d 41, 47, 127 CR 896] .

➡ **Cross Reference:**

Discussion of motion to correct a judgment, see Ch. 28, Correcting and Modifying Judgment.

29.04[3] Case Authority Supports Court's Inherent Equitable Jurisdiction to Set Aside Judgment or Order Obtained by Fraud or Mistake. Under their general equitable power, courts may grant equitable relief from a judgment or order on the grounds of extrinsic fraud or extrinsic mistake by the adverse party [see, e.g., *Estate of Beard* (1999) 71 CA4th 753, 774-775, 84 CR2d 276] .

29.04[4] Defendant's Military Service May Be Basis for Setting Aside Default Judgment. A default judgment rendered in an action against a defendant who is prejudiced by reason of military service may be set aside, among others, as a default [50 USC app § 501 et seq.; M&V Code § 402(d)].

➡ **Cross References:**

Discussion of relief due to military service, see 29.45 et seq.

Discussion and forms for setting aside default due to military service, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.70 (Matthew Bender).

29.04[5] CCP § 473.1 Provides for Relief When Court Assumes Attorney's Practice. On an application for relief from judgments and orders on the basis that a court has assumed jurisdiction over the law practice of the party's attorney, relief may be on any terms that are just [CCP § 473.1].

➡ **Cross Reference:**

Discussion of setting aside judgment or order when court assumes attorney practice, see 29.53 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
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29.05 Determine Limitation Periods and Remedies Available Depending on Grounds Alleged--Comparison Table.

The following table compares the grounds for relief alleged and the limitation periods and authority for the remedy sought.

GROUNDS	LIMITATION PERIOD	REMEDY(IES)
Void on face of record	None	Motion under CCP § 473(d) or court's inherent power, or collateral attack
Void in fact	Reasonable time after entry of judgment or order	Motion under CCP § 473(d) or court's inherent power
Adverse or third party's extrinsic fraud or mistake	3 years after discovery	Motion or action in equity
Excusable mistake, inadvertence, surprise, or neglect of party or party's attorney	Reasonable time after entry of judgment or order, generally not to exceed 6 months	Motion under CCP § 473(b)
Party's or attorney's extrinsic mistake	3 years after discovery or, for party's incompetence, 4 years after discovery	Motion or action in equity
Attorney abandonment	3 years after discovery	Motion under CCP § 473(b), or motion or action in equity
Prejudice due to full-time active military service	[not yet defined]	Motion under M&V § 402(d)
Court has assumed jurisdiction over attorney's practice	Reasonable time after entry of judgment or order, generally not to exceed 6 months	Motion under CCP § 473.1

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise



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29.06 Determine Whether to Bring Direct or Collateral Attack.

29.06[1] Direct Attack Is Brought Against Judgment or Order Regarding Issue Currently Before Court. A direct attack on a judgment or order is a proceeding, whether by motion made in the existing action or bringing a new action, brought specifically to nullify the judgment or order as it pertains to the immediate issue under consideration [*People ex rel. Mosk v. City of Santa Barbara* (1961) 192 CA2d 342, 356, 13 CR 423] .

29.06[2] Collateral Attack Is Brought Against Judgment or Order From Another Proceeding. A collateral attack is any procedural challenge that does not constitute a direct attack [*People ex rel. Mosk v. City of Santa Barbara* (1961) 192 CA2d 342, 356, 13 CR 423] , or as an action to prevent enforcement of a judgment or to defeat rights acquired under it [*Rios v. Allstate Ins. Co.* (1977) 68 CA3d 811, 818, 137 CR 441] . A collateral attack attempts to avoid the effect of a judgment or order made in some other proceeding, and for the attack to succeed, the invalidity of the former judgment or order must appear on the face of the record or the party seeking relief did not have an opportunity to contest the judgment or order earlier.

Distinguish:

Collateral attack is proper to contest lack of personal or subject matter jurisdiction or the granting of relief which the court has *no power* to grant [*Swycaffer v. Swycaffer* (1959) 44 C2d 689, 693, 285 P2d 1 (default judgment in excess of relief demanded by prayer); *Michel v. Williams* (1936) 13 CA2d 198, 201, 56 P2d 546 (court had no power to award costs)]. However, nonjurisdictional errors are not appropriate procedural targets within this context [*Armstrong v. Armstrong* (1976) 15 C3d 942, 950, 126 CR 805, 544 P2d 941] , such as a failure to state a cause of action [*Estate of Keet* (1940) 15 C2d 328, 334, 100 P2d 1045] , insufficiency of evidence [*Estate of Kay* (1947) 30 C2d 215, 218-219, 181 P2d 1] , abuse of discretion [*Howard v. Superior Court* (1944) 25 C2d 784, 788, 154 P2d 849] , and mistake of law [*Barquis v. Merchants Collection Ass'n* (1972) 7 C3d 94, 114-116, 101 CR 745, 496 P2d 817] . Errors that are in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal and generally are not subject to collateral attack once the judgment is final [*Lee v. An* (2009) 168 CA4th 558, 564, 85 CR3d 620] .

29.06[3] Availability of Direct and Collateral Attacks and Examples. A judgment or order may be attacked

directly or collaterally, depending on its nature and the specific ground relied on [see, e.g., *Parsons v. Weis* (1904) 144 C 410, 415, 77 P 1007; *People ex rel. Mosk v. City of Santa Barbara* (1961) 192 CA2d 342, 356, 13 CR 423]. Although not all judgments and orders subject to direct attack are subject to collateral attack, all judgments and orders subject to collateral attack are subject to a direct attack if the direct attack is timely made [see, e.g., *Parsons v. Weis* (1904) 144 C 410, 415, 77 P 1007]. Collateral attacks are available only if the judgment or order is void in fact or the moving party did not have an opportunity to contest the judgment or order earlier [see 29.24 et seq., 29.34 et seq.].

Examples:

Direct attacks include:

- Motion to set aside judgments or order due to a party's or the party's attorney's excusable mistake, inadvertence, surprise, or neglect, or based on the attorney's affidavit of fault under CCP § 473(b) [see 29.10 et seq.].
- Motion or action on equitable grounds attacking judgments or orders due to extrinsic fraud or mistake [see 29.34 et seq.].
- Motion to set aside default and default judgment under CCP § 473.5 and CCP § 585 [see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Default and Motions for Relief*, 36.65 et seq. (Matthew Bender)].
- Motions to set aside default judgment due to prejudice from military service under M&V Code § 402(d) [see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief*, 36.70 (Matthew Bender)].
- Motion to set aside judgment or order when a court has assumed jurisdiction over the attorney's practice under CCP § 473.1 [see 29.53 et seq.].
- Appeal from the judgment or order to a higher court [*Parsons v. Weis* (1904) 144 C 410, 415, 77 P 1007].
- Action in quo warranto or by certiorari and other writs [*People ex rel. Mosk v. City of Santa Barbara* (1961) 192 CA2d 342, 356, 13 CR 423].

Examples of collateral attacks include:

- If an action has been dismissed with prejudice and judgment entered, bringing an action on the same grounds [see *Palmquist v. Palmquist* (1963) 212 CA2d 340, 343-344, 27 CR 756].
- Action to quiet title to property awarded to another by a partially void judgment [see *Vasquez v. Vasquez* (1952) 109 CA2d 280, 283, 240 P2d 319].
- When order are independently appealable and become final by lapse of time, a subsequent attack on them in an appeal from a later judgment or order [*Estate of Wemyss* (1975) 49 CA3d 53, 58, 122 CR 134].

Cross Reference:

Additional examples of collateral attacks on judgment or order void on its face, see 29.33[1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise



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29.07 Review Policy Considerations in Choosing Discretionary Relief and Frame Relief As Serving Highest Policy Goal.

29.07[1] Policy Generally Favors Trial on Merits. In considering discretionary relief, every litigated case should be tried on its merits [*Maynard v. Brandon* (2005) 36 C4th 364, 372, 30 CR3d 558, 114 P3d 795 ; see *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 255-256, 121 CR2d 187, 47 P3d 1056 (discretionary relief under CCP § 473(b) available from voluntary dismissals based on accepted compromise)]. Policy disfavors a party who, regardless of the merits of the case, tries to take advantage of the mistake, surprise, inadvertence, or neglect of an adversary [*Au-Yang v. Barton* (1999) 21 C4th 958, 963, 90 CR2d 227, 987 P2d 697 (party seeking trial has burden of notifying adverse parties under CCP § 594(a))].

29.07[2] Policy Also Favors Judicial Economy. Policy favors getting cases to trial on time, avoiding unnecessary and prejudicial delay, and preventing litigants from playing fast and loose with the pertinent legal rules and procedures [*Gardner v. Superior Court* (1986) 182 CA3d 335, 339, 227 CR 78] . Courts should not condone poor practice by excusing it, because to do so undermines the orderly process of law [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 900, 187 CR 592, 654 P2d 775] .



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29.08 Determine If Seeking Relief May Be Made From Multiple Authorities and Avoid Mixing Grounds That May Waive Certain Rights.

29.08[1] Seeking Relief on Multiple Grounds Requires Compliance With Each Ground's Procedural Requirements. A party may seek relief on multiple grounds for setting aside a judgment or order in one motion. The authorities for setting aside a judgment or order under *CCP* § 473(b) and (d) also may be made under equitable grounds; however the time limits and the evidence that may be admitted for the motion are different depending on the authority asserted. Counsel should carefully review the analyses in this chapter, which compare statutory authority with the court's equitable authority, and decide whether multiple authorities apply and the best strategic use of these authorities given the facts and circumstances.

Example:

A party may seek relief on the ground of mistake, inadvertence, surprise, or excusable neglect under *CCP* § 473(b), on the ground that the judgment is void under *CCP* § 473(d), and on the further equitable ground that the judgment was obtained by extrinsic fraud or mistake [*see, e.g., Don v. Cruz* (1982) 131 CA3d 695, 698-699, 182 CR 581].



Strategic Point:

Counsel must consider the difficulty of meeting the procedural requirements of each ground without disturbing the possibility of relief on the other grounds for relief.

29.08[2] Combined Relief From Judgment or Order Void on Its Face for Lack of Personal Jurisdiction and on Other Grounds May Result in General Appearance. When the motion for relief from a judgment is made on the ground that the judgment is void for lack of jurisdiction over the person of the moving defendant [*see* 29.10[3]] as well as other statutory or equitable grounds [*see, e.g., Don v. Cruz* (1982) 131 CA3d 695, 702, 182 CR 581 (grounds of voidness, party's excusable mistake or neglect, and extrinsic fraud or mistake)], counsel should be careful in mixing the grounds of relief. This is to avoid inadvertently making a general appearance and, in so doing, waiving the lack of jurisdiction objection by voluntarily submitting to the personal jurisdiction of the court [*see CCP* § 410.50(a)].

A motion that incorporates any other ground, particularly if it seeks relief that may be granted only on the ground that the court has jurisdiction over the defendant, may be deemed a general appearance and subject the defendant to the court's personal jurisdiction in subsequent proceedings [*see CCP § 410.50*].

➤ **Cross Reference:**

Further discussion of personal jurisdiction and motions to quash, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction (Matthew Bender).

Distinguish:

A motion for relief under *CCP § 473*, if joined with a motion to quash service of summons for lack of personal jurisdiction [*see CCP § 418.10(a)(1)*], to dismiss for inconvenient forum [*CCP § 418.10(a)(2)*], or to dismiss for delay in prosecution [*CCP § 418.10(a)(3)*], does not constitute a general appearance [*CCP § 418.10(d)*].

➤ **Cross Reference:**

Discussion of motions to dismiss for delay in prosecution without making a general appearance under *CCP § 418.10(a)(3)*, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 9.07 (Matthew Bender).

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 JudgmentVoid Judgments



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29.09 Determine Effect of Time to Appeal on Relief Sought.

29.09[1] Appeal Generally Removes Trial Court Jurisdiction to Consider Setting Aside Judgment or Order.

An appeal removes from the trial court's jurisdiction the subject matter of the judgment or order appealed from [CCP § 916(a); *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 666, 73 CR2d 242]. The trial court's power to enforce, vacate, or modify an appealed judgment or order is suspended while the appeal is pending. Further trial court proceedings in contravention of the CCP § 916(a) stay are in excess of the court's jurisdiction [see *Elsa v. Saberi* (1992) 4 CA4th 625, 629, 5 CR2d 742 (CCP § 473(b) order vacating default judgment set aside as in excess of trial court's jurisdiction)].



Warning:

An appeal from a nonappealable order does not stay the trial court's jurisdiction to set aside the order [*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 666, 73 CR2d 242 (no stay)]. Counsel should immediately determine whether a judgment or order that is appealed is appealable, in order to preserve the filing period for setting aside a nonappealable judgment or order.

Example:

A judgment order pursuant to acceptance of offer of compromise under CCP § 998 is not appealable, and thus filing a notice of appeal from such an order does not divest the trial court of jurisdiction over the matters before it [*Roden v. Bergen Brunswick Corp.* (2003) 107 CA4th 620, 634-635, 132 CR2d 549].

Exception:

The trial court retains jurisdiction over ancillary or collateral matters that do not affect the judgment on appeal [CCP § 916(a); *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 666, 73 CR2d 242 (motion to tax attorney's fees); *Silver v. Gold* (1989) 211 CA3d 17, 26, 259 CR 185 (imposition of sanctions for frivolous motion)].

Example:

The general rule that a pending appeal deprives the trial court of jurisdiction of the cause does not apply

to a judgment or order void on its face, because a court may set it aside at any time [*Betz v. Pankow* (1993) 16 CA4th 931, 938, 20 CR2d 841] .



Strategic Point:

A party seeking relief from dismissal under *CCP* § 473(b) injects into the case new elements of mistake, inadvertence, surprise, and excusable neglect that may demonstrate the deprivation of a meaningful opportunity to defend. The trial court's discretion in disposing of a motion to set aside will be affected by facts not before it on the original motion, and the appellate court's action will be based on a record not available to the plaintiff if the plaintiff instead appealed from the dismissal itself [*Daley v. County of Butte* (1964) 227 CA2d 380, 388-389, 38 CR 693] .

Example:

The trial court does not have jurisdiction to set aside a judgment or order void in fact once an appeal is filed [*Betz v. Pankow* (1993) 16 CA4th 931, 940, 20 CR2d 841 (judgment confirming arbitration award may not be set aside after appeal is filed)].

With respect to post-judgment trial court proceedings, whether a matter is embraced in or affected by a judgment within the meaning of *CCP* § 916(a), and therefore in excess of jurisdiction of the trial court, depends on whether the proceedings on the particular matter would have any impact on the effectiveness of the appeal [*Betz v. Pankow* (1993) 16 CA4th 931, 940, 20 CR2d 841 (order vacating judgment confirming arbitration award affected judgment)].



Cross Reference:

Further discussion of stay of proceedings in the trial court pending appeal, see California Forms of Pleading and Practice, Ch. 43, Appeal: Stay of Proceedings (Matthew Bender).

29.09[2] Appeal Period Extended While Seeking to Set Aside Judgment. If a party serves a notice of motion to vacate the judgment during the appeal period set forth in *Cal Rules Ct, Rule 8.104*, the time to appeal from the judgment is extended for all parties. The extended appeal period lasts until the earliest of [*Cal Rules Ct, Rule 8.108(c)*]:

- 30 days after the superior court clerk mails or a party serves an order denying the motion for a notice of entry of that order.
- 90 days after the first notice of the motion is filed.
- 180 days after entry of the judgment.

A motion under *CCP* § 473 has the effect of extending the time for appeal [*English v. IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 135, 114 CR2d 93] .



Warning:

Although a *CCP* § 473(b) motion must be made within a reasonable time not exceeding six months after judgment, in order also to extend the time for filing a notice of appeal from the underlying judgment, a § 473(b) motion must be filed within the more limited parameters of *Cal Rules Ct, Rule 8.104*, which requires filing within 60 days of the entry of judgment [*English v. IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 135-136, 114 CR2d 93 (appeal of summary judgment untimely because motion to vacate filed two weeks after end of appeal period); *In re Marriage of Eben-King & King* (2000) 80 CA4th 92, 108-109, 95 CR2d 113 (motion for relief filed four months after entry of order of dissolution did not extend appeal period on order)].

Example:

Appeal from judgment after trial of a quiet title action was timely when notice was filed within 30 days after entry of an order denying defendant's motion under *CCP* § 473 to vacate the judgment [*Duncan v. Sunset Agric. Minerals* (1969) 273 CA2d 489, 492, 78 CR 339] .

► Cross Reference:

Further discussion of stay of proceedings in the trial court pending appeal, see California Forms of Pleading and Practice, Ch. 43, Appeal: Stay of Proceedings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil
 ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsAppellate JurisdictionLower Court
 JurisdictionCivil ProcedureAppealsReviewabilityTime Limitations



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Chapter 29 Setting Aside Judgments and Orders

III. SETTING ASIDE JUDGMENTS AND ORDERS UNDER CCP § 473(b) DUE TO MISTAKE,
INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLIGENCE, AND RELATED EQUITABLE RELIEF

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.10

29.10 CHECKLIST: Setting Aside Judgments and Orders Under CCP § 473(b) Due to Mistake, Inadvertence, Surprise, and Excusable Neglect, and Related Equitable Relief.

☐ Determine whether the party has grounds for relief.

☐ Determine whether conduct of party or party's attorney falls into category of conduct from which relief may be granted.

☐ Determine if conduct of party or party's attorney constitutes excusable mistake, inadvertence, surprise, or neglect.

Authority:
CCP § 473(b)

Discussion:
See 29.17 -29.21

☐ Determine if conduct of party or party's attorney constitutes extrinsic mistake.

Discussion:
See 29.11[1][e], [f], 29.18 -29.21

☐ Determine if conduct of party's attorney constitutes abandonment of party.

Discussion:
See 29.22[1]

☐ Determine if conduct of party's attorney constitutes mistake, inadvertence, surprise, or neglect.

Discussion:

See 29.23[1]

- ☐ If party has grounds for relief from extrinsic mistake, determine whether the party can show:

- ☐ That the extrinsic mistake deprived the party of his or her day in court in the underlying action.

Discussion:

See 29.12[1]

- ☐ A meritorious case or defense in the underlying action.

Discussion:

See 29.12[4]

- ☐ If party has grounds for relief from attorney's mistake, inadvertence, surprise, or neglect, determine whether:

- ☐ The attorney at fault will provide an affidavit of fault.

Authority:

CCP § 473(b)

Discussion:

See 29.11[1][d]

- ☐ The judgment from which relief is sought is a "dismissal" from which relief may be obtained.

Authority:

CCP § 473(b)

Discussion:

See 29.23[2] -[5]



Determine whether statute of limitation on available grounds has expired.

- ☐ If relief is from party's or party's attorney's excusable mistake, inadvertence, surprise, or neglect, relief must be sought within a reasonable time, not to exceed six months, from the entry of the judgment or order.

Exception:

If opposing party has given sufficient notice in action to determine property rights, relief must be sought within 90 days of entry of judgment or order.

Authority:

CCP § 473(b)

Discussion:

See 29.14[1]

- ☐ If relief is from failure to file expert witness information, relief must be sought promptly after discovery of the failure.

Authority:

CCP § 2034.720

Discussion:

See 29.14[2]

- ☐ If relief is from party's or party's attorney's extrinsic mistake or attorney abandonment, relief must be sought by motion within a reasonable time from the entry of the judgment or order or of the discovery of the mistake, or by separate action within three years of discovery of the mistake.

Exception:

If moving party seeks relief from party's incompetence, relief must be sought within four years of entry of judgment or order.

Discussion:

See 29.14[3], 29.22[2]

- ☐ If relief is from party's attorney's mistake, inadvertence, surprise, or neglect based on the attorney's affidavit of fault, relief must be sought within six months from the entry of the judgment or order.

Authority:

CCP § 473(b)

Discussion:

See 29.23[7]

- ☐ Determine whether the moving party has standing to seek relief on the extant grounds.

Discussion:

See 29.13, 29.23[6]

- ☐ Prepare and file request for relief to which the party may be eligible.

- ☐ If party is eligible for relief from party's or party's attorney's excusable mistake, inadvertence, surprise, or neglect, or attorney abandonment, or attorney's mistake, inadvertence, surprise, or neglect based on the attorney's affidavit of fault, file and prepare a noticed motion in the action in which the judgment or order from which relief is sought was issued.

Authority:

CCP § 473(b)

Discussion:

See 29.15

Forms:

See 29.71 -29.73, 29.75

- If party is eligible for relief from party's or party's attorney's extrinsic mistake or attorney abandonment, file and prepare a noticed motion in the action or a separate action via complaint in which the judgment or order from which relief is sought was issued or file a separate action attacking the judgment or order.

Discussion:

See 29.43, 29.44

Forms:

See 29.80 -29.83

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise



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29.11 Options and Strategies for Moving Party.

29.11[1] Scope of Available Relief From Party's or Party's Attorney's Fault.

29.11[1][a] Distinguish Discretionary Relief From Mandatory Relief Under CCP § 473(b). *CCP § 473(b)* provides for two distinct types of relief, differentiated as discretionary and mandatory from prior actions or proceedings in the trial court. Under the *discretionary* relief provision, on a showing of mistake, inadvertence, surprise, or excusable neglect, the court has discretion to allow relief from a judgment, dismissal, order, or other proceeding taken against a party or his or her attorney. Under the *mandatory* relief provision, on a showing by attorney declaration of mistake, inadvertence, surprise, or neglect, the court must vacate any resulting default judgment or dismissal entered [*Wagner v. Wagner* (2008) 162 CA4th 249, 258-259, 75 CR3d 511] .

Distinguish:

Discretionary relief under *CCP § 473(b)* is available to set aside a voluntary judgments, dismissals, and stipulations [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 255, 121 CR2d 187, 47 P3d 1056] , but mandatory relief is not [*Huens v. Tatum* (1997) 52 CA4th 259, 264-265, 60 CR2d 438] .



Warning:

Relief is not available under *CCP § 473(b)* from judgments rendered in the courts of other states [*Liquidator of Integrity Ins. Co. v. Hendrix* (1997) 54 CA4th 971, 976, 63 CR2d 240 (relief under *CCP § 473(b)* is not a defense under *CCP § 1710.40*, which provides sole basis for relief from judgment of another state)].

29.11[1][b] Discovery Statutes Are Sole Relief When Addressed by Statute and Not CCP § 473(b).

Considering that the legislature intended to incorporate the discretionary principles of *CCP § 473(b)* into the provisions of the Discovery Act that employ similar language, relief under *CCP § 473* is not available when the discovery act provides analogous, if more limited, relief [*Zellerino v. Brown* (1991) 235 CA3d 1097, 1107, 1 CR2d 222] .

Examples:

- The discovery statute providing for relief from a waiver of objection to a discovery request because the party failed to respond to the request due to the party's mistake, inadvertence, or excusable neglect [see *CCP § 2031.300(a)*] is applied using the principles applicable to the discretionary provision of *CCP § 473(b)* [*Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 275, 69 CR2d 112] .

- Relief from failure to include a witness on an expert witness list due to the party's mistake, inadvertence, surprise, or excusable neglect under *CCP § 2034.720* is governed by principles applicable to discretionary relief under *CCP § 473(b)* [see, e.g., *Plunkett v. Spaulding* (1997) 52 CA4th 114, 137, 60 CR2d 377] .

Consider:

CCP § 2033.280(a), providing for relief from waiver of objection to discovery requests by failing to timely respond to them due to mistake, inadvertence, or excusable neglect, employs similar language that likely would be interpreted the same way.

 Cross Reference:

Requirement of filing sufficient response to discovery with application for relief, see 29.12[4].

When the discovery act does not provide a remedy, the provisions of *CCP § 473(b)* provide relief from a discovery sanction due to the party's mistake, inadvertence, surprise, or neglect [*Zellerino v. Brown* (1991) 235 CA3d 1097, 1107, 1 CR2d 222] .

Example:

CCP § 473(b) provides relief from sanctions for failure to timely exchange an expert witness list due to the party's mistake, inadvertence, surprise, or neglect, because the discovery act provides no basis for relief [*Zellerino v. Brown* (1991) 235 CA3d 1097, 1107, 1 CR2d 222] .

29.11[1][c] Four Grounds for Discretionary Relief Under CCP § 473(b). A court, on any just terms, may on application relieve a party or legal representative from a judgment, dismissal, order, or other proceeding taken against the party through one of the following [*CCP § 473(b)*]:

- Mistake.
- Inadvertence.
- Surprise.
- Excusable neglect.

The moving party must affirmatively show that the situation falls within one or more of the foregoing categories, i.e., the party's mistake, inadvertence, surprise, or neglect [see *Kendall v. Barker* (1988) 197 CA3d 619, 623-624, 243 CR 42] .

Prerequisite:

CCP § 473(b) is directed to setting aside valid judgments and orders [People v. One 1941 Chrysler 6 Touring Sedan (1947) 81 CA2d 18, 21, 183 P2d 368] .

Distinguish:

Anything done from the commencement to the termination of an action is a proceeding for purposes of

relief under CCP § 473(b) [*Maynard v. Brandon* (2005) 36 C4th 364, 372, 30 CR3d 558, 114 P3d 795 (mandatory relief); *Zellerino v. Brown* (1991) 235 CA3d 1097, 1105-1106, 1 CR2d 222 (relief under discovery statute)].

Exceptions:

The following categories are not within the discretionary provisions of CCP § 473(b):

- Relief from judgment or order for failing to file an action within the statute of limitations [*Life Savings Bank v. Wilhelm* (2000) 84 CA4th 174, 177, 100 CR2d 657] .
- Relief from failing to timely move to set aside judgment or order under CCP § 473(b) itself [*Arambula v. Union Carbide Corp.* (2005) 128 CA4th 333, 345, 26 CR3d 854 (CCP § 473(b) may not be used to extend six-month limitation on applying under CCP § 473(b))].
- Complying with other jurisdictional requirements [*Maynard v. Brandon* (2005) 36 C4th 364, 372-373, 30 CR3d 558, 114 P3d 795 (request for trial de novo after attorney-fee arbitration under B&P Code § 6203(b)); *Advanced Bldg. Maint. v. State Comp. Ins. Fund* (1996) 49 CA4th 1388, 1393, 57 CR2d 310 (CCP § 473(b) does not apply to untimely motion to vacate judgment under CCP §§ 663, 663a)].

29.11[1][d] Mandatory Relief From Defaults, Default Judgments, and Dismissals Under CCP § 473(b) Is Only Available Based on Attorney's Affidavit of Fault. When the procedural requirements of the mandatory provisions of CCP § 473(b) are met, including the requirement of filing an attorney affidavit of fault [see CCP § 473(b)], relief is mandatory [*English v. IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 140, 114 CR2d 93] . This relief is available only from defaults, default judgments, and dismissals [CCP § 473(b); see *Vandermoon v. Sanwong* (2006) 142 CA4th 315, 320-321, 47 CR3d 772 (limiting definitions of "default" and "default judgment")].

Cross Reference:

Setting aside void defaults and default judgments based on excusable mistake, inadvertence, surprise, or neglect of the party under CCP § 473(b), see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.66, 36.67; or
California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

29.11[1][e] Extrinsic Fraud or Mistake May Be Combined With CCP § 473(b) Motion. If the mistake, inadvertence, surprise, or excusable neglect on which the CCP § 473(b) motion for relief is based may have resulted from extrinsic fraud or mistake, relief may also be in equity. Counsel should consider whether to combine motions for equitable and statutory relief under these circumstances; however, counsel should keep in mind the separate procedural and time limitations requirements of each motion.

29.11[2] Strategies for Relief Based on Party's or Party's Attorney's Fault Under CCP § 473(b).

29.11[2][a] Necessity of Excusable Acts. The exception to the rule that the party's mistake, inadvertence, surprise, or neglect must be excusable in order for relief to be granted [see 29.16] is when it results from total abandonment by the party's attorney [see 29.22]. Although discretionary relief under CCP § 473(b) and equitable relief from extrinsic mistake may both be obtained in both categories of circumstances, equitable relief is much narrower than the discretionary relief under CCP § 473(b), due to the exclusion of relief from "intrinsic mistake" [see 29.11[1][f], 29.17[3][a]], and because it requires the showing of a meritorious case or defense [see 29.12[4]].



Strategic Point--Equity Alternative:

On the other hand, equitable relief is available within a three-year statute of limitation, running from the discovery of the extrinsic mistake, when filed as a separate action [see 29.14[3][b]], while discretionary statutory relief must be sought within a reasonable time not to exceed six months from the entry of judgment or order from which relief is sought, at best [see 29.14[1]]. After the six-month period for discretionary statutory relief has passed, a defendant may still be able to obtain equitable relief based on extrinsic fraud or mistake from a judgment or order [*In re Marriage of Coffin* (1976) 63 CA3d 139, 148-149, 133 CR 583] . Although the grounds on which equitable relief may be granted are somewhat narrower, the procedure is essentially the same [*In re Marriage of Coffin* (1976) 63 CA3d 139, 148-149, 133 CR 583] .



Strategic Point--Alternative After Denial of CCP § 473(b) Motion:

When discretionary relief under CCP § 473(b) is denied on procedural or jurisdictional grounds, such as because it was made more than six months after the judgment, order, or proceeding was taken, the order denying relief is not res judicata, and a subsequent action in equity, or motion filed in the same case, based on equitable grounds, may lie [*Sternbeck v. Buck* (1957) 148 CA2d 829, 831, 307 P2d 970] . To the extent that the grounds were litigated on the merits in the CCP § 473(b) motion, the ruling is res judicata in the subsequent equity proceeding [*Darlington v. Basalt Rock Co.* (1961) 188 CA2d 706, 709-710, 10 CR 556 (involving denial of motion under CCP § 473(b) to vacate and set aside order approving compromise of minor's claim for damages for personal injuries)].

29.11[2][b] Wider Range of Relief If Party's Attorney at Fault. The widest range of relief from a judgment or order results from an attorney's fault. If the attorney will give an affidavit of fault, the mistake, inadvertence, surprise, or neglect of the attorney need not be excusable, and relief is mandatory.



Timing:

Mandatory relief under CCP § 473(b) is available for only a slightly longer limitation period than discretionary relief, namely, six months after entry of the judgment or order from which relief is sought, rather than a reasonable time not to exceed six months from the entry of the judgment or order.

With or without an attorney's affidavit, the discretionary provision of CCP § 473(b) can provide significant relief from judgments and orders.



Strategic Point:

Even with respect to relief from attorney's fault, the remedy afforded under the discretionary provisions of CCP § 473(b) is merely concurrent with the remedy afforded by equity under proper circumstances [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 260, 121 CR2d 187, 47 P3d 1056] . However, equitable relief is much narrower than the discretionary relief under CCP § 473(b), due to the exclusion of relief from intrinsic mistake and because it requires the showing of a meritorious case or defense.

29.11[2][c] Showing Multiple Grounds Based on Party's and/or Party's Attorney's Fault. A motion for relief may be based on more than one ground of mistake, inadvertence, surprise, and neglect [see, e.g., *Billings v. Health Plan of Am.* (1990) 225 CA3d 250, 253, 275 CR 80 (mistake or inadvertence); *Lint v. Chisholm* (1981) 121 CA3d 615, 620, 177 CR 314 (surprise and excusable neglect); *Yarbrough v. Yarbrough* (1956) 144 CA2d 610, 613, 301 P2d 426

(inadvertence, surprise, and excusable neglect)].



Warning:

Rather than treating inadvertence as a distinct ground for relief, courts most often consider it in conjunction with the grounds of excusable neglect [*see, e.g., Lynch v. Spilman* (1967) 67 C2d 251, 258, 62 CR 12, 431 P2d 636] , mistake [*see, e.g., Martin v. Johnson* (1979) 88 CA3d 595, 605, 151 CR 816 (mistake of law); *Martin v. Cook* (1977) 68 CA3d 799, 802, 137 CR 434 (mistake of fact)], or surprise [*see, e.g., Yarbrough v. Yarbrough* (1956) 144 CA2d 610, 613, 301 P2d 426 (inadvertence, surprise, and excusable neglect)]. Unless counsel can show that there were circumstances that would render the mistake, surprise, or negligence excusable, relief may be denied, because mere forgetfulness, such as misfiling or mislaying of plaintiff's complaint and summons, is not a ground for relief [*Kooper v. King* (1961) 195 CA2d 621, 627, 15 CR 848] .



Trap:

Filing a CCP § 473(b) motion on attorney's affidavit of fault after the court denied a CCP § 473(b) motion on the basis of the party's mistake, inadvertence, surprise, or neglect may result in the court finding that the attorney is covering up for the client [*see Todd v. Thrifty Corp.* (1995) 34 CA4th 986, 991-992, 40 CR2d 727 (first affidavit destroys credibility of second)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise



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29.12 Distinguishing Discretionary Statutory Relief Under CCP § 473(b) From Equitable Relief.

29.12[1] Equitable Relief Is Narrower, Requiring Showing of Denial of Day in Court. To the extent that the court's equity power to grant relief differs from its power under *CCP* § 473(b), the equity power must be considered narrower, not wider. A party who seeks to have a default set aside under a court's equity power must make a stronger showing than is necessary to obtain relief under *CCP* § 473(b) [*Gribin Von Dyl & Assocs., Inc. v. Kovalsky* (1986) 185 CA3d 653, 660, 230 CR 50] .

29.12[2] Extent of Court's Discretion on Proper Showing.

29.12[2][a] Statutory Relief Is Within Sound Discretion of Court. On a proper showing of statutory relief under *CCP* § 473(b) based on a party's excusable mistake, inadvertence, surprise, or neglect, relief is addressed to the trial court's sound discretion [*Elston v. City of Turlock* (1985) 38 C3d 227, 233, 211 CR 416, 695 P2d 713 (trial court abused its discretion in denying motion to set aside deemed admissions on ground of excusable neglect); *Burnete v. La Casa Dana Apartments* (2007) 148 CA4th 1262, 1268-1270, 56 CR3d 437] . The trial judge must consider and weigh all the evidence and argument and make a reasoned choice [*Gardner v. Superior Court* (1986) 182 CA3d 335, 338-339, 227 CR 78 (relief granted without proper exercise of discretion)].

Distinguish:

Normally, discretion has no part under *CCP* § 473(b). Rather, its exercise is limited to doubtful cases, when an impartial mind hesitates [*Benjamin v. Dalmo Mfg. Co.* (1948) 31 C2d 523, 526, 190 P2d 593] . Consequently, *CCP* § 473(b) both grants and circumscribes trial court discretion. If a party shows that a judgment has been taken through the party's excusable mistake, inadvertence, surprise, or neglect the court may grant relief or not, in its discretion. However, if a party fails to show that a judgment has been taken against him or her through the party's excusable mistake, inadvertence, surprise, or neglect, the court has no discretion and may not grant relief [*Parage v. Couedel* (1997) 60 CA4th 1037, 1042, 70 CR2d 671] .

29.12[2][b] Exercise of Discretion Under CCP § 473(b) Must Conform to Spirit of Statute. The trial court's discretion under *CCP* § 473(b) is not unlimited, and must be exercised in conformity with the spirit of the law and in a

manner that serves and not impedes or defeats, the ends of substantial justice [*Elston v. City of Turlock* (1985) 38 C3d 227, 233, 211 CR 416, 695 P2d 713] . Thus, although a large amount of discretion is vested in the trial court, the ensuing decision must rest on sound considerations consistent with the showing made for the relief sought [*Benjamin v. Dalmo Mfg. Co.* (1948) 31 C2d 523, 525-526, 190 P2d 593] .

Cross Reference:

Discussion of review of trial court's exercise of discretion, see 29.66.

29.12[3] Equitable Relief Applies Also to Mistake of Adverse or Third Party, but Not to Attorney Mistakes of Law, While Discretionary Statutory Relief Under CCP § 473(b) Applies Only to Act of Party or Counsel.

Although the equitable doctrine of extrinsic mistake can also provide relief from the mistake of an adverse or third party, but does not provide relief from an attorney's mistakes of law, discretionary relief under CCP § 473(b) applies only to mistake, inadvertence, surprise, or excusable neglect of the moving party [see *Don v. Cruz* (1982) 131 CA3d 695, 702, 182 CR 581] or his or her attorney [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 258, 121 CR2d 187, 47 P3d 1056] .

Examples:

The discretionary provision of CCP § 473(b) does not apply to:

- Judicial mistakes [*Consoli Const. Co. v. Pacific Elec. Ry. Co.* (1920) 184 C 244, 247, 193 P 238 ; see *Don v. Cruz* (1982) 131 CA3d 695, 702, 182 CR 581] .

- Mistakes by adverse party [see *Consoli Const. Co. v. Pacific Elec. Ry. Co.* (1920) 184 C 244, 247, 193 P 238] .

Thus, at law and in equity, an attorney's inexcusable neglect is generally chargeable to the client [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 255, 121 CR2d 187, 47 P3d 1056 (relief under CCP § 473(b))], whose remedy is an action against the attorney for malpractice [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 900, 187 CR 592, 654 P2d 775] .

Exception:

The inexcusable neglect of the attorney is not attributable to the client in cases of attorney abandonment of the client [see 29.40].

Cross Reference:

Discussion of mandatory relief based on attorney affidavit of fault, see 29.41.

29.12[4] Equitable Relief Requires Showing of Meritorious Case, Whereas Discretionary Relief Only Requires Prima Facie Showing of Merit. A party seeking equitable relief from a judgment or order due to the party's extrinsic mistake must demonstrate that he or she has a meritorious case or defense [*People v. One Parcel of Land* (1991) 235 CA3d 579, 583-584, 286 CR 739 (meritorious case shown in claim for relief from attorney abandonment); see 29.20[3]]. On the other hand, no affidavit or declaration of merits is to be required of the moving party for discretionary statutory relief under CCP § 473(b) from the party's excusable mistake, inadvertence, surprise, or neglect [*Lipson v. Jordache Enters., Inc.* (1992) 9 CA4th 151, 161, 11 CR2d 271] , although the moving party is required to file proposed pleadings setting forth a prima facie case with the application for discretionary relief [CCP § 473(b); see 29.42[3]].



Timing:

Although courts generally agree that the proposed pleading required for discretionary relief under CCP §

473(b) may be filed any time within the six-month limitations period, they disagree about whether it may be filed after that [see 29.14[1][b]].

Exceptions:

The discovery statute providing relief from a party's failure to object to a discovery request due to the party's mistake, inadvertence, or excusable neglect requires the moving party to also file a response to the request substantially in compliance with *CCP § 2031.210 et seq.*, governing the nature of the response [*CCP § 2031.300(a)*; *Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 275, 69 CR2d 112 (inadequate response is equivalent to no response)].

Similarly, relief from failure to include a witness on an expert witness list due to the party's mistake, inadvertence, surprise, or excusable neglect under *CCP § 2034.720* is dependent on the prompt service of the proposed expert witness information on other parties to the action [*CCP § 2034.720(c)*; *Plunkett v. Spaulding* (1997) 52 CA4th 114, 137, 60 CR2d 377 (information promptly served)].

Consider:

CCP § 2033.280(a), providing for relief from waiver of objection to discovery requests for admissions by failing to timely respond to them due to mistake, inadvertence, or excusable neglect, employs similar language that likely would be interpreted the same way.

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 JudgmentIndependent Actions



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29.13 Who May Apply Differs for Discretionary Statutory Relief and Equitable Relief.

29.13[1] Party, Party's Counsel, or Party's Insurer May Seek Discretionary Statutory Relief Under CCP § 473(b). Only a party or the party's legal representative may seek relief from judgment or order due to the party's mistake, inadvertence, surprise or excusable neglect [CCP § 473(b); *O'Dell v. Freightliner Corp.* (1992) 10 CA4th 645, 658-659, 12 CR2d 774 (employer has no standing in employee's third-party suit); *Roski v. Superior Court* (1971) 17 CA3d 841, 846, 95 CR 312 (employee has no standing in employer's third-party suit)]. When justice requires it, a party in whose favor a judgment has been rendered is entitled to relief from the judgment as well as the party against whom it is rendered [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 255, 121 CR2d 187, 47 P3d 1056] . A party's insurer may seek relief from a judgment or order against the party that it might otherwise be required to satisfy [*Eigner v. Worthington* (1997) 57 CA4th 188, 196 n5, 66 CR2d 808 (relief denied)].

29.13[2] Who May Seek Equitable Relief.

29.13[2][a] Party or Person in Privity With Party May Make Motion or Bring Action for Equitable Relief. A party or person in privity with a party who has been prevented from obtaining a fair adversary hearing through extrinsic or mistake may bring an equitable action to vacate the judgment [*Morton Regent Enters., Inc. v. Leadtec California, Inc.* (1977) 74 CA3d 842, 847, 141 CR 706 ; *People ex rel. Public Utils. Comm'n v. Ryerson* (1966) 241 CA2d 115, 119, 50 CR 246] . Relief is available either by a motion in the action in which the judgment was rendered or in an independent action in equity [see *Morton Regent Enters., Inc. v. Leadtec California, Inc.* (1977) 74 CA3d 842, 847, 141 CR 706] .

29.13[2][b] Third Party May Make Motion or Bring Action for Equitable Relief. A stranger to the proceedings may maintain an action if his or her interests have been adversely affected by the judgment [*Morton Regent Enters., Inc. v. Leadtec California, Inc.* (1977) 74 CA3d 842, 847, 141 CR 706] . The right of a third party to set aside a judgment may depend on extrinsic mistake as well as extrinsic fraud [*Villarruel v. Arreola* (1977) 66 CA3d 309, 318, 136 CR 19] .

A stranger to the proceedings may also seek relief by intervention [*Villarruel v. Arreola* (1977) 66 CA3d 309, 318, 136 CR 19 ; see CCP § 387]. The interest necessary for intervention must involve such an immediate and direct claim

on the very subject matter of the litigation that the intervener will either gain or lose by the direct operation of the judgment that may be rendered [*Hinton v. Beck* (2009) 176 CA4th 1378, 1382-1387, 98 CR3d 612] . Although the interest of the intervener is normally pecuniary, that is not an indispensable element [*People ex rel. Public Utils. Comm'n v. Ryerson* (1966) 241 CA2d 115, 119, 50 CR 246] .



Cross Reference:

Discussion and forms for use in seeking to intervene, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 31, Intervention; or California Forms of Pleading and Practice, Ch. 395, Parties (Matthew Bender).

29.13[2][c] Court May Make Motion for Equitable Relief. The court may grant equitable relief from a party's extrinsic mistake on its own motion, as long as the motion is noticed and a hearing is held on it [see, e.g., *Badella v. Miller* (1955) 44 C2d 81, 86-87, 279 P2d 729 (relief denied because motion not noticed and hearing not held)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityStandingThird Party StandingCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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Chapter 29 Setting Aside Judgments and Orders

III. SETTING ASIDE JUDGMENTS AND ORDERS UNDER CCP § 473(b) DUE TO MISTAKE,
INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLECT, AND RELATED EQUITABLE RELIEF

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29.14 Time for Seeking Relief Differs for Discretionary Statutory Relief and Equitable Relief.

29.14[1] Motion for Discretionary Relief Under CCP § 473(b).

29.14[1][a] Time for Filing Motion for Discretionary Relief Under CCP § 473(b) Generally Is Reasonable Time, Not Exceeding Six Months From Entry of Judgment or Order. An application for discretionary relief must be made within a reasonable time, not exceeding six months, after the judgment, dismissal, order, or proceeding is taken. The six-month limit is mandatory. A court has no authority to grant relief under *CCP* § 473(b) unless an application is made within the six-month period [*Arambula v. Union Carbide Corp.* (2005) 128 CA4th 333, 340, 26 CR3d 854 ; *City & County of San Francisco v. Bullock* (1996) 50 CA4th 1738, 1748, 58 CR2d 482] . Application for relief is considered filed when the notice of motion is filed [see *Puryear v. Stanley* (1985) 172 CA3d 291, 294, 218 CR 196] .



Warning:

When relief is sought from more than one order or a judgment and one or more orders, the filing period begins to run on the entry of the order or judgment entered earliest in time [see *Rutan v. Summit Sports, Inc.* (1985) 173 CA3d 965, 970, 219 CR 381] .

Prerequisites:

The motion must be filed with the court and served on adverse parties to be within the six-month time period [*Arambula v. Union Carbide Corp.* (2005) 128 CA4th 333, 341-342, 26 CR3d 854] . Generally, the six-month period within which the trial judge retains jurisdiction to set aside judgment is not set in motion until an action is taken by the adverse party based on the default or some order of the court is made as a result [*Colburn Biological Inst. v. DeBolt* (1936) 6 C2d 631, 634, 59 P2d 108 ; *Save Our Forest & Ranchlands v. County of San Diego* (1996) 50 CA4th 1757, 1769, 58 CR2d 708 (granting motion filed within six months after adverse party asserted untimeliness of late filed motion for attorney's fees under *Cal Rules Ct, Rule 3.1702(b)*)]. However, one court of appeals pointed out that none of the decisions so ruling determined which of those two points in time controlled, because they did not have to. Facing the question directly, the court ruled that when the relief is sought from the denial of a motion because the motion was untimely, the six-month period for filing the motion for relief runs from

the entry of the denial, rather than the initial notice from the adverse party claiming that the initial motion was untimely [*Lee v. Wells Fargo Bank* (2001) 88 CA4th 1187, 1192-1196, 106 CR2d 726 (affirming relief on motion filed within 6 months after ruling of untimeliness of late filed motion for prejudgment costs under former Cal Rules Ct, Rule 879 (see now *Cal Rules Ct, Rule 3.1700*); see *Berman v. Klassman* (1971) 17 CA3d 900, 908, 95 CR 417 (date of entry, not date of minute order))].

Exceptions:

Relief from judgments and orders due to the inexcusable neglect of the attorney constituting attorney abandonment of the client is subject to time limitations applicable to equitable relief from extrinsic mistake [see 29.40[2]].

A shorter period than six months may apply in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property. Without extending the six-month period, if a written statutory notice is personally served in California on both the party against whom the judgment, dismissal, order, or other proceeding was taken, and on any attorney of record, then the application for relief must be made within 90 days after the later of service of the notice on the defaulting party or the party's attorney of record [CCP § 473(b)].

Consider--"Reasonable Time":

What is a "reasonable time" depends on the facts and circumstances of the case, but requires a showing of diligence in making the motion after the discovery of the default [*Lee v. Wells Fargo Bank* (2001) 88 CA4th 1187, 1200-1201, 106 CR2d 726 (diligence shown); *Adoption of Aaron H.* (2000) 84 CA4th 786, 791, 101 CR2d 45 (no diligence in motion based on party's mistake, inadvertence, surprise, or excusable neglect)]. If there is a delay in filing for relief under CCP § 473(b), the reason for the delay must be substantial and must justify or excuse the delay [e.g., *H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1369, 118 CR2d 71 (trial court properly believed party's explanation that delay was caused by attempt to negotiate settlement); see *Stafford v. Mach* (1998) 64 CA4th 1174, 1181, 75 CR2d 809 (standard)].



Trap:

Some courts deny of relief when there is no satisfactory explanation for a delay of three months or more [see *Caldwell v. Methodist Hosp.* (1994) 24 CA4th 1521, 1524-1525, 29 CR2d 894] .

Exception:

An unexplained delay in moving for relief within the six-month period may not result in a denial of relief if the denial would result in the enforcement of a judgment that is against public policy [see *Berman v. Klassman* (1971) 17 CA3d 900, 909-910, 95 CR 417 (affirming order granting relief despite 93-day unexplained delay, when to allow the judgment to stand might result in usury law violation)].



Strategic Point:

When the defaulting party moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted, the policy of permitting trial on the merits prevails. Only slight evidence is required to justify a court in setting aside the default [*Brochtrup v. INTEP* (1987) 190 CA3d 323, 329, 235 CR 390] .

Distinguish:

Whether the other party is prejudiced does not obviate a showing of compliance with the "reasonable time" requirement in making the motion [see *Stafford v. Mach* (1998) 64 CA4th 1174, 1187, 75 CR2d

809] .



Strategic Point:

A party who asserts an objection that an application for relief was not made within the six-month limit does not waive that limit by appearing at a hearing on the motion to oppose the motion on the merits [*Arambula v. Union Carbide Corp.* (2005) 128 CA4th 333, 344, 26 CR3d 854] .

Examples:

- CCP § 473(b) may not be used to extend six-month limitation on applying for relief from judgments or orders under CCP § 473(b) [*Arambula v. Union Carbide Corp.* (2005) 128 CA4th 333, 345, 26 CR3d 854 (relief denied)].

- Mother exercised diligence in promptly challenging voluntary declaration of paternity of child only after declarant stopped holding the child out as his own and supporting the child after three years of doing so, because she did not understand the legal significance of the declaration [*County of Los Angeles v. Sheldon P.* (2002) 102 CA4th 1337, 1347, 126 CR2d 350 (relief denied)].

29.14[1][b] Courts of Appeal Split on Whether Proposed Pleading May Be Filed After Six-Month Limitation Period. The courts of appeals appear to agree that a required proposed pleading [see 29.23[4]] need not be filed with the notice of motion for relief, but are in conflict as to whether the pleading must be filed within the six-month period.

The Third Court of Appeals has ruled that although a motion for relief from judgment is timely filed, the trial court is without jurisdiction to grant relief when the defendant fails to serve and file the proposed pleading with the motion for relief or within the six-month period prescribed by the statute [*Puryear v. Stanley* (1985) 172 CA3d 291, 293-295, 218 CR 196 (affirmed the order denying relief from on the ground that, although the motion was timely filed, the proposed answer was not filed until after the six-month limitation period had passed)].

In contrast, the Second Court of Appeals ruled that as long as the motion for relief is timely filed within six months of entry of the judgment or order, the proposed pleading may be filed after the six-month period has passed, but must be filed before the scheduled hearing on motion [*Job v. Farrington* (1989) 209 CA3d 338, 340-341, 257 CR 210] . Subsequently, the Fifth Court allowed a party to substantially comply with the "accompanied by" requirement by filing the proposed pleading sufficiently in advance of the hearing to permit the other party to prepare for the hearing [see *County of Stanislaus v. Johnson* (1996) 43 CA4th 832, 838, 51 CR2d 73 (default)]

29.14[2] Time for Filing for Relief From Failure to File Expert Witness Information Under Discovery Statutes Is Promptly After Discovery of Party's Mistake, Inadvertence, Surprise, or Neglect. Relief from failure to include a witness on an expert witness list due to the party's mistake, inadvertence, surprise, or excusable neglect under CCP § 2034.720 requires that the moving party seek relief promptly after discovering the mistake, inadvertence, surprise, or excusable neglect [CCP § 2034.720(b); *Plunkett v. Spaulding* (1997) 52 CA4th 114, 137, 60 CR2d 377 (motion after denial of admission of testimony during trial was prompt)].

29.14[3] Time for Filing for Equitable Relief From Party's Extrinsic Mistake by Motion Differs From Time for Filing Separate Action.

29.14[3][a] Time for Filing Motion for Equitable Relief Is Reasonable Time From Entry of Judgment or Order or Discovery of Party's Extrinsic Mistake. A motion for relief in equity must be filed within a reasonable time from the date the judgment, or the extrinsic fraud or mistake, was discovered, irrespective of when the judgment was

entered [see *Marianos v. Tutunjian* (1977) 70 CA3d 61, 65, 138 CR 529 (rule applies to statutory motions for equitable relief filed in a municipal court applying CCP § 86(b)(3))].

29.14[3][b] Three-Year Statute of Limitation Generally Applies to Action for Equitable Relief From Extrinsic Mistake. When the party's extrinsic mistake is the basis of a suit in equity to vacate, or to secure relief from, a judgment that is not void on its face, the action is governed by a three-year period of limitation that runs from the party's discovery of the extrinsic mistake [CCP § 338(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsGovernmentsLegislationStatutes of LimitationsTime Limitations



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29.15 Moving for Relief Under CCP § 473(b).

29.15[1] Noticed Motion Specifying Requested Relief Must Be Filed. An application for relief from dismissal based on attorney's affidavit of fault requires a noticed motion [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1126, 132 CR2d 680] . The relief sought is to be specified in the notice of motion [*Cal Rules Ct, Rule 3.1110(a)*]; specifically, the opening paragraph of the notice of motion must state the nature of the order being sought and the grounds for issuance of the order [*Cal Rules Ct, Rule 3.110(a)*; *Luri v. Greenwald* (2003) 107 CA4th 1119, 1126, 132 CR2d 680 (trial court did not have to treat motion for discretionary CCP § 473(b) relief to be one for mandatory relief as well)].



Cross Reference:

Form of noticed motion, see 29.71.



Warning:

The trial court is not required to consider the availability of relief under the discretionary or mandatory provisions of CCP § 473(b) in the absence of any request for relief under those grounds. As the trial court may overlook procedural deficiencies in pleadings, it is not precluded from considering a motion under CCP § 473(b) to be one under the mandatory provision. If relief is to be considered, the parties should have fair notice of the possibility of such relief. But when faced with a motion for relief under CCP § 473(b), the trial court does not have to consider the availability of relief under the mandatory provision unless such relief is requested in an appropriate manner [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1126-1127, 132 CR2d 680 (rejecting contention that relief under mandatory provisions should be granted whenever attorney's declaration suggests fault, even if motion is framed solely in terms of excusable neglect)].



Strategic Point:

Counsel seeking relief alternatively under the "excusable" and "attorney fault" provisions should acknowledge that the excusable mistake, inadvertence, surprise, or neglect might be determined

inexcusable by the court [see *Solv-All v. Superior Court* (2005) 131 CA4th 1003, 1012, 32 CR3d 202 (default judgment)].



Timing:

A noticed motion to set aside a judgment or order based on a request for discretionary relief from a party's or attorney's fault must be filed within a reasonable time, not to exceed six months, of the entry of judgment or order [see 29.14[1][a]]. A noticed motion to set aside a judgment or order based on the attorney's affidavit of fault must be filed within six months of the entry of judgment or order [see 29.22[7]].



Strategic Point:

The filing of a *CCP* § 473(b) motion extends the period in which appeal may be filed [see 29.09[2]]. To preserve the right to seek both forms of relief, the *CCP* § 473(b) motion should be filed expeditiously, because the filing of an appeal, even at the end of the extended period in which to do so, removes the trial court's jurisdiction to rule on the *CCP* § 473(b) motion [see 29.02[1]].



Cross Reference:

Making noticed motions, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.39 *et seq.*

29.15[2] Documents Accompanying *CCP* § 473(b) Motion Must Include Affidavits, Notice of Hearing, and Memorandum. The papers filed in support of a motion under *CCP* § 473(b) must include the motion itself, a notice of hearing on the motion, and a memorandum in support of the motion [*Cal Rules Ct, Rule 3.1112(a)*]. Although these may be combined into a single document under a caption specifying their consolidation, all three elements must be present for a valid motion [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1126, 132 CR2d 680] .



Cross References:

Forms of documents accompanying noticed motion, see 29.72, 29.73.

Discussion of supporting memorandum, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.43[5]; or *California Forms of Pleading and Practice*, Ch. 417, Points and Authorities (Matthew Bender).

Affidavits [see *CCP* §§ 2002, 2003, 2009] or declarations under penalty of perjury [see *CCP* § 2015.5] or both, that set forth the facts necessary to establish the grounds of the motion and a showing that the motion is timely must also accompany the application [see *Cal Rules Ct, Rules 3.1100, 3.1103(a)(2), 3.1115, 3.1306*].



Strategic Point:

Objection to an affidavit in support of a motion to vacate that contains hearsay, legal conclusions, or other objectionable contents must be made in the trial court, because failure to object on these grounds in the trial court waives the defects, and the affidavit becomes competent evidence [*In re the Marriage of Kerry* (1984) 158 CA3d 456, 466, 204 CR 660] .

Example:

The application for relief from judgment or order due to excusable neglect resulting from illness of the party [*Davis v. Thayer* (1980) 113 CA3d 892, 905, 170 CR 328 (statement insufficient for relief from

default when it did not state the severity of the condition or in what manner it limited party's activity, and no doctor's declaration confirmed statement)] or the party's attorney [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1129, 132 CR2d 680 (brief reference to "medication-induced fatigue" was insufficient); *Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 286-287, 75 CR 848] must detail the nature of the illness or be accompanied by a doctor's declaration.

29.15[3] Setting Aside Judgment or Order Due to Party's Excusable Mistake, Inadvertence, Surprise, or Neglect May Require Filing Sufficient Proposed Pleadings. The application for relief be accompanied by a copy of the answer or other pleading proposed to be filed, for the application to be granted [CCP § 473(b)]. On hearing the motion, the court's inquiry is limited to whether the pleading contains a statement of facts sufficient to constitute a meritorious claim or defense and the truth concerning the meritorious case is not at issue [see *Ludka v. Memory Magnetics International* (1972) 25 CA3d 316, 323, 101 CR 615] .

Although CCP § 2033.280(a), which authorizes relief from judgments and order resulting from noncompliance with discovery requests, does not expressly include the requirement, the courts have read the CCP § 473(b) requirement of filing pleadings with the motion to require filing the proposed response to the discovery request with a CCP § 2033.280(a) motion [*Brochtrup v. INTEP* (1987) 190 CA3d 323, 333, 235 CR 390] .

In practice, courts require proposed pleadings only when pleadings are at issue. Thus, considering that a motion for discretionary relief under CCP § 473(b) is not limited to cases in which a pleading is the issue [*Spellens v. Spellens* (1957) 49 C2d 210, 226 227-228, 317 P2d 613] , when the judgment resulted from the failure to file a paper other than a pleading, or the filing of a defective paper, a copy of the paper or corrected paper must accompany the notice of motion [*Brochtrup v. INTEP* (1987) 190 CA3d 323, 333, 235 CR 390 (properly verified responses to request for admissions); *Estate of Parks* (1962) 206 CA2d 623, 632, 24 CR 250 (order granting relief in probate case affirmed, although proposed objection to report of inheritance tax appraiser was not filed until after trial court had granted relief but was specified in verified application for relief and in supporting declaration)].



Timing:

While courts generally agree that the proposed pleading may be filed any time within the six-month limitations period, they disagree about whether it may be filed after that [see 29.14[1][b]].

29.15[4] Setting Aside Dismissal Due to Attorney's Fault Requires Filing Attorney's Affidavit of Fault. Relief under the express terms of the mandatory provision of CCP § 473(b) is available only if the application is accompanied by an attorney's sworn affidavit [see CCP §§ 2002, 2003, 2009; *Rodrigues v. Superior Court* (2005) 127 CA4th 1027, 1033, 26 CR3d 194] or declaration [see CCP § 2015.5; *Rodrigues v. Superior Court* (2005) 127 CA4th 1027, 1033, 26 CR3d 194] that his or her mistake, inadvertence, surprise, or neglect resulted in the dismissal against the client. Admission by counsel that the error resulted in the dismissal from which relief is sought is indispensable and is commonly referred to as an "attorney affidavit of fault" [*State Farm Fire & Cas. Co. v. Pietak* (2001) 90 CA4th 600, 608-609, 109 CR2d 256 (trial court not required to grant relief when no such affidavit filed by counsel)].



Warnings:

- The attorney affidavit of fault must clearly state "a straightforward admission of fault" by the attorney to ensure that it will be considered the required proof warranting mandatory relief [*State Farm Fire & Cas. Co. v. Pietak* (2001) 90 CA4th 600, 610, 109 CR2d 256 (declaration referring to supporting memorandum and stating that attorney dismissed state action because he assumed federal action would cover all issues client wanted litigated but not admitting error was insufficient)].

• The trial court assesses the credibility of the attorney's affidavit of fault, and may require testimony of witnesses. Counsel must request a special finding on credibility, if the trial court's ruling hinges on it, to preserve the issue for appeal of the decision on the *CCP* § 473(b) motion [*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 CA4th 613, 622-623, 34 CR2d 26 (issue of credibility not subject to review on appeal due to lack of request for special finding by trial court)].

Strategic Point:



A client represented by more than one lawyer can obtain relief if any one attorney submits affidavit of fault [*Milton v. Perceptual Dev. Corp.* (1997) 53 CA4th 861, 867 & n5, 62 CR2d 98]. The affiant can be licensed in any jurisdiction [*Rodrigues v. Superior Court* (2005) 127 CA4th 1027, 1036-1037, 26 CR3d 194 (Portuguese attorney's affidavit of fault sufficient for relief)].

29.15[5] Notice of Motion, Motion, and Accompanying Papers Must Be Filed With Court and Served on Adverse Party. The party seeking relief must serve on the adverse party's attorney, or on the adverse party if unrepresented, and file with the court, a notice of motion stating the order sought, the grounds for its issuance, and the papers on which the motion is based [see *CCP* §§ 1005(b), 1010-1013, 1015; *Cal Rules Ct, Rules 3.1100, 3.1103(a)(2), 3.1110, 3.1300*].



Timing:

The *CCP* § 473(b) motion and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing, but if service is by mail, the required 16-day period of notice is increased by five calendar days if the place of mailing and place of address are in California, 10 calendar days if either the place of mailing or place of address is outside California but in the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If notice is served by fax, express mail, or other overnight delivery method, the 16-day period is extended by two calendar days [*CCP* § 1005(a)(13), (b)].

Example:

The attorney-client relationship ordinarily continues through disposition of post-trial motions to vacate judgments, so that notice of a *CCP* § 473(b) motion served on an adverse party's attorney of record in the action confers personal jurisdiction over the adverse party for purposes of the motion [*Maxwell v. Cooltech, Inc.* (1997) 57 CA4th 629, 632-633, 67 CR2d 293].

29.15[6] Hearing on Application. A different judge from the judge who entered the judgment or order may hear the motion under *CCP* § 473(b), but in the interests of consistency and efficiency, the better practice is to keep such matters with the same judge [*Elsa v. Saberi* (1992) 4 CA4th 625, 630-631, 5 CR2d 742].

Strategic Point:



A motion for reconsideration may be treated as a motion under *CCP* § 473(b) if it meets the statutory requirements of *CCP* § 473(b) [*Worth v. Asiatic TransPac., Inc.* (1979) 93 CA3d 849, 855-856, 156 CR 110 (motion failed to qualify)].

The mandatory relief provision of *CCP* § 473(b) involves an assessment of credibility by the trial court [see *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 CA4th 981, 998, 47 CR2d 362].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion
PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil
ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview



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29.16 Burden of Proof Is on Aggrieved Party.

Under the discretionary provision of CCP § 473(b) [*Luz v. Lopes* (1960) 55 C2d 54, 62, 10 CR 161, 358 P2d 289 ; *Luri v. Greenwald* (2003) 107 CA4th 1119, 1128, 132 CR2d 680 (excusable neglect)], as well as under equitable principles [see, e.g., *Aheroni v. Maxwell* (1988) 205 CA3d 284, 293, 252 CR 369 (burden not sustained)], the moving party has the burden of showing that the judgment, dismissal, or order was entered through the party's mistake, inadvertence, surprise, or excusable neglect, as the case may be. Under the statute, the moving party must affirmatively show that the situation clearly falls within one of the foregoing categories [see *Kendall v. Barker* (1988) 197 CA3d 619, 623-624, 243 CR 42] . The moving party's burden is to establish his or her position by a preponderance of the evidence [*Luz v. Lopes* (1960) 55 C2d 54, 62, 10 CR 161, 358 P2d 289 ; *Northridge Fin. Corp. v. Hamblin* (1975) 48 CA3d 819, 822, 122 CR 109] .



Strategic Point:

CCP § 473(b) is to be liberally construed, and public policy favors the determination of actions on the merits [*Maynard v. Brandon* (2005) 36 C4th 364, 372, 30 CR3d 558, 114 P3d 795] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview



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29.17 Grounds Requiring Party's Act to Be Excusable.

29.17[1] Mistake, Inadvertence, or Surprise As Well As Neglect Generally Must Be Excusable for Discretionary Statutory Relief. Although "excusable" appears only before the word "neglect" in the discretionary language of *CCP* § 473(b), relief on the other stated grounds can be granted only when the mistake, inadvertence, or surprise is excusable [see *Dill v. Berquist Constr. Co.* (1994) 24 CA4th 1426, 1440, 29 CR2d 746 ; see also, e.g., *Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 898, 187 CR 592, 654 P2d 775 (mistake, inadvertence, or general neglect); *Beeman v. Burling* (1990) 216 CA3d 1586, 1602, 265 CR 719 (surprise)].

29.17[2] Extrinsic Mistake Generally Must Also Be Excusable for Equitable Relief. Setting aside a judgment or order on equitable grounds requires that the extrinsic mistake of the party or the party's attorney be excusable [*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 CA3d 725, 738, 216 CR 300] .

29.17[3] Mistakes by Attorney Are Only Excusable If Anyone Could Have Made Them. In determining whether the attorney's mistake or inadvertence was excusable, the court inquires whether a reasonably prudent person under the same or similar circumstances might have made the same error. The discretionary relief provision of *CCP* § 473(b) only permits relief from attorney error fairly imputable to the client, in that they are mistakes anyone could have made. Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not excusable [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 258, 121 CR2d 187, 47 P3d 1056 (attorney's mistake was excusable); see 29.36[3][c]].

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 JudgmentIndependent Actions



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Chapter 29 Setting Aside Judgments and Orders

III. SETTING ASIDE JUDGMENTS AND ORDERS UNDER CCP § 473(b) DUE TO MISTAKE,
INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLECT, AND RELATED EQUITABLE RELIEF

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.18

29.18 Setting Aside Judgment or Order on Grounds of Party's Mistake.

29.18[1] Mistake Must Be Excusable. A mistake justifying relief under *CCP* § 473(b) may be a mistake of fact or mistake of law [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71] . In general, mere mistake does not warrant relief unless, on a consideration of all the evidence, it is found to be excusable [see *Hearn v. Howard* (2009) 177 CA4th 1193, 1206-1207, 99 CR3d 642] . A party who seeks relief under *CCP* § 473(b) on the basis of mistake must generally demonstrate that the mistake was excusable [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 898, 187 CR 592, 654 P2d 775] .

29.18[2] Relief From Mistake of Fact.

29.18[2][a] Mistake of Fact When Party Understands Facts to Be Other Than They Are. Relief may be had from a judgment, dismissal, or order resulting from reasonable mistakes of fact [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71] .

Distinguish:

A mistake of fact occurs when a person understands the facts to be other than they are [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71] .

➡ Cross Reference:

Definition of mistake of law, see 29.18[3][b].

Examples:

Relief from a party's reasonable mistake of fact has been granted with respect to the following:

- Voluntary dismissal with prejudice [*Salazar v. Steelman* (1937) 22 CA2d 402, 409-410, 71 P2d 79 (plaintiff dismissed her lawsuit regarding a portion of real property, intending to foreclose on a deed of trust that she held, but later learned that a prior trust deed on the property had foreclosed, rendering the security valueless, so court granted motion to vacate the judgment of dismissal); *DeRose v. Heurlin*

(2002) 100 CA4th 158, 167-168, 122 CR2d 630 (trust fund alleged to be held by adverse party to satisfy settlement was in fact not maintained); *H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368-1369, 118 CR2d 71 (party dismissed case for breach of option contract against municipality with which he was negotiating for development on property subject of the lease option)].

- Order striking cost from plaintiff's cost bill [*Spellens v. Spellens* (1957) 49 C2d 210, 226 229, 233-234, 317 P2d 613 (trial court issued an order striking the cost of a transcript from the plaintiff's cost bill on the ground that the item was not allowable because the transcript had not been ordered by the court, and the order was set aside after plaintiff discovered that the court did order the transcript).

Cross Reference:

Examples of setting aside defaults and default judgments based on excusable mistake under CCP § 473(b), see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.66[1][a].

29.18[2][b] Courts Routinely Vacate Judgments Based on Clerical Mistakes of Fact Made by an Attorney or His or Her Staff. The discretionary relief provision of CCP § 473(b) permits relief only from attorney mistakes of fact fairly imputable to the client, in that they are clerical mistakes anyone could have made. Under this standard, courts routinely vacate judgments based on mistakes of fact made by an attorney or his or her staff [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 259, 121 CR2d 187, 47 P3d 1056] .

Examples:

Relief from a attorney's or attorney's staff's clerical mistake of fact has been granted with respect to the following:

- Erroneous substitution of the word "against" for the phrase "in favor of" is a clerical or ministerial mistake that could have been made by anyone. Although counsel's failure to review the document before sending it was imprudent, that imprudence did not render the mistake inexcusable under the circumstances [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 259, 121 CR2d 187, 47 P3d 1056 (contract law principles do not limit relief from accepted compromise under CCP § 998 before actual dismissal pursuant to agreement)].

- An associate misinterpreted the instructions of the lead attorney and gave incorrect information at a hearing [*Bergloff v. Reynolds* (1960) 181 CA2d 349, 358-359, 5 CR 461 (dismissal for delay properly vacated)].

29.18[2][c] Lack of Actual Mistake of Fact Bars Relief. Relief from a party's reasonable mistake of fact has been denied due to lack of mistake with respect to the following:

- Father who failed to apply for determination under *Fam Code* § 7662 of paternity within 30 days of later of service of notice or birth of the child because he was not sure child was his [*Adoption of Aaron H.* (2000) 84 CA4th 786, 791, 101 CR2d 45] .

- A party who has not requested special notice and who receives constructive notice under *Prob Code* §§ 8110, 8120 of the probate of an estate but not actual notice is not entitled to relief from mistake under CCP § 473(b) [*Parage v. Couedel* (1997) 60 CA4th 1037, 1042-1044, 70 CR2d 671] .

- Alleged breach of a settlement agreement accepted under CCP § 998 is not grounds for relief on the basis of mistake of the party relying on it [*Basinger v. Rogers & Wells* (1990) 220 CA3d 16, 23, 269 CR 332] .

29.18[3] Relief From Mistake of Law Only Permitted Under CCP § 473(b).**29.18[3][a] Mistake of Law That Is Reasonable Is Grounds for Discretionary Relief Under CCP § 473(b).**

Relief may be had under *CCP* § 473(b) from a judgment, dismissal, or order resulting from mistakes of law that are reasonable, but a mistake as to the law does not require relief as a matter of law [*City of Ontario v. Superior Court* (1970) 2 C3d 335, 346, 85 CR 149, 466 P2d 693 ; *A & S Air Conditioning v. John J. Moore Co.* (1960) 184 CA2d 617, 620, 7 CR 592] .

Distinguish:

A mistake of law occurs when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts [*In re Marriage of Mansell* (1989) 217 CA3d 219, 234, 265 CR 227] . The mistake must relate to the law at the time of the original proceeding; a lack of a mistake of law at the time is fatal to a claim for relief [see *In re Marriage of Mansell* (1989) 217 CA3d 219, 234, 265 CR 227 (party was correct about law at the time)].

29.18[3][b] Mistake of Law Must Be Excusable. The issue of whether a mistake of law is excusable presents a fact question [*City of Ontario v. Superior Court* (1970) 2 C3d 335, 346, 85 CR 149, 466 P2d 693 ; *Miller v. City of Hermosa Beach* (1993) 13 CA4th 1118, 1136, 17 CR2d 408] , the determining factors of which are the reasonableness of the misconception and the justifiability of the attorney's failure to determine the correct law [*City of Ontario v. Superior Court* (1970) 2 C3d 335, 346, 85 CR 149, 466 P2d 693 ; *State Farm Fire & Cas. Co. v. Pietak* (2001) 90 CA4th 600, 611, 109 CR2d 256] .

Reasonable Misconception:

The court inquires whether a reasonably prudent person under the circumstances might have made the same error of law. The reasonably prudent person standard gives the attorney the benefit of relief only when the mistake might ordinarily be made by a person with no special training or skill [*Roden v. Bergen Brunswick Corp.* (2003) 107 CA4th 620, 634-635, 132 CR2d 549] .

Example:

Failure to include provisions for attorney's fees and costs in an offer to compromise under *CCP* § 998 is not the type of mistake ordinarily made by a person with no special training or skill [*Roden v. Bergen Brunswick Corp.* (2003) 107 CA4th 620, 634-635, 132 CR2d 549 ; *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 671, 73 CR2d 242 (motion to set aside award of attorney's fees outside of silent compromise agreement granted to adverse party)].

Distinguish:

A mistake of law may be excusable when made by a layperson, but not when made by an attorney [*Tammen v. County of San Diego* (1967) 66 C2d 468, 479, 58 CR 249, 426 P2d 753] .

29.18[3][c] Mistake of Law Must Prevent Party From Presenting Case in Court or Arise From Complex and Debatable Issue. To warrant relief under *CCP* § 473(b), the attorney's mistake of law must prevent a party from presenting his or her case in court [see *Gunter v. Lomas & Nettleton Co.* (1983) 140 CA3d 460, 466, 189 CR 470 (trial court did not err in denying relief from order striking unauthorized pleading)], or result from an honest and reasonable mistake of law on a complex and debatable issue that resulted in the judgment or order against the client [*City of Ontario v. Superior Court* (1970) 2 C3d 335, 346, 85 CR 149, 466 P2d 693 (trial court did not abuse its discretion in relieving plaintiffs from their mistake of law resulting in failure to comply with certain statutory requirements for publication of summons in action against city); *State Farm Fire & Cas. Co. v. Pietak* (2001) 90 CA4th 600, 611, 109 CR2d 256 (complexity of whether to assert cross-claims in interpleader action under *CCP* §§ 386, 426.30(a) or separate action)].

Examples:

- Counsel's interpretation of law as not requiring witness to be added to expert witness list was reasonable in light of question of first impression on complex and debatable issue, so relief from exclusion of testimony was appropriate under *CCP* § 2034.720 [*Plunkett v. Spaulding* (1997) 52 CA4th 114, 137, 60 CR2d 377] .

- In a mandate proceeding under the California Environmental Quality Act [see PR Code § 21000 et seq.], relief was granted from dismissal for noncompliance with PR Code § 21167.4 for failure to request a hearing within 90 days of filing the petition as a result of the attorney's reasonable mistake of law on a complex and debatable issue that resulted in her request for hearing being insufficient [*Miller v. City of Hermosa Beach* (1993) 13 CA4th 1118, 1136, 17 CR2d 408 (order denying relief reversed); *McCormick v. Board of Supervisors* (1988) 198 CA3d 352, 360, 362, 243 CR 617 (order denying relief reversed)].

- Relief from summary judgment for plaintiff based primarily on matters deemed admitted arising from improper response to plaintiff's request for admissions resulting in improper response was granted based on mistake of law [*Brochtrup v. INTEP* (1987) 190 CA3d 323, 329, 235 CR 390 (vacating order denying motion to set aside summary judgment, granting motion, and ordering the filing of defendants' responses that were attached to motion for reconsideration, subsequently filed by substituted attorney, and properly verified)].

29.18[3][d] Mere Ignorance of Law Due to Negligence in Ascertaining It Does Not Constitute Excusable Mistake of Law. If the court finds that the alleged mistake of law is the result of professional incompetence based on erroneous advice, general ignorance of the law, lack of knowledge of the rules, unjustifiable negligence in the discovery or research of the law, laxness, or indifference, relief is normally denied [*State Farm Fire & Cas. Co. v. Pietak* (2001) 90 CA4th 600, 611, 109 CR2d 256 ; see *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 671, 73 CR2d 242 (reasonably prudent person standard gives an attorney the benefit of such relief only when the mistake is one which might ordinarily be made by a person with no special training or skill); see also 29.18[3][c]].

Exception:

If competent research would have only "made more severe the complexity presented by" the state of the law, the attorney's failure "to discover reasons for more confusion" will not preclude relief for the attorney's fault in pursuing the incorrect procedural path [*State Farm Fire & Cas. Co. v. Pietak* (2001) 90 CA4th 600, 614, 109 CR2d 256 (relief granted even though attorney failed to research or investigate the question with sufficient care to discover the uncertainties in the law)].

Examples:

- Relief is not available from waiver of objection to discovery request under *CCP* § 2031.300(a) when counsel failed to invoke attorney-client privilege in initial response to discovery request under *CCP* § 2031.210 et seq., due to counsel's tactical choices [*Scottsdale Ins. Co. v. Superior Court* (1997) 59 CA4th 263, 274-276, 69 CR2d 112] .

- Plaintiffs' failure to make an effort to ascertain the validity of their erroneous belief regarding mootness of defendant's motion to dismiss on the filing of the defendant's demurrer against the belatedly filed amended complaint was an inexcusable mistake of law [*Robbins v. Los Angeles Unified Sch. Dist.* (1992) 3 CA4th 313, 319, 4 CR2d 649] .

- Order denying motion to set aside summary judgment on grounds of inadvertence and mistake in

filing affidavits based on hearsay in response to summary judgment motion was affirmed [*Martin v. Johnson* (1979) 88 CA3d 595, 605, 151 CR 816] .

29.18[3][e] Mistake of Law Does Not Have to Be Mutual. There is no requirement that the mistake of law be mutual in order for relief to be granted [*A & S Air Conditioning v. John J. Moore Co.* (1960) 184 CA2d 617, 620, 7 CR 592] .

29.18[3][f] Mistake of Law Bars Equitable Relief. When a party's attorney knows the facts but mistakenly interprets their legal significance, the mistake is intrinsic and does not warrant relief. An attorney's mistake will not provide the basis for relief unless it was caused by the party's adversary [*Janetsky v. Avis* (1986) 176 CA3d 799, 811, 804, 222 CR 342 ; *In re Marriage of Guardino* (1979) 95 CA3d 77, 93, 156 CR 883] . Thus, mistaken legal advice from a party's own attorney is intrinsic, rather than extrinsic, mistake, and does not justify setting aside a final judgment [*In re Marriage of Guardino* (1979) 95 CA3d 77, 93-94, 156 CR 883] .

Examples:

- A client whose attorney did not further investigate the taxability of income from foreign assets to be disposed to the client in a divorce proceeding because another law firm told the attorney that the income was not taxable was denied relief from the order of distribution disposing of the assets [*Kulchar v. Kulchar* (1969) 1 C3d 467, 473-474, 82 CR 489, 462 P2d 17] .

- Extrinsic mistake is not established by the inclusion of patently ambiguous language for division of property in a dissolution judgment that is based on a marital termination agreement drafted by the attorney for the party claiming equitable relief [*In re Marriage of Dorris* (1984) 160 CA3d 1208, 1213, 207 CR 160 (provision that each party will receive "a share" of personal property)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake



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29.19 Setting Aside Judgment or Order on Grounds of Party's Inadvertence.

29.19[1] Inadvertence Is Unheedfulness, Inattentiveness, or Negligence. A party's inadvertence resulting in a judgment or order from which relief may be had under *CCP* § 473(b) consists of (1) a lack of heedfulness or attentiveness, inattention, or (2) fault from negligence [*Pacific Lining, Inc. v. Raging Waters, Inc.* (1991) 231 CA3d 1388, 1398, 282 CR 769 (inattentiveness inexcusable); see *Dingwall v. Vangas, Inc.* (1963) 218 CA2d 108, 113, 32 CR 351] .

29.19[2] Inadvertence Must Be Excusable. Mere inadvertence does not warrant relief from a judgment or order, unless it is excusable after a consideration of all the evidence [see *Martin v. Taylor* (1968) 267 CA2d 112, 113, 72 CR 847] . The inadvertence must be the act of a reasonably prudent person [see *Pacific Lining, Inc. v. Raging Waters, Inc.* (1991) 231 CA3d 1388, 1398, 282 CR 769] . The reasons, the causes, and the excuses for the inadvertence are matters that concern the court. Inadvertence in the abstract is no plea on which to set aside a judgment or order. The moving party must acquaint the court with the reasons for the inadvertence and, if satisfactory, the court will act on them and relieve the party from the burdens caused by them. If the inadvertence is inexcusable, however, as when it arises from gross negligence, the court will not grant relief [see *Kendall v. Barker* (1988) 197 CA3d 619, 624, 243 CR 42 (default)].

Example:

A party who has not requested special notice and who receives constructive notice under *Prob Code* §§ 8110, 8120 of the probate of an estate but not actual notice is not entitled to relief from inadvertence under *CCP* § 473(b) [*Parage v. Couedel* (1997) 60 CA4th 1037, 1042-1044, 70 CR2d 671] .

29.19[3] Legal Disability of Party May Be Excusable Inadvertence. A party who suffers a judgment or order due to that party's legal disability may be able to obtain relief from the judgment or order. Discretionary statutory relief under *CCP* § 473(b) or equitable relief has been granted for the following disabilities:

- Incompetence [*Zastrow v. Zastrow* (1976) 61 CA3d 710, 714, 132 CR 536 (equitable relief but neither extrinsic mistake nor extrinsic fraud)].

- Incarceration [*Humes v. MarGil Ventures, Inc.* (1985) 174 CA3d 486, 499-500, 220 CR 186 (extrinsic mistake)].

- Inability to speak English [*Berri v. Rogero* (1914) 168 C 736, 739, 145 P 95 (inadvertence, surprise, and excusable neglect under CCP § 473(b)); *Watson v. Watson* (1958) 161 CA2d 35, 36-39, 325 P2d 1011 (equitable relief for ignorance, mistake, and inadvertence)].



Strategic Point:

Courts have not consistently identified the same grounds, among mistake, inadvertence, surprise, and neglect, as those on which relief due to legal disability are based. Some courts have considered disability to be a separate category of equitable relief from extrinsic fraud or mistake altogether. Generally, counsel for the moving party should argue those grounds cited in the case or cases most factually similar to the facts of the party's case. However, the court in *Zastrow* took the position that, as a separate category from extrinsic fraud or mistake, equitable relief from disability is subject not to the three-year limitation period for fraud or mistake, but to the general four-year statute of limitation [see 29.33[3][b]]. If the three-year limitation period on a separate action has run, counsel for the moving party should argue disability is grounds for relief separate from extrinsic fraud or mistake, subject to the longer limitation period.



Cross Reference:

Adverse party's concealment of party's disability as constituting extrinsic fraud from which relief may be granted, see 29.24[5].

29.19[4] Mere Forgetfulness Is Not Excusable Inadvertence. Mere forgetfulness is not a sufficient ground for relief under CCP § 473(b) [*Pacific Lining, Inc. v. Raging Waters, Inc.* (1991) 231 CA3d 1388, 1398, 282 CR 769 (failing to have signing party indicate who he was signing for)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertence



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29.20 Setting Aside Judgment or Order on Grounds of Party's Surprise.

29.20[1] Party Must Not Foresee Surprise Through Ordinary Prudence. A party's surprise resulting in a judgment or order from which relief may be had under *CCP* § 473(b) consists of some condition or situation in which a party is unexpectedly placed to his or her injury, without any fault or negligence, that ordinary prudence could not have guarded against [*Eigner v. Worthington* (1997) 57 CA4th 188, 199, 66 CR2d 808] .

Example:

Service of an amended complaint that added unanticipated new claims two days before trial constituted surprise [*Lipson v. Jordache Enters., Inc.* (1992) 9 CA4th 151, 161, 11 CR2d 271] .

➡ Cross Reference:

Examples of setting aside void defaults and default judgments based on surprise, or neglect of the party under *CCP* § 473(b), see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 36.66[3].

California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

29.20[2] Surprise Does Not Always Arise From Lack of Notice. Failure to receive a notice will not always constitute surprise from which relief will be available [*Lint v. Chisholm* (1981) 121 CA3d 615, 620, 177 CR 314] .

Example:

Neither surprise nor excusable neglect is established when the defendant's failure to receive notice of trial, which resulted in a judgment for plaintiff, was caused by the defendant's failure to notify the court of a change of address or otherwise arrange for the forwarding of mail [*Lint v. Chisholm* (1981) 121 CA3d 615, 620, 177 CR 314 (trial court properly denied motion to vacate dismissal entered on defendant's failure to appear at trial)].

29.20[3] Circumstances That Should Have Alerted Party of Need to Defend Do Not Constitute Surprise.

Circumstances that should alert a reasonable person to the need to further investigate the possibility of adverse judgment or order do not constitute surprise [*Eigner v. Worthington* (1997) 57 CA4th 188, 196 n5, 66 CR2d 808] .

Example--Reasonable Person:

A complaint that alleges causes of action for assault, harassment, stalking, obscene and threatening telephone calls, and factual allegations of gun use and threats to strangle and kill, causing mental and emotional distress, embarrassment and humiliation, and other injuries according to proof at trial should have on its face alerted a reasonable insurer to the need to further investigate whether it might be liable under a policy covering liability for personal injury [*Eigner v. Worthington* (1997) 57 CA4th 188, 196 n5, 66 CR2d 808 (relief from judgment denied)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise



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29.21 Setting Aside Judgment or Order on Grounds of Party's Neglect.

29.21[1] Neglect Must Be Excusable. A party's neglect resulting in a judgment or order from which relief may be had must under the terms of *CCP* § 473(b) be excusable [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1128, 132 CR2d 680 (moving party has burden of proof)]. To be excusable, the neglect must have been the act or omission of a reasonably prudent person under the same circumstances [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1128, 132 CR2d 680] .

Exception:

The inexcusable neglect of the attorney is not attributable to the client in cases of attorney abandonment of the client [see 29.22].

Example:

An order vacating summary judgment on grounds of excusable neglect of attorneys in trying but failing to get a substitute attorney to request a continuance of hearing on summary judgment was affirmed [*Lynch v. Spilman* (1967) 67 C2d 251, 257, 62 CR 12, 431 P2d 636] .

29.21[2] Reasonable Reliance on Third Party to Defend May Be Excusable Neglect. The neglect to act to prevent entry of a judgment or order may constitute excusable neglect when it was due to the defendant's reasonable reliance on a third party to defend [see, e.g., *Weitz v. Yankosky* (1966) 63 C2d 849, 855, 48 CR 620, 409 P2d 700 (relief in equity on ground of extrinsic mistake)]. A defendant who relies on a codefendant or employer to defend the action need show only that the reliance was reasonable without inquiring into the conduct of the codefendant or employer [see *Don v. Cruz* (1982) 131 CA3d 695, 700, 182 CR 581] .

Distinguish:

The neglect of a defendant's insurer to defend after the defendant notified the insurer of the action and service of process is imputed to the defendant who must show not only reasonable reliance on the carrier to defend, but justification for the carrier's inaction as well, i.e., that the insurer's failure was excusable [see *Don v. Cruz* (1982) 131 CA3d 695, 702, 182 CR 581] .

29.21[3] Reasonable Reliance on Misinformation May Be Excusable Neglect. Under CCP § 473(b), neglect to act to prevent entry of an adverse judgment may constitute excusable neglect when it was due to the defendant's reasonable reliance on misrepresentations made by the opposing party or his or her attorney [see *Nelson v. Southerland* (1960) 187 CA2d 140, 141-142, 9 CR 735] .

Statutory relief may also be granted on the ground of excusable neglect when a party's failure to appear at trial was due to reliance on misinformation provided by a court officer [see *Lynch v. De Boom* (1915) 26 CA 311, 314, 146 P 908 (reversing order denying motion to vacate judgment of dismissal on ground that plaintiff's failure to appear at trial resulted from excusable neglect in relying on misinformation given to him by courtroom clerk)].

29.21[4] Illness of Party or Party's Attorney May Be Excusable Neglect. Under CCP § 473(b), illness of the party [see *Davis v. Thayer* (1980) 113 CA3d 892, 909, 170 CR 328 (default)] or the party's attorney [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 280, 75 CR 848 (reversing order setting aside default and default judgment)] that actually disables the party or the attorney from timely compliance with the rules of procedure is excusable neglect if the motion for relief is made as soon as the disability terminates or attenuates to the extent that a reasonable person under similar conditions would take action for relief.

Equitable relief may also be available if, without the client's knowledge or fault, the attorney becomes physically or mentally incapacitated leading to a damaging result in pending litigation. In a situation in which the circumstances could not reasonably have been anticipated or avoided by the exercise of due diligence, equity may set aside the judgment [see *McCreadie v. Arques* (1967) 248 CA2d 39, 45, 56 CR 188 (relief denied)].

Example--Reasonable Person:

The court will examine the nature of the illness and then consider if the illness was so disabling that the neglect consisted only of acts or omissions that a reasonably prudent practitioner in similar circumstances would commit [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 286-287, 75 CR 848] . Mental confusion or illness of the party moving to set aside an order supports granting the motion, and a court may infer the existence of such problems from the whole record [*In re the Marriage of Kerry* (1984) 158 CA3d 456, 466, 204 CR 660] .



Warning:

The application for relief from judgment or order due to excusable neglect resulting from illness of the party [see *Davis v. Thayer* (1980) 113 CA3d 892, 905, 170 CR 328 (statement insufficient that did not state severity of condition or in what manner it limited party's activity, and no doctor's declaration confirmed statement)] or the party's attorney [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1129, 132 CR2d 680 (reference to "medication-induced fatigue" was insufficient); *Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 286-287, 75 CR 848] must detail the nature of the illness or be accompanied by a doctor's declaration.

If the neglect consisted of both excusable and inexcusable acts or omissions, the court will consider which part caused the default [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 286-287, 75 CR 848] .

29.21[5] Counsel Overburdened by Multitude of Circumstances May Be Excusable Neglect. Excusable neglect may result from a combination of multiple factors overburdening the party's counsel [*Contreras v. Blue Cross of California* (1988) 199 CA3d 945, 951, 245 CR 258] . The circumstances must exceed the mere press of business [*Robbins v. Los Angeles Unified Sch. Dist.* (1992) 3 CA4th 313, 319, 4 CR2d 649] .



Cross Reference:

See 29.39[9].

Example:

In a case involving multiple plaintiffs, numerous causes of action, and a complex and developing field of law, plaintiffs' attorney submitted a detailed declaration in support of a motion for relief from dismissal for failure to have timely filed an amended complaint listing the following factors that were sufficient to establish excusable neglect [*Contreras v. Blue Cross of California* (1988) 199 CA3d 945, 951, 245 CR 258] :

- Counsel was the sole counsel from her firm assigned to the case.
- 58 individual plaintiffs remained active members of the lawsuit.
- Her firm broke up the month before the amended complaint was due, leaving three attorneys with the work of five.
- The same month, she received an appellate opinion that required her to prepare a petition for hearing to the Supreme Court.
- She conferred with 40 of the plaintiffs to prepare answers to interrogatories due the same day the amended complaint was due.
- The issues raised by the case and the prior demurrer were complex.
- 10 days before the amended complaint was due, she fractured her right elbow and wrist, leaving her in a sling and substantially impairing her mobility and writing ability.
- On the day the amended complaint was due she tried to obtain an extension of time from a court commissioner who refused to entertain it.

In this case, the court rejected defendant's claim that defendant should have been allowed to depose plaintiffs' counsel and subpoena her files to impeach her claim of workload [*Contreras v. Blue Cross of California* (1988) 199 CA3d 945, 951, 245 CR 258] .

29.21[6] Inexcusability of Neglect Bars Relief. Neglect that is inexcusable may not be the basis for setting aside a judgment or order under CCP § 473(b) [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 900, 187 CR 592, 654 P2d 775 ; see *Cruz v. Fagor America, Inc.* (2007) 146 CA4th 488, 508-509, 52 CR3d 862].

Neglect that is inexcusable may not be the basis for setting aside a judgment or order under CCP § 473(b) merely because the other side has not been prejudiced [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 900, 187 CR 592, 654 P2d 775] .

Exception:

The inexcusable neglect of the attorney may be the basis for relief in cases of attorney abandonment of the client [see 29.21].

Example:

Defendant's attorney assumed opposing counsel had granted extensions of time to file papers because, in an effort to request such extensions, the attorney had placed telephone calls to, but did not speak with, and had written letters to, but did not receive any answers from, opposing counsel [see *Iott v. Franklin* (1988) 206 CA3d 521, 531, 253 CR 635 (reversing order granting relief from default)].

► Cross References:

Examples of denial of relief from defaults and default judgments based on inexcusable neglect of the party under *CCP* § 473(b), see California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders (Matthew Bender).

29.21[7] Failure to Advance Legal Arguments Properly Is Inexcusable Neglect. The advancement of arguments by counsel is the essence of the attorney's professional responsibilities; the failure to do so appropriately is not excusable [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1129, 132 CR2d 680] .

Examples:

- Failure to file opposition papers, or file opposition papers on time, is not excusable in the absence of some other explanation [*Luri v. Greenwald* (2003) 107 CA4th 1119, 1129, 132 CR2d 680 (summary judgment)].

- A mere showing, in an effort to set aside a summary judgment, that the opposing party's attorney had negligently failed to present a particular argument in the papers that the attorney filed in opposition to the motion for summary judgment is inexcusable negligence [*Garcia v. Hejmadi* (1997) 58 CA4th 674, 684-685, 68 CR2d 228] .

29.21[8] Repeated Clerical Errors May Be Inexcusable Neglect. The courts may excuse an attorney's neglect caused by clerical errors of the attorney's office staff [see 29.17[2][b]]. However, if repeated clerical errors demonstrate that the "tactics of counsel for respondents was to proceed with all deliberate delay," the court may deny relief from a consequent judgment or order [*Davis v. Kay* (1973) 34 CA3d 680, 682-684, 110 CR 198] .

Example:

The appellate court reversed an order granting a motion to vacate a summary judgment for plaintiff based on the neglect of defendants' attorney's secretary to calendar the date of the hearing on the summary judgment motion, because [*Davis v. Kay* (1973) 34 CA3d 680, 682-684, 110 CR 198] :

- A default judgment in the same action had been set aside for excusable neglect attributable to the same secretary's mistake in recording the date for the answer to be filed.

- The secretary's declaration supporting the motion to vacate the summary judgment admitted that the attorney handling the case had examined the summary judgment motion and its contents when it was received, knew or could have known without effort that it was to be heard in just 10 days, and that the points and authorities and exhaustive declarations with extensive exhibits attached to the motion would require substantial time for preparation of answers.

- Defendants' attorneys were notified of the court's adverse ruling on the summary judgment motion two days after it was made and took no action to vacate it for another 23 days.

29.21[9] General Press of Business on Party's Attorney Is Inexcusable Neglect. The attorney's neglect caused merely by the press of other business or similar procrastination will not support the client's motion for relief based on excusable neglect under *CCP* § 473(b), absent some further showing of excuse [*Robbins v. Los Angeles Unified Sch. Dist.* (1992) 3 CA4th 313, 319, 4 CR2d 649 (relief denied)]. However, press of business coupled with unusual circumstances may justify relief [see 29.20[5]].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable Neglect



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Cathcart Durie McGee Prather

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Chapter 29 Setting Aside Judgments and Orders

III. SETTING ASIDE JUDGMENTS AND ORDERS UNDER CCP § 473(b) DUE TO MISTAKE,
INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLIGENCE, AND RELATED EQUITABLE RELIEF

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29.22 Relief From Judgment or Order Due to Attorney Abandonment.

29.22[1] Attorney Abandonment Is Grounds for Relief.

29.22[1][a] Attorney Abandonment Amounting to Positive Misconduct May Be Grounds for Relief. As an exception to the rule that an attorney's neglect attributable to the client must be excusable, in order for relief to be available [see 29.20[1]], relief may be granted if the attorney's neglect amounts to positive misconduct by which the moving party was effectually and unknowingly deprived of representation, and the person seeking relief is relatively free from negligence [see *Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 898, 187 CR 592, 654 P2d 775] .



Strategic Point--Opposing Party.

Relief for attorney abandonment is narrowly applied to guard against negligent attorneys rescuing clients from defaults and themselves from malpractice liability by indulging in incompetence and professional irresponsibility while, nonetheless, maintaining a attorney-client relationship [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 900, 187 CR 592, 654 P2d 775] .

29.22[1][b] Misconduct Must Obliterate Existence of Attorney-Client Relationship. Positive misconduct is when there is a total failure on the part of counsel to represent the client [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 900, 187 CR 592, 654 P2d 775] . Relief for attorney abandonment is conditioned on a showing that the attorney's conduct has obliterated the existence of the attorney-client relationship [*Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 205, 86 CR2d 229] , so that the attorney's inexcusable negligence should not be imputed to the client [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 898, 187 CR 592, 654 P2d 775] , because there is no attorney whose neglect is attributable to the client [*Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 205, 86 CR2d 229] .

29.22[1][c] Client's Neglect Must Not Prejudice Adverse Party. The abandoned client seeking relief must be free from negligence [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 898, 187 CR 592, 654 P2d 775 ; *Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 205, 86 CR2d 229] . The client will not be charged

with responsibility for misconduct if the client acts with due diligence in moving for relief after discovering the attorney's neglect [*Russell v. Dopp* (1995) 36 CA4th 765, 776, 42 CR2d 768] .

Example:

Clients are not expected to be aware of statutory deadlines for bringing a case to trial, so the fact that a client waited two years before inquiring of the attorney does not preclude relief for attorney abandonment, when motion for relief was made two weeks after client found out about dismissal [*Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 206, 86 CR2d 229 (dismissal under CCP § 583.420)].

The court must balance that freedom from neglect with the concern that the defendant would be prejudiced by allowing the case to proceed [*Russell v. Dopp* (1995) 36 CA4th 765, 776, 42 CR2d 768] .

Example:

Granting relief from failure to bring challenge to administrative decision to trial would not prejudice administrative agency, because administrative decision was purely application of law, so no evidentiary problems develop through passage of time [*Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 207, 86 CR2d 229 (relief from dismissal under CCP § 583.420 granted)].

29.22[1][d] Relief Allowed From Discretionary Dismissal, but Not From Mandatory Dismissal. The courts must consider whether the dismissal was discretionary or mandatory [*Daley v. County of Butte* (1964) 227 CA2d 380, 394, 38 CR 693] .

Examples:

- The public policy against delay in prosecution is not as strong in a case under the two-year discretionary provision in CCP § 583.420 as in a case dismissed under the mandatory five-year rule of CCP § 583.310 [*Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 206, 86 CR2d 229 (relief from dismissal under CCP § 583.420 granted); *Fleming v. Gallegos* (1994) 23 CA4th 68, 70, 28 CR2d 350 (denial of relief from discretionary dismissal reversed)].

- Attorney abandonment is not grounds for relief from a contested mandatory dismissal under CCP § 583.240 [*Shipley v. Sugita* (1996) 50 CA4th 320, 327, 57 CR2d 750 (granting relief would penalize adverse party with an extension of the mandatory limitation period due to the misconduct of the moving party's attorney)].

29.22[1][e] Court Must Balance Protection of Client From Attorney With Making Attorney Suffer Consequences of Incompetence. The courts must balance the policy that an innocent client should not suffer from its attorney's gross negligence against the policy that a grossly incompetent attorney should not be relieved from the consequences of his or her incompetence [*Fleming v. Gallegos* (1994) 23 CA4th 68, 75, 28 CR2d 350] .

29.22[2] Relief Either Under CCP § 473(b) or in Equity. Relief from the client's mistake in believing the attorney was properly representing the client may be had either by a timely motion under CCP § 473(b) [*Carroll v. Abbott Labs., Inc.* (1982) 32 C3d 892, 900, 187 CR 592, 654 P2d 775 (reversing order denying relief under CCP § 473(b))], or by a court in the exercise of its equitable jurisdiction [*Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 207, 86 CR2d 229 (inherent equity power)].



Timing:

Although CCP § 473(b) expressly limits discretionary relief due to a party's fault to a reasonable time not to exceed six months [see 29.14[1]], the time limitations imposed on relief for the party's extrinsic

mistake [see 29.14[3]] apply not only to applications for relief on the basis of attorney abandonment, but also to motions made under *CCP* § 473(b) on that basis [*Seacall Dev., Ltd. v. Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 207, 86 CR2d 229 (relief granted on motion made more than 1 year after summary judgment)].

Cross References:

Filing motion under *CCP* § 473(b), see 29.23. Filing motions and actions for equitable relief on grounds of extrinsic mistake, see 29.27, 29.28.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsLegal EthicsClient RelationsEffective RepresentationTortsMalpractice & Professional LiabilityAttorneys



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Chapter 29 Setting Aside Judgments and Orders

III. SETTING ASIDE JUDGMENTS AND ORDERS UNDER CCP § 473(b) DUE TO MISTAKE, INADVERTENCE, SURPRISE, AND EXCUSABLE NEGLIGENCE, AND RELATED EQUITABLE RELIEF

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.23

29.23 Mandatory Relief From Dismissal Based on Attorney's Affidavit of Fault Under CCP § 473(b).

29.23[1] Mandatory Relief Due to Attorney's Mistake, Inadvertence, Surprise, or Neglect. A dismissal against a party as the result of his or her attorney's mistake, inadvertence, surprise, or neglect may be set aside under *CCP* § 473(b). Relief is mandatory on meeting the procedural and evidentiary requirements of the statute [*Sprague v. County of San Diego* (2003) 106 CA4th 119, 133-134, 130 CR2d 517] .



Warning:

Mandatory relief, as opposed to discretionary relief [see 29.11 et seq.], from a dismissal against a party as the result of the attorney's mistake, inadvertence, surprise, or neglect is available only if the application is accompanied by an attorney's affidavit of fault [see 29.22[2]].

Exception:

Mandatory relief for dismissals based on attorney affidavit of fault under *CCP* § 473(b) is not available when the dismissal is for failure to comply with the applicable statute of limitations [*Sprague v. County of San Diego* (2003) 106 CA4th 119, 134, 130 CR2d 517] .



Strategic Point--Moving Party:

Appellate courts are disposed toward such action on the part of the trial courts that will permit, rather than prevent, the adjudication of legal controversies on their merits. Thus, the provisions of *CCP* § 473(b) are to be liberally construed, and policy favors the determination of actions on their merits [*Rodrigues v. Superior Court* (2005) 127 CA4th 1027, 1037, 26 CR3d 194] .

The purpose of the attorney affidavit provision is to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits [*In re Marriage of Hock & Gordon-Hock* (2000) 80 CA4th 1438, 1446, 96 CR2d 546] .

Distinguish:

Unlike relief from a judgment, dismissal, or order taken against the party through his or her mistake, inadvertence, surprise, or excusable neglect under *CCP* § 473(b), relief from the mistake, inadvertence, surprise, or neglect of the party's attorney under this separate provision of *CCP* § 473(b) requires the court to grant relief whether the attorney's mistake, inadvertence, surprise, or neglect is excusable or not [*Rodrigues v. Superior Court* (2005) 127 CA4th 1027, 1033, 26 CR3d 194] . Even deliberate tactical errors by counsel may be grounds for relief [see *Solv-All v. Superior Court* (2005) 131 CA4th 1003, 1012, 32 CR3d 202 (default judgment)].

 Cross Reference:

Discussion of relief from defaults and default judgments based on attorney's fault under *CCP* § 473(b), see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.66, 36.67; or

California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

29.23[2] Attorney's Mistake, Inadvertence, Surprise, or Neglect Must Be Cause in Fact of Dismissal. The court must grant relief on a proper showing unless the court finds that the dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*CCP* § 473(b); *Vaccaro v. Kaiman* (1998) 63 CA4th 761, 771, 73 CR2d 829 ; *Todd v. Thrifty Corp.* (1995) 34 CA4th 986, 990-991, 40 CR2d 727] . An act is a cause in fact if it is a necessary antecedent of an event [*Benedict v. Danner Press* (2001) 87 CA4th 923, 929, 104 CR2d 896] .

 Warning:

Some districts of the courts of appeal have held that the attorney's mistake, inadvertence, surprise, or neglect must be the actual cause of the judgment [*In re Marriage of Hock & Gordon-Hock* (2000) 80 CA4th 1438, 1446, 96 CR2d 546 ; *Lang v. Hochman* (2000) 77 CA4th 1225, 1252, 92 CR2d 322 ; *Todd v. Thrifty Corp.* (1995) 34 CA4th 986, 990-991, 40 CR2d 727] , as in, the sole cause of the judgment with the party not participating in the conduct that led to it [*Lang v. Hochman* (2000) 77 CA4th 1225, 1251, 92 CR2d 322 ; *Vaccaro v. Kaiman* (1998) 63 CA4th 761, 771, 73 CR2d 829 (uncontradicted affidavit of counsel and plaintiff that pleading was not signed solely because of attorney's delay); *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 CA4th 613, 623, 34 CR2d 26 (client participated in misconduct)].

Example:

One court found that the attorney was simply covering up for the client [*Lang v. Hochman* (2000) 77 CA4th 1225, 1249, 92 CR2d 322 (dismissal for noncompliance with discovery); see *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 CA4th 613, 623, 34 CR2d 26 (sanctions for noncompliance with discovery due to client's denial of existence of requested documents)].

 Trap:

Filing a *CCP* § 473(b) motion on attorney's affidavit of fault after the court denied a *CCP* § 473(b) motion on the basis of the party's mistake, inadvertence, surprise, or neglect may result in the court finding that the attorney is covering up for the client [see *Todd v. Thrifty Corp.* (1995) 34 CA4th 986, 991-992, 40 CR2d 727 (first affidavit destroys credibility of second)].

Another view of actual cause provides that if the attorney is covering up for client misconduct or neglect that is the primary cause, the statutory condition that the judgment or order must be caused by attorney fault is not satisfied [*Todd v. Thrifty Corp.* (1995) 34 CA4th 986, 992, 40 CR2d 727 (dismissal for noncompliance with discovery)].

In other districts of the Courts of Appeal, cause in fact does not condition relief on the court's finding that the attorney is solely responsible for the dismissal [see *Benedict v. Danner Press* (2001) 87 CA4th 923, 928-929, 104 CR2d 896 (default)] so long as it is a proximate cause [*Milton v. Perceptual Dev. Corp.* (1997) 53 CA4th 861, 867-868, 62 CR2d 98 (evidence showed client did not contribute)]. Relief can be granted when dismissal is entered as a result of a combination of attorney and client fault. Under this view, the statute merely requires that the attorney's conduct be a cause in fact of the dismissal, and not necessarily the only cause, so long as the client's contributing conduct is not intentional [*Benedict v. Danner Press* (2001) 87 CA4th 923, 928-932, 104 CR2d 896 (relief from default granted even though client unintentionally contributed to attorney mistake)].



Strategic Point:

The view that the attorney's fault sufficient for relief on an attorney's affidavit of fault need only consist of a proximate cause of the dismissal in the absence of intentional contribution by the client is based on the causality standard for legal malpractice actions [*Benedict v. Danner Press* (2001) 87 CA4th 923, 929, 104 CR2d 896], and partial causality in that context would merely support a partial defense of comparative fault [*Benedict v. Danner Press* (2001) 87 CA4th 923, 929, 104 CR2d 896]. This rule may best advance the purpose of the mandatory provision consisting of preventing further litigation in the form of legal malpractice actions [*Benedict v. Danner Press* (2001) 87 CA4th 923, 929, 104 CR2d 896].

Another view of cause in fact states both that the client's conduct must not have contributed to the dismissal, and the attorney's fault need be only a proximate cause of the dismissal [*In re Marriage of Hock & Gordon-Hock* (2000) 80 CA4th 1438, 1446-1447, 96 CR2d 546 (client's failure to tell new attorney of trial date was not contribution)].

Relief must be denied when the court finds that the dismissal was not in fact the attorney's fault [CCP § 473(b); *Todd v. Thrifty Corp.* (1995) 34 CA4th 986, 991, 40 CR2d 727].

Distinguish:

The rule granting mandatory relief from an attorney's mistake, inadvertence, surprise, or neglect on the attorney's affidavit of fault does not apply to judgments that are the fault of a party's insurer [see *Scognamillo v. Herrick* (2003) 106 CA4th 1139, 1149-1150, 131 CR2d 393].

Example:

A judgment or order issued when attorney is not retained by party cannot be caused by that attorney [see *Cisneros v. Vuevo* (1995) 37 CA4th 906, 909, 44 CR2d 682 (no relief when default occurred before retention of attorney, after which default judgment was entered)].

29.23[3] Dismissals From Which Relief Is Mandatory Must Be "Against" Client of Attorney Filing Affidavit. Relief from a dismissal under the mandatory provisions of CCP § 473(b) is limited to a dismissal entered "against" a client [*J.A.T. Ent'mt, Inc. v. Reed* (1998) 62 CA4th 1485, 1492, 73 CR2d 365].

Examples:

Courts considering whether a dismissal was against the client have determined the following:

- Dismissal for defendant's attorney's failure to object to plaintiff's motion to dismiss claim without prejudice under CCP § 581(e) after court had determined before trial that the plaintiff had insufficient evidence to support the claim is "against" client [*J.A.T. Ent'mt, Inc. v. Reed* (1998) 62 CA4th 1485, 1492-1494, 73 CR2d 365].

- Voluntary dismissal of an action entered pursuant to a settlement between the parties, which was reached after full negotiation proceedings had been conducted, is not against the client [*Huens v. Tatum* (1997) 52 CA4th 259, 264-265, 60 CR2d 438 (party was simply attempting to cure counsel's inexcusable neglect in failing to ascertain correct amount of insurance coverage during settlement negotiations)] for purposes of mandatory relief only [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 256, 121 CR2d 187, 47 P3d 1056] .

29.23[4] Dismissals From Which Relief Is Mandatory Must Deprive Party of Day in Court. The mandatory provision affords relief only from those dismissals that are functionally equivalent to a default. That is, mandatory relief is generally limited to set aside only those dismissals in which the client's attorney's has failed, excusably or inexcusably, to respond to a motion to dismiss, and the resulting dismissal therefore deprives the client of his or her "day in court" to adjudicate the matter on the merits [*Peltier v. McCloud River R.R. Co.* (1995) 34 CA4th 1809, 1824, 41 CR2d 182; see *Vandermoon v. Sanwong* (2006) 142 CA4th 315, 320-321, 47 CR3d 772 (limiting definitions of "default" and "default judgment")].



Strategic Point:

Relief from dismissals based on an attorney's affidavit of fault may not be used indiscriminately by plaintiffs' attorneys as a "perfect escape hatch" to undo dismissals of civil cases [*Nacimiento Reg'l Water Mgmt. Advisory Comm. v. Monterey County Water Res. Agency* (2004) 122 CA4th 961, 967, 18 CR3d 921] .

Accordingly, relief is afforded from dismissals entered when a plaintiff fails to appear in opposition to a motion for dismissal due to the fault of counsel [*Gotschall v. Daley* (2002) 96 CA4th 479, 483, 116 CR2d 882] . Conversely, a contested dismissal entered under a discretionary dismissal statute may not be set aside on an attorney's affidavit of fault [*Peltier v. McCloud River R.R. Co.* (1995) 34 CA4th 1809, 1825, 41 CR2d 182] .

Distinguish:

The inapplicability of the mandatory provisions for relief from dismissal to contested dismissals entered under a discretionary dismissal statute does not apply to relief from a default [*Bernasconi Commercial Real Estate v. St. Joseph's Reg'l Healthcare Sys.* (1997) 57 CA4th 1078, 1082-1083 & n12, 67 CR2d 475] .



Cross Reference:

Relief from defaults and default judgments based on attorney affidavit of fault, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.66 et seq.

Examples:

Relief based on an attorney's affidavit of fault is not available to set aside a dismissal for:

- Failing to inform the client of the trial date [*Vandermoon v. Sanwong* (2006) 142 CA4th 315, 320-321, 47 CR3d 772].
- Failing to file an amended complaint after a demurrer has been sustained with leave to amend [*Leader v. Health Indus. of Am., Inc.* (2001) 89 CA4th 603, 620, 107 CR2d 489] .
- Failure to object to motion to dismiss claims without prejudice under CCP § 581(e) [*J.A.T. Ent'mt, Inc. v. Reed* (1998) 62 CA4th 1485, 1494, 73 CR2d 365] .

- Delay in prosecution on a contested motion under *CCP* § 583.410 *et seq.* [*Peltier v. McCloud River R.R. Co.* (1995) 34 CA4th 1809, 1815-1822, 41 CR2d 182 (court has already considered and rejected mitigating reasons for delay); *Graham v. Beers* (1994) 30 CA4th 1656, 1661, 36 CR2d 765] .

- Delay in prosecution by failing to serve the complaint within three years on a contested motion under *CCP* § 583.250 [*Bernasconi Commercial Real Estate v. St. Joseph's Reg'l Healthcare Sys.* (1997) 57 CA4th 1078, 1081-1083, 67 CR2d 475] .

- Failing to request a hearing on alleged CEQA violations within the time required by PR Code § 21167.4 [*Nacimiento Reg'l Water Mgmt. Advisory Comm. v. Monterey County Water Res. Agency* (2004) 122 CA4th 961, 968, 18 CR3d 921] .

- Failing to serve process within the statute of limitations period in challenging an agency's decision with respect to a subdivision [*Sprague v. County of San Diego* (2003) 106 CA4th 119, 133-135, 130 CR2d 517 (failure to serve summons within 90-day period required by *Gov Code* § 66499.37)].

- Failing to list an expert witness under *CCP* § 2034.210, rendering plaintiff unable to introduce expert's testimony and thus prove element of claim [*Gotschall v. Daley* (2002) 96 CA4th 479, 483-485, 116 CR2d 882] .

29.23[5] Courts Differ on Whether Other Judgments May Be Set Aside on an Attorney's Affidavit of Fault.

The mandatory provision of *CCP* § 473(b) is generally limited to defaults, default judgments, and dismissals that are equivalent to a default [*English v. IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 145-146, 114 CR2d 93] .

Distinguish:

Relief under the discretionary provisions of *CCP* § 473(b) [see 29.31 *et seq.*] is not limited to defaults, default judgments, and dismissals that are equivalent to a default [*English v. IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 149, 114 CR2d 93] .

Examples:

The rule has supported the barring of relief on an attorney's affidavit of fault from:

- Summary judgment [*Prieto v. Loyola Marymount University* (2005) 132 CA4th 290, 33 CR3d 639; *English v. IKON Bus. Solutions, Inc.* (2001) 94 CA4th 130, 137-138, 114 CR2d 93] .

- Failure to comply with the claim-presentation requirement of the Government Tort Claims Act, *Gov Code* § 910 *et seq.* [*Tackett v. City of Huntington Beach* (1994) 22 CA4th 60, 65, 27 CR2d 133] .

- Failure to file a motion to tax costs in the trial court [*Douglas v. Willis* (1994) 27 CA4th 287, 292, 32 CR2d 408] .

Some courts have applied the mandatory relief provision in nondismissal proceedings in which the functional or procedural equivalent of a default has occurred, depriving the client of any opportunity to litigate on the merits [*In re Marriage of Hock & Gordon-Hock* (2000) 80 CA4th 1438, 1443-1444, 96 CR2d 546; *Yeap v. Leake* (1997) 60 CA4th 591, 600-601, 70 CR2d 680; *Avila v. Chua* (1997) 57 CA4th 860, 868, 67 CR2d 373] .

Examples:

- A summary adjudication that resulted from a failure of the opposing party's counsel to file any timely

response to the motion was set aside under the mandatory provision. The court deemed this situation to be equivalent to a default because the trial court determined the summary adjudication motion solely on the basis of the moving party's papers and there was no litigation on the merits [*Avila v. Chua* (1997) 57 CA4th 860, 868, 67 CR2d 373] .

- Judgment after uncontested hearing under CCP § 594(a) due to failure of attorney, formally retained a week before trial, to appear at trial because he was not advised of trial date by former counsel was set aside on the basis of the attorney's affidavit of fault [*In re Marriage of Hock & Gordon-Hock* (2000) 80 CA4th 1438, 1443-1444, 96 CR2d 546] .

- Mandatory relief applied to plaintiff whose opportunity to participate in arbitration was lost due to negligence of counsel and award became final due to attorney misfeasance [*Yeap v. Leake* (1997) 60 CA4th 591, 600-601, 70 CR2d 680] .

The courts adopting the stricter view, as described above, have explicitly criticized this approach [see, e.g., *Vandermoon v. Sanwong* (2006) 142 CA4th 315, 320-321, 47 CR3d 772]. Still others have noted that even those decisions do not permit relief when the party has his or her day in court in contesting the judgment that is the equivalent of a default [*Garcia v. Hejmadi* (1997) 58 CA4th 674, 683, 68 CR2d 228] .

Example:

Relief was denied when the party has had his or her day in court in contesting the judgment that is the equivalent of a default in the following:

- Summary judgment that was entered after the opposing party's counsel did in fact oppose the motion, but the opposition papers submitted were inexcusably insufficient [*Garcia v. Hejmadi* (1997) 58 CA4th 674, 681-685, 68 CR2d 228 ("[t]his case was not a default but rather a motion lost, on its merits, after opposition was filed")].

- Failure to timely request trial de novo after plaintiff appeared and participated in arbitration hearing [*Brown v. Williams* (2000) 78 CA4th 182, 189, 92 CR2d 634 (arbitration hearing does not constitute "day in court")].

29.23[6] Who May Apply Is Not Defined. The mandatory relief provision of CCP § 473(b) does not specify who may file for relief under it.

That the party whose attorney is filing an affidavit of fault is also an attorney does not limit the right to relief [*Vaccaro v. Kaiman* (1998) 63 CA4th 761, 771, 73 CR2d 829] .

29.23[7] Motion for Mandatory Relief Must Be Filed Within Six Months of Entry of Dismissal. The application for relief on an attorney's affidavit of fault must be made within six months after the dismissal has been entered [CCP § 473(b); *Milton v. Perceptual Dev. Corp.* (1997) 53 CA4th 861, 868, 62 CR2d 98] . The application for relief from a judgment of dismissal filed within six months of the date of the entry of that judgment may also include relief from an order of default on which the dismissal is based, even if that order was entered more than six months before the application is filed [see *Sugasawara v. Newland* (1994) 27 CA4th 294, 297, 32 CR2d 484 (default judgment)].



Trap:

At least one court has adhered to the rule from before amendment of the attorney fault provision of CCP § 473(b) [see *Billings v. Health Plan of Am.* (1990) 225 CA3d 250, 258, n5, 275 CR 80] , which stated

that the application for relief on an attorney's affidavit of fault must be made within a "reasonable time" within six months after the party becomes aware that a default has been entered against it [see 29.33[1]]. Under that rule, delays of three months or more routinely result in denial of relief when there is no satisfactory explanation for the delay [see *Caldwell v. Methodist Hosp.* (1994) 24 CA4th 1521, 1524-1525, 29 CR2d 894] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake



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Chapter 29 Setting Aside Judgments and Orders
IV. SETTING ASIDE VOID JUDGMENTS OR ORDERS UNDER CCP § 473(d) AND RELATED EQUITABLE RELIEF

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.24

29.24 CHECKLIST: Setting Aside Void Judgment or Order Under CCP § 473(d) and Related Equitable Relief.

- ☐ Determine whether court rendering the judgment or order to be avoided had proper subject matter jurisdiction, personal jurisdiction, and jurisdiction to provide the relief granted.

Discussion:

See 29.26, 29.27

- ☐ Determine whether the moving party has standing to attack the judgment or order.

Discussion:

See 29.30[1], 29.31[1]

-  Determine if relief can be requested within a reasonable time of the entry of the judgment or order:

- ☐ Reasonable time;
- ☐ Six months under *CCP* § 473(b) by analogy; or
- ☐ Two years under *CCP* § 473.5 by analogy.

Discussion:

See 29.31[2]

- ☐ If relief can be requested within a reasonable time of the entry of the judgment or order:

☐ Attack judgment or order by filing direct attack in the form of a motion directed to the court issuing the judgment or order.

Authority:

CCP § 473(d)

Discussion:

See 29.32

☐ Present any extrinsic evidence necessary to show jurisdictional defect voiding the judgment or order on which relief may be granted.

Discussion:

See 29.29[3], 29.31[4]

☐ If relief cannot be requested within a reasonable time of the entry of the judgment or order:

☐ Determining whether the jurisdictional defect can be determined from the judgment roll or only by consideration of extrinsic evidence.

Authority:

CCP § 670

Discussion:

See 29.29

☐ If the jurisdictional defect can be determined from the judgment roll, determining if the particular jurisdictional defect was contested in a prior proceeding that is res judicata.

Discussion:

See 29.30[2]

☐ If the jurisdictional defect can be determined from the judgment roll, and the particular jurisdictional defect was not contested in a prior proceeding that is res judicata, file a collateral attack in the same or different court to have the judgment or order set aside.

Authority:

CCP § 473(d)

Discussion:

See 29.32, 29.33

☐ If asserting grounds of judgment or order void on its face, serve and file notice of motion, motion, and associated documents.

Authority:

CCP § 473(d)

Discussion:

See 29.16[1]

Forms:

See 29.76, 29.77

☐ If asserting grounds of judgment or order void on in fact, serve and file notice of motion, motion, and associated documents, and marshal extrinsic evidence.

Discussion:

See 29.16[2]

Forms:

See 29.78, 29.79

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityStandingThird Party StandingCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments



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IV. SETTING ASIDE VOID JUDGMENTS OR ORDERS UNDER CCP § 473(d) AND RELATED EQUITABLE RELIEF

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.25

29.25 Options and Strategies for Moving Party.

29.25[1] Distinguishing Between Statutory and Equitable Relief and Effect on Use of Case Law. Under *CCP* § 473(d), a court may, on motion of either party, after notice to the other party, set aside any void judgment or order [see, e.g., *People v. One 1941 Chrysler 6 Touring Sedan* (1947) 81 CA2d 18, 22, 183 P2d 368]. Additionally, a court also has the inherent power to set aside a void judgment or order void on its face at any time, and that *CCP* § 473(d) is the codification of the court's inherent power to do so [*National Diversified Servs., Inc. v. Bernstein* (1985) 168 CA3d 410, 416, 214 CR 113].

However, a judgment that is void on its face is not necessarily governed by *CCP* § 473(d) inasmuch as the judgment may be vacated by the court on its own motion under equitable principles, as well as on motion of a party [see *Montgomery v. Norman* (1953) 120 CA2d 855, 858, 262 P2d 360]. Note that the court also has the inherent power in equity to vacate void judgments obtained through extrinsic fraud or mistake; and this power may be exercised either by a motion made in the original action or by an independent action in equity [*Olivera v. Grace* (1942) 19 C2d 570, 574, 122 P2d 564].



Strategic Point--Statutory Language and Court Acting on Its Own Motion:

CCP § 473(d) specifically does not state a court may set aside a void judgment or order on its own motion. It is unlikely that this is a legislative oversight since the statute expressly grants the court the authority to correct a clerical mistake on the court's own motion in the first clause of *CCP* § 473(d). Given the interplay between law and equity, the likely result is that a court may be hesitant to raise the matter on its own motion absent a clear belief that the judgment or order is void in equity, and the parties should be the ones raising the matter with the court by noticed motion with full briefing for a likely later appeal.

Consider--Use of Case Law:

Because courts have the power both at law and equity to vacate and set aside void judgments, although the procedures applicable to relief at law or in equity differ, cases in equity may be cited in cases at law,

and vice versa, to the extent that they identify or define what constitutes a void judgment.

Cross Reference:

Setting aside a judgment or order for extrinsic fraud or mistake, see 29.34 et seq.

29.25[2] Distinguishing Between Valid and Void Judgments and Orders. To render a valid judgment or order, a court must be lawfully organized, it must have jurisdiction over the subject matter and the parties, and it must have the power to grant the judgment or order [see *Lee v. An* (2009) 168 CA4th 558, 563-564, 85 CR3d 620 ; CCP § 1917]. If the court lacks any one of these, its judgment or order is void [see 29.26].

Cross References:

Subject-matter and personal jurisdiction, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 9, Motions to Quash and Other Objections to Personal Jurisdiction; and Ch. 10, Dismissal for Lack of Subject Matter Jurisdiction.

See also California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter; and Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances (Matthew Bender); or

California Points and Authorities, Ch. 132, Jurisdiction: Personal Jurisdiction and Inconvenient Forum; and Ch. 133, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

The grounds discussed in this analysis that render a judgment or order void, are:

- Lack of subject matter jurisdiction;
- Lack of personal jurisdiction; and
- Lack of power to grant remedy granted.

They generally apply to any judgment or order [see *Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 493, 165 CR 825, 612 P2d 915] . Other grounds that render a judgment or order void apply only to defaults and default judgments.

Cross References:

Relief from default, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 36.72[1].

California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender)].

29.25[3] Judgment or Order May Be Void in Part. A judgment may be partially void and subject to direct or collateral attack as to the invalid portion, even when the court does have jurisdiction of the subject matter and the parties [see, e.g., *Jones v. World Life Research Inst.* (1976) 60 CA3d 836, 844-848, 131 CR 674] .

A judgment that appears on its face to be partially void may be properly challenged collaterally with respect to the void portion only when it can be readily severed from the valid portion as surplusage [*Harwell v. Harwell* (1938) 26 CA2d 143, 144-145, 78 P2d 1167] .

Example:

Judgment based on the stipulation of the parties that awards interest in excess of that agreed to in the stipulation is void to that extent, although the remainder of the judgment is valid [see *Jones v. World*

Life Research Inst. (1976) 60 CA3d 836, 844-848, 131 CR 674] .

29.25[4] Setting Aside Valid Judgments and Orders Due to Clerical Mistake. Courts have inherent authority to set aside a judgment or order due to the court's clerical mistake or inadvertence in making it, but cannot set aside a judgment or order in which the mistake is inherently judicial, i.e., involving discretion [*Aspen Int'l Capital Corp. v. Marsch (1991) 235 CA3d 1199, 1204, 286 CR 921*] . If an error, mistake, or omission is the result of inadvertence, but for which a different judgment would have been rendered, the error is clerical and the judgment may be corrected to correspond with what it would have been but for the inadvertence [*Aspen Int'l Capital Corp. v. Marsch (1991) 235 CA3d 1199, 1204, 286 CR 921*] .



Cross Reference:

Relief from the court's clerical errors in judgments or orders permitted under *CCP* § 473(d), see *Ch. 28, Correcting and Modifying Judgment, 28.06*.

Relief cannot be granted under *CCP* § 473(b) for mistakes of the court, or of the court and the adverse party, in issuing erroneous orders [*Consoli Const. Co. v. Pacific Elec. Ry. Co. (1920) 184 C 244, 247, 193 P 238* ; *Don v. Cruz (1982) 131 CA3d 695, 702, 182 CR 581*] .

29.25[5] Strategies for Setting Aside Void Judgments and Orders. Relief from void judgments and orders depends on a jurisdictional defect or error [see 29.25[2]], as opposed to a court's clerical error or judicial error (i.e., error of law or application of law to facts) [see 29.25[4]]. All cases of jurisdictional defect are susceptible to direct attack by motion under *CCP* § 473(d) [see 29.16], or the court's inherent power to vacate void judgments and orders [see 29.25]. While the cases vary [see 29.29[3]], it appears that if the jurisdictional defect can be discerned as a matter of law solely from the judgment roll of the case [see 29.29[1], [2]], and may thus be described as "void on its face" [see 29.29[1]], the judgment or order also may be attacked by collateral attack if necessary [see 29.27].



Strategic Point--Option of Equitable Relief:

Although relief from a void judgment that is not void on its face may be barred at law because not timely sought within the specified periods, relief might still be available either by an equitable motion in the same action or by an independent action in equity to have the judgment or order declared void on the ground of extrinsic fraud or mistake if those grounds exist [see *Munoz v. Lopez (1969) 275 CA2d 178, 180-181, 79 CR 563* ; see also 29.18 et seq.]. Equity requires that the moving party establish a meritorious defense to the action in which the allegedly void judgment was entered.



Strategic Point--Eliminating Basis in Prior Action for Adverse Decision in Subsequent Action:

When collateral attack is made in a subsequently filed action on the same subject matter, the moving party should request not only the nullification of the original defective judgment or order, but should request the nullification of any adverse judgment or order in the subsequent action that arises from the original judgment or order. If that subsequent action is in a different court, to get around the application of the doctrine of collateral estoppel or res judicata, requiring a final judgment on the merits, the moving party should inform the trial or appellate court of the nullification of the earlier judgment and the consequent elimination of the basis for the later judgment. The court then normally sets aside the later judgment [*Romadka v. Hoge (1991) 232 CA3d 1231, 1237, 283 CR 878*] .

Example:

When the court sets aside a voluntary dismissal with prejudice when the plaintiff's attorney had entered it with prejudice, rather than without prejudice, the court also set aside the adverse judgment based on res

judicata of the judgment in the first action in a subsequent action filed by the plaintiff [*Romadka v. Hoge* (1991) 232 CA3d 1231, 1236-1238, 283 CR 878] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsAuthority to Adjudicate



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IV. SETTING ASIDE VOID JUDGMENTS OR ORDERS UNDER CCP § 473(d) AND RELATED EQUITABLE RELIEF

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.26

29.26 Determining Whether Judgment or Order Is Void for Lack of Jurisdiction in Fundamental Sense.

29.26[1] Lack of Subject Matter or Personal Jurisdiction Is Lack of Jurisdiction in Fundamental Sense. The lack of subject matter or personal jurisdiction is the lack of jurisdiction in a fundamental sense [see *Abelleira v. District Court of Appeal* (1941) 17 C2d 280, 288, 109 P2d 942] .

29.26[2] No Subject Matter Jurisdiction.

29.26[2][a] Court Must Lack Power to Adjudicate Matter in Question to Be Void. A judgment rendered by a court that lacks jurisdiction over the subject matter of the action is void [*Connelly v. Castillo* (1987) 190 CA3d 1583, 1588, 236 CR 112 ; see also *Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 493, 165 CR 825, 612 P2d 915 (collateral attack is proper to contest judgment void on its face for lack of personal or subject matter jurisdiction or granting of relief that court has no power to grant)].

Distinguish:

Some court decisions state that a judgment rendered by a court that lacks jurisdiction over the subject matter of the action or the person of the defendant or that grants relief the court has no power to grant is void on its face [see, e.g., *Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 493, 165 CR 825, 612 P2d 915 ; *County of Ventura v. Tillett* (1982) 133 CA3d 105, 112, 183 CR 741] . However, given that a judgment or order void on its face must be capable of being determined solely from the judgment roll [see, e.g., *Morgan v. Clapp* (1929) 207 C 221, 224, 277 P 490 ; *Parsons v. Weis* (1904) 144 C 410, 414-415, 77 P 1007] , and that some jurisdictional questions require the examination of evidence extrinsic to the judgment roll [see *Strathvale Holdings v. E.B.H.* (2005) 126 CA4th 1241, 1249, 25 CR3d 372 (extrinsic evidence may be considered when voidness not shown on face of record)], the accuracy of that definition is questionable.



Cross References:

Determining if court has subject matter jurisdiction, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 10.03 et seq.*

Discussion of subject matter jurisdiction of California courts, see California Forms of Pleading and Practice, Ch. 324, Jurisdiction: Subject Matter (Matthew Bender); or California Points and Authorities, Ch. 133, Jurisdiction: Subject Matter Jurisdiction (Matthew Bender).

29.26[2][b] Exception When Court Already Determined Question of Subject Matter Jurisdiction. A court may not, after the time for appeal has passed, set aside a domestic [*In re Estate of Estrem* (1940) 16 C2d 563, 569-570, 572, 107 P2d 36 (probate court had found that facts establishing subject matter jurisdiction existed)] or foreign [*In re Marriage of Hanley* (1988) 199 CA3d 1109, 1120, 245 CR 441] judgment or order on the ground that it lacked subject matter jurisdiction if the court found the facts establishing that jurisdiction in the original proceedings. Thus, a determination of subject matter jurisdiction by the trial court may become res judicata subject to collateral attack by other means [*Perry v. Farley Bros. Moving & Storage, Inc.* (1970) 6 CA3d 884, 888, 86 CR 397 (domestic)].

29.26[3] No Personal Jurisdiction.

29.26[3][a] Improper Service of Summons Voids Judgment or Order. Unless the defendant makes a general appearance [see CCP § 410.50(a)], proper service of the summons is a requirement for a court's exercise of personal jurisdiction over the defendant [*Caldwell v. Coppola* (1990) 219 CA3d 859, 863, 268 CR 453 ; *Slaughter v. Legal Process & Courier Serv.* (1984) 162 CA3d 1236, 1251, 209 CR 189] . Absent such jurisdiction, a court's judgment is void [*Renoir v. Redstar Corp.* (2004) 123 CA4th 1145, 1154, 20 CR3d 603] .

Cross References:

Grounds for proving lack of jurisdiction if summons or service was defective and motion to quash, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 9.08[1].

Additional grounds for attacking void defaults and default judgments based on lack of personal jurisdiction, see California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

The court may also set aside a judgment or order for lack of personal jurisdiction due to extrinsic fraud of an adverse or third party [see 29.24[2]].

Cross Reference:

Setting aside judgment or order for lack of personal jurisdiction due to extrinsic fraud of an adverse or third party, see 29.18 et seq.

29.26[3][b] Lack of Personal Jurisdiction Over Nonresident Defendant Voids Judgment or Order. A judgment or order is void if the court lacks personal jurisdiction over a nonresident defendant who does not appear in the case and lacks sufficient contacts with California to permit the state's exercise of personal jurisdiction over him or her, even if a summons is properly served on the person [see, e.g., *In re Marriage of Merideth* (1982) 129 CA3d 356, 361-363, 180 CR 909] .

Cross References:

Grounds for proving lack of personal jurisdiction over nonresident, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 9.08[2].

Discussion of the bases for personal jurisdiction over a nonresident defendant, see California Forms of Pleading and Practice, Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances (Matthew Bender).

29.26[3][c] Failure to File Summons and Proof of Service May Void Judgment or Order. The failure to return

the summons, together with its proof of service [see CCP §§ 417.10, 417.20, 417.40] to the court for filing [see CCP § 417.30], as shown by their absence from the judgment roll [see 29.13] historically rendered the judgment void on its face [see, e.g., *Pearson v. Superior Court* (1932) 122 CA 571, 574-575, 10 P2d 489]. Recent cases involving specifically default judgments have stated that those judgments are merely irregular, not void [*National Diversified Servs., Inc. v. Bernstein* (1985) 168 CA3d 410, 416, 214 CR 113 ; see also *Connelly v. Castillo* (1987) 190 CA3d 1583, 1589, 236 CR 112] .

29.26[3][d] Judgment Against Dissolved Corporation Is Void. A judgment rendered against a corporation that was dissolved before the action was filed is void. If lack of jurisdiction of a corporation is disclosed on the face of the judgment roll, a judgment against it is a nullity and is subject to collateral attack [*Traub Co. v. Coffee Break Serv., Inc.* (1967) 66 C2d 368, 370, 57 CR 846, 425 P2d 790] .

29.26[3][e] Exception When Already Determined Question of Personal Jurisdiction. A court may not, after the time for appeal has passed, set aside a judgment or order on the ground that it lacked personal jurisdiction if the court found the facts establishing that all adverse parties were properly served with notice and had the opportunity to present their objections [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese* (1990) 223 CA3d 1354, 1364, 1374, 273 CR 340 ; see 29.14[4]]. Thus, a determination of subject matter jurisdiction by the trial court may become res judicata [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese* (1990) 223 CA3d 1354, 1364, 273 CR 340 (foreign)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.27

29.27 Determining Whether Judgment or Order Is Void for Being Issued in Excess of Jurisdiction by Granting Relief That Court Had No Power to Grant.

29.27[1] Judgment or Order Issued by Disqualified Judge Is Void. A party may obtain relief from a judgment or order on the ground that the judge was disqualified from making the judgment or order [*Urias v. Harris Farms, Inc.* (1991) 234 CA3d 415, 424, 285 CR 659] .

Prerequisite:

A party seeking to have a judgment declared void on the ground that the judge was disqualified must allege and prove facts that clearly show that the disqualification existed [*Urias v. Harris Farms, Inc.* (1991) 234 CA3d 415, 424, 285 CR 659] .



Timing:

The disqualification of a judge before judgment may be made the basis for relief from orders at any time before judgment is final [*Cadenasso v. Bank of Italy* (1932) 214 C 562, 569, 6 P2d 944] , as long as it is raised at the earliest practicable opportunity after its discovery [*Caminetti v. Pacific Mut. Life Ins. Co.* (1943) 22 C2d 386, 390-392, 139 P2d 930] . When the grounds for disqualification are not discovered until after judgment is entered, a statement of the disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered [*Urias v. Harris Farms, Inc.* (1991) 234 CA3d 415, 424-425, 285 CR 659] . However, other cases have allowed relief at any time [see *Lindsay-Strathmore Irrigation Dist. v. Superior Court* (1920) 182 C 315, 333, 187 P 1056 ; *T.P.B. v. Superior Court* (1977) 66 CA3d 881, 885-886, 136 CR 311] .



Strategic Point--Appeal Pending:

A trial court's lack of jurisdiction to vacate a judgment while an appeal is pending [see 29.09] creates a dilemma for the party who, with due diligence, discovers only after the notice of appeal is filed that the judge or arbitrator hearing the matter was disqualified. For the sake of judicial efficiency and economy, a

party who first discovers facts during the pendency of an appeal indicating the disqualification of a judge or arbitrator should raise the disqualification issue at the earliest opportunity, rather than waiting until the appellate process is exhausted and the trial court is again vested with jurisdiction [see *Betz v. Pankow* (1993) 16 CA4th 931, 940, 20 CR2d 841 (reconsideration)].

Cross Reference:

Discussion and forms for disqualification of judge, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 22, Disqualification of Judge.

29.27[2] Judgment or Order by Commissioner Without Proper Appointment May Be Void.

29.27[2][a] Hearing Matter Under General Reference Is Void. A general reference of a matter to a commissioner under *CCP* § 259(b) is an unconstitutionally overbroad delegation of judicial power, and an order or judgment under such a reference by a commissioner appointed without consent of the parties is invalid [*Settemire v. Superior Court* (2003) 105 CA4th 666, 675, 129 CR2d 560 (authorization in reference order exceeded scope of power delegable under *CCP* § 259(f))].

29.27[2][b] Acting As Temporary Judge Without Stipulation of Parties Is Void. The order or judgment of a commissioner acting as a temporary judge is void when a party has not stipulated to the commissioner's deciding the specific matter as required by *CCP* § 259(d) [*Foosadas v. Superior Court* (2005) 130 CA4th 649, 655, 30 CR3d 358 (preliminary hearing); *Reisman v. Shahverdian* (1984) 153 CA3d 1074, 1087, 1094-1097, 201 CR 194 (confirmation of arbitration award); see also *Rooney v. Vermont Inv. Corp.* (1973) 10 C3d 351, 359-360, 372, 110 CR 353, 515 P2d 297 (stipulation did not authorize act as temporary judge)].

The parties to a stipulation may submit extrinsic evidence concerning the circumstances surrounding the making of the stipulation [*Rooney v. Vermont Inv. Corp.* (1973) 10 C3d 351, 372, 110 CR 353, 515 P2d 297] .

29.27[3] Judgment or Order in Violation of Due Process Right of Party May Be Void. A judgment may be void if it is rendered in violation of a party's due process rights [see *In re Marriage of Carlsson* (2008) 163 CA4th 281, 290-293, 77 CR3d 305 (judgment reversed when party was not allowed to put on evidence)].

Examples:

- A stipulated judgment is treated as a confession of judgment, which requires a valid waiver of constitutional right to due process. A waiver of due process is only valid if it is made knowingly, intelligently, and voluntarily. A judgment or order based on a stipulation without a valid waiver is void [*County of Ventura v. Tillett* (1982) 133 CA3d 105, 112, 183 CR 741 (valid waiver of due process requires either advice of counsel or hearing before judge on validity of waiver)].

- A stipulation that provides for some elements of a judgment but not others cannot be the basis for judgment without a hearing on the remaining elements or an effective waiver of due process by a party not present at the hearing [*Rooney v. Vermont Inv. Corp.* (1973) 10 C3d 351, 372, 110 CR 353, 515 P2d 297 (grant of ex parte motion for judgment was void)].

Cross Reference:

Attacking void defaults and default judgments based on service of papers on suspended attorney, see *California Forms of Pleading and Practice*, § 489.163 (Matthew Bender).

When issues have been joined, judgment made after trial held without notice, timely notice, or waiver of notice under

CCP § 594(a) is not merely error; rather, the court acts in excess of jurisdiction [*Wilson v. Goldman* (1969) 274 CA2d 573, 577-578, 79 CR 309 (default filed after trial); see *Au-Yang v. Barton* (1999) 21 C4th 958, 966, 90 CR2d 227, 987 P2d 697 ("mandatory" requirement applies to insufficient notice due to advancement of original trial date to less than 15 days from notice)].

► Cross References:

Attacking void defaults and default judgments obtained after uncontested trial, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 36.72[1][d].

California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

29.27[4] Voluntary Judgment Entered by Attorney Without Plaintiff's Approval Is Void. The voluntary dismissal of an action by the plaintiff's attorney without plaintiff's approval is void and subject to attack within a reasonable time after its discovery [*Romadka v. Hoge* (1991) 232 CA3d 1231, 1236, 283 CR 878] .

Prerequisite:

A proceeding to set aside a voluntary judgment entered by an attorney without the plaintiff's approval requires strong and convincing proof. The longer the delay in the application for relief, the stronger and more convincing the factual proof must be [*Romadka v. Hoge* (1991) 232 CA3d 1231, 1236, 283 CR 878] .

Example:

Entry of voluntary dismissal with prejudice rather than without prejudice because the attorney mistakenly checked the "with prejudice" box instead of, as directed by the client, the "without prejudice" box is void on its face [*Romadka v. Hoge* (1991) 232 CA3d 1231, 1236, 283 CR 878] .

► Cross Reference:

Attorney clerical mistakes as basis for relief under CCP § 473(b), see 29.18[2][b].

Dismissal with prejudice by attorney who settled and dismissed case without client's authorization and absconded with settlement funds is void [*Whittier Union High Sch. Dist. v. Superior Court* (1977) 66 CA3d 504, 509, 136 CR 86] .

29.27[5] Judgment or Order Modified or Amended to Correct Judicial Error Instead of Clerical Error Is Void. The trial court's entry of an amended judgment to correct a judicial error, and not to correct or modify for clerical error or to set aside on statutory grounds or under the inherent power of the court, is void on its face and subject to attack at any time [*Rochin v. Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1237-1239, 79 CR2d 719 (action to set aside amended judgment reinstated after trial court approved demurrer)].

► Cross Reference:

Discussion and forms for correcting clerical error, see Ch. 28, Correcting and Modifying Judgment.

29.27[6] Order Sealing Records Without Statutory Authorization Is Void. An order to seal court records that is made without legislative authority is in excess of the court's jurisdiction. When this fact appears from the record, it is void on its face and the court that made the order must set it aside on motion under CCP § 473(d) at any time after its entry. Though a motion with notice is appropriate in the case of a void judgment, notice to the adverse party is not essential. The court has full power to vacate a void order without any application on the part of anyone [*People v. Glimps* (1979) 92 CA3d 315, 325, 155 CR 230] .

► Cross Reference:

Discussion and forms for sealing records, see *Ch. 2, Public Access to Trial and Records, 2.11* et seq.

29.27[7] Order Denying Relief From Judgment or Order May Be Void. The denial of an attack on a judgment or order that is void on its face is itself void [*Renoir v. Redstar Corp. (2004) 123 CA4th 1145, 1154, 20 CR3d 603* (order void)].

29.27[8] Judgment or Order in Contravention of Stay During Pendency of Bankruptcy Proceeding Is Void. A judgment or order in a proceeding stayed during a bankruptcy proceeding under *11 USC § 362(a)* is void [*Sindler v. Brennan (2003) 105 CA4th 1350, 1353, 129 CR2d 888* (dismissal properly set aside on *CCP § 473(d)* motion)]. The case so holding treated the subject judgment as void on its face, after citing law concerning setting aside a judgment or order void on its face at any time, then permitting a motion under *CCP § 473(d)* almost two years after the entry of the judgment without discussion of limitation periods [*compare 29.15[2] with 29.14[2]*], and stating further that prejudice is not a consideration in doing so [*see Sindler v. Brennan (2003) 105 CA4th 1350, 1353-1354, 129 CR2d 888*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedurePretrial
JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsJudgment by ConfessionCivil
ProcedureJudgmentsRelief From JudgmentVoid JudgmentsConstitutional LawBill of RightsFundamental
RightsProcedural Due ProcessGeneral Overview



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29.28 Judicial Error Solely in Exercise of Jurisdiction Does Not Render Judgment or Order Void.

A judgment or order of a court with subject-matter and personal jurisdiction is not void because the court committed errors in the exercise of its jurisdiction [*Estate of Buck* (1994) 29 CA4th 1846, 1857, 35 CR2d 442] .

Examples:

- Court's modification of trust without proper findings of "unusual or emergent circumstances" necessary to the proper exercise of its jurisdiction was nonjurisdictional error [*Estate of Buck* (1994) 29 CA4th 1846, 1857, 35 CR2d 442] .

- A mere erroneous decision on a question of law, even though the error appears on the face of the record, does not make the judgment void, if the court had jurisdiction of the subject matter and of the person of the defendant [*Jones v. World Life Research Inst.* (1976) 60 CA3d 836, 844, 131 CR 674] .

Strategic Point:



A judgment or order based on a judicial error must be appealed [*In re Estate of Bette* (1915) 171 C 583, 585-586, 153 P 949] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsAppellate JurisdictionState Court Review



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29.29 Distinguishing Between Judgment or Order Void on Its Face From Void in Fact and Effect on Evidence.

29.29[1] Void on Its Face Is Based Only on Record, While Void in Fact Requires Extrinsic Evidence. A judgment is void on its face when its invalidity appears from inspection of the record [*Cruz v. Fagor America, Inc.* (2007) 146 CA4th 488, 496, 52 CR3d 862], otherwise known as the judgment roll in the statute defining it [see CCP § 670(b)].

Exception:

A judgment may also be void on its face when its invalidity appears from the inspection of certain other papers on file in the case [see, e.g., *Swain v. Swain* (1967) 250 CA2d 1, 10-11, 58 CR 83 (facts stated in domestic relations officer's report that had been filed in case)].

Distinguish:

A judgment or order that is void in fact but not void on its face requires the presentation of extrinsic evidence to show that it is void [see *People v. One 1941 Chrysler 6 Touring Sedan* (1947) 81 CA2d 18, 25-27, 183 P2d 368].

29.29[2] Judgment Roll Is Delimited by Statute. The judgment roll in an action in which at least one defendant answers the complaint includes all of the following actually filed in the action [CCP § 670(b)]:

- The pleadings.
- Orders striking out any pleading in whole or in part.
- The verdict of the jury.
- The statement of decision of the court, or finding of the referee.
- Orders made on demurrer, or relating to a change of parties.

- The judgment.

Distinguish--No Defendant Appearance:

The statutory delimitations of judgment roll in an action in which no defendant appears [see CCP § 670(a)], or applicable to a defaulting defendant in an action in which at least one defendant has appeared [see CCP § 670(b)] or an action under the Probate Code [see Probate Code § 1050] are different from the aforementioned.

Cross Reference:

Discussion of judgment roll in an action in which no defendant appears or applicable to a defaulting defendant in an action in which at least one defendant has appeared, see *California Forms of Pleading and Practice*, Ch. 489, *Relief from Judgments and Orders*, 489.136 (Matthew Bender).

29.29[3] Case Law Is Unclear on Which Jurisdictional Defects Render Judgment or Order Void on Its Face or Void in Fact. Some older decisions state that a judgment or order is void on its face and subject to collateral attack when the court lacked personal or subject matter jurisdiction to make the judgment or order [see, e.g., *Wells Fargo & Co. v. City of San Francisco* (1944) 25 C2d 37, 40, 152 P2d 625] .

The case law presents at least three strains of thought on when a judgment or order in excess of the court's jurisdiction in granting relief which the court had no power to grant is void on its face and when it is void in fact, as follows:

- One school of thought states that judgments and orders in excess of jurisdiction do not demonstrate lack of jurisdiction in a fundamental sense and are categorically not subject to collateral attacks [*Wells Fargo & Co. v. City of San Francisco* (1944) 25 C2d 37, 40, 152 P2d 625] , although some cases include adequate notice as an element of fundamental jurisdiction along with subject matter and personal jurisdiction [*Estate of Buck* (1994) 29 CA4th 1846, 1854, 35 CR2d 442] .

Other cases have expanded on the notion of lack of jurisdiction in a fundamental sense by holding that relief that the court "in no circumstances had the power to grant" is void for lack of jurisdiction in the fundamental sense when the relief granted is contrary to a statute that relates to subject matter jurisdiction [*Plaza Hollister Ltd. P'ship v. County of San Benito* (1999) 72 CA4th 1, 20, 84 CR2d 715] .

- A second school of thought states that a judgment or order in excess of the court's jurisdiction in granting relief which the court had no power to grant is void on its face and, therefore, subject to collateral attack at any time [*Sindler v. Brennan* (2003) 105 CA4th 1350, 1353, 129 CR2d 888] . Some cases state that where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no jurisdiction or power to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites [*Jones v. World Life Research Inst.* (1976) 60 CA3d 836, 846, 131 CR 674] . Under this line of thought, "any acts which exceed the defined power of a court in any instance, 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" [*Abelleira v. District Court of Appeal* (1941) 17 C2d 280, 291, 109 P2d 942 ; *Jones v. World Life Research Inst.* (1976) 60 CA3d 836, 846, 131 CR 674 (however, the ruling in this case also contradicted a settlement agreement)]. Put another way, the "mere fact that the court has jurisdiction of the subject matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to a party that the law declares shall not be granted" [*Selma Auto Mall II v. Superior Court* (1996) 44 CA4th 1672, 1683-1684, 52 CR2d 599] . Thus, judgments or orders in excess of jurisdiction, as so defined, are subject to collateral attack [*Jones v. World Life Research Inst.* (1976) 60 CA3d 836, 847, 131 CR 674] .

While one case attempts to reconcile the first school of thought from this second view by distinguishing between relief in excess of jurisdiction and relief that is in excess of the amount to which the party is otherwise entitled by law [*Jones v. World Life Research Inst.* (1976) 60 CA3d 836, 848, 131 CR 674 (the latter standard being that which the first strain of thought expressed in *Wells Fargo & Co. v. City of San Francisco* (1944) 25 C2d 37, 43, 152 P2d 625 applied to acts not subject to collateral attack)], the Supreme Court ruled subsequently that relief in excess of the amount to which the party is otherwise entitled by law is also subject to relief in excess of jurisdiction subject to collateral attack [see *Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 493, 165 CR 825, 612 P2d 915]. The Court, in so doing, used the "no power to grant" standard [*Becker v. S.P.V. Constr. Co.* (1980) 27 C3d 489, 493, 165 CR 825, 612 P2d 915], although it has been suggested that even that decision may be interpreted as one based on lack of notice constituting lack of fundamental jurisdiction under the first strain of thought [*Estate of Buck* (1994) 29 CA4th 1846, 1856 n10, 35 CR2d 442].

■ Under the third school of thought, a judgment or order that is in excess of the issuing court's jurisdiction is void on its face if the fact that it is void appears from the record, but is void in fact if showing that fact requires presentation of evidence extrinsic to the record [*People v. Glimps* (1979) 92 CA3d 315, 325, 155 CR 230].

Example:

A court order sealing court records that is made without legislative authority is in excess of the court's jurisdiction. When this fact appears from the record, a motion to set aside orders sealing records on the ground the court lacked jurisdiction to make the orders and that the orders were therefore void may be made at any time after entry of the order [*People v. Glimps* (1979) 92 CA3d 315, 325, 155 CR 230].

Consider:

The various schools of thought concerning judgments and orders in excess of jurisdiction in granting relief that the court had no power to grant shows a struggle by the courts to ascertain which of those judgments and orders are subject to collateral attack. The rulings in the second school of thought essentially hold to the line that relief granted in violation of law is subject to collateral attack. Interestingly, showing that a judgment or order is void as a matter of law would not require the consideration or, therefore, presentation of extrinsic evidence, which corresponds to the prohibition of the use of extrinsic evidence in collateral attacks [see 29.30[4]]. It could be shown on the face of the judgment roll [see 29.29[1]]. But as noted, the same rule functionally applies to a judgment or order void on its face for lack of jurisdiction in a fundamental sense, i.e., subject matter or personal jurisdiction. In light of the fact that some cases do not talk in terms of void on its face or void in fact, but only discuss whether a particular judgment or order is subject to collateral attack, that correlation suggests that the third strain describes the rule in the manner closest to the actual effect of the sum of the cases. The general rule would appear to be that judgments and orders void due to a defect in jurisdiction with respect to subject matter, person, or relief that may be granted, is void on its face and subject to collateral attack when its voidness can be shown on the face of the record, but is void in fact and not subject to collateral attack when its voidness requires extrinsic evidence to be shown. This reading of the cases has the benefit of corresponding to the rule that on direct attack, lack of jurisdiction can be shown by extrinsic evidence [see *Strathvale Holdings v. E.B.H.* (2005) 126 CA4th 1241, 1249, 25 CR3d 372]. The distinction between void on its face and void in fact is quite simply a rule of evidence limiting the time in which to nullify a judgment or order with extrinsic evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil

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29.30 General Principles for Attacks on Judgment or Order Void on Its Face.

29.30[1] Standing to Make Attack.

29.30[1][a] Any Party to the Judgment or Order May Make Attack. A judgment that is void on its face may be attacked by the parties to the judgment [*Nagel v. P & M Distribs., Inc.* (1969) 273 CA2d 176, 180, 78 CR 65] without any showing of prejudice [*Ryerson v. Riverside Cement Co.* (1968) 266 CA2d 789, 795, 72 CR 595] .

29.30[1][b] Any Interested Party to the Judgment or Order May Make Attack. A judgment that is void on its face may be attacked by strangers to the judgment [*Plaza Hollister Ltd. P'ship v. County of San Benito* (1999) 72 CA4th 1, 15, 84 CR2d 715] . It can be attacked by strangers to the record when the judgment, if given full effect, would injuriously affect their rights [*Plaza Hollister Ltd. P'ship v. County of San Benito* (1999) 72 CA4th 1, 15-16, 84 CR2d 715] .

Examples:

- County assessor has standing to bring a motion to vacate a judgment on the ground it is void when the judgment revises the base-year value reached by the assessor and reduces assessments on the local roll prepared by the assessor [*Plaza Hollister Ltd. P'ship v. County of San Benito* (1999) 72 CA4th 1, 18, 84 CR2d 715] .

- A foreign judgment that is void on its face is subject to collateral attack in California, regardless of the participation of the parties in the foreign action [*Aldabe v. Aldabe* (1962) 209 CA2d 453, 470-471, 26 CR 208 (involving invalid Nevada divorce decree obtained while California divorce action was pending)].

29.30[1][c] Court May Make Motion in Pending Action. A judgment or order void on its face may be set aside by the court on its own motion under the court's inherent power [see, e.g., *Montgomery v. Norman* (1953) 120 CA2d 855, 858, 262 P2d 360] .

29.30[2] Relief Not Barred by Res Judicata May Be Sought at Any Time. A judgment that is void on its face may be attacked at any time [*Renoir v. Redstar Corp.* (2004) 123 CA4th 1145, 1154, 20 CR3d 603 (motion under CCP § 473(d))]. It is a nullity [*Rochin v. Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1240, 79 CR2d 719] , and can be neither the basis nor evidence of any right [*Wettstein v. Cameto* (1964) 61 C2d 838, 840, 40 CR 705, 395 P2d 665] . The rule applies equally to motions by the court under the court's inherent power to set aside void judgments and orders [*Connelly v. Castillo* (1987) 190 CA3d 1583, 1588, 236 CR 112] .

Exception:

A judgment or order may not be attacked as void on its face if the issue of the court's lack of jurisdiction has already been contested and has become res judicata [see 29.26[2][b], 29.26[3][e]].

29.30[3] Showing of Meritorious Defense or Case Not Required. If the judgment is void on its face, no showing of a meritorious case, that is, a good claim or defense, by the party moving for relief is required [see *Bennett v. Hibernia Bank* (1956) 47 C2d 540, 554, 305 P2d 20] , and the judgment may be set aside by the court on its own motion [see, e.g., *Montgomery v. Norman* (1953) 120 CA2d 855, 858, 262 P2d 360] . Accordingly, no affidavit or declaration of merits is required to support a motion for relief at law from a judgment on the ground that it is void on its face [*County of Ventura v. Tillett* (1982) 133 CA3d 105, 112, 183 CR 741] .

29.30[4] Extrinsic Evidence Generally May Not Be Presented in Collateral Attack. When a California judgment is collaterally attacked, the court may review only matters that appear in the judgment roll or that are admitted by the parties [*Phelan v. Superior Court* (1950) 35 C2d 363, 372-373, 217 P2d 951] .

Exception:

When the judgment is one of either another state or a foreign nation, extrinsic evidence is normally admissible in a collateral attack to show lack of jurisdiction [*De Rasmio v. Smith* (1971) 15 CA3d 601, 607 n6, 93 CR 289] .

Example:

A defendant or unnamed party who was never served with summons and who never appeared in the proceedings in the other state (the laws of which, like California, requires the service of summons and the complaint, or a voluntary appearance, for the court to acquire jurisdiction over a defendant), but whose rights were directly adjudicated therein, may attack the judgment either directly or collaterally as void for failure to obtain jurisdiction over his or her person [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese* (1990) 223 CA3d 1354, 1364, 1374, 273 CR 340] .

 Cross Reference:

Discussion of attacks on foreign judgments, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

29.30[5] Judgment or Order Void On Its Face May Be Set Aside by Collateral Attack As Well As Direct Attack. In addition to a direct attack [*Renoir v. Redstar Corp.* (2004) 123 CA4th 1145, 1154, 20 CR3d 603 (motion to set aside used in action to enforce foreign judgment due to lack of service of summons in enforcement action)], a judgment or order that is void on its face may be set aside by a collateral attack [*Rochin v. Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1239, 79 CR2d 719] .

 Cross References:

Direct attack on judgment or order void on its face via motion to set aside void judgment or order, see 29.32.

Collateral attack on judgment or order void on its face via separate action, see 29.33.

Discussion of which types of jurisdictional defects render a judgment or order void on its face and thus subject to collateral attack, see 29.29[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityStandingThird Party StandingCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments



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29.31 Timing of Motion Setting Aside Judgment or Order Void in Fact and Evidentiary Issues.

29.31[1] Time for Making Motion.

29.31[1][a] Motion Must Be Made Within Reasonable Time. An attack on a judgment that is void in fact, but not on its face, must be made within a reasonable time, whether the attack is made under *CCP* § 473(d) or pursuant to the court's inherent power at law to set aside void judgments and orders [see, e.g., *Plaza Hollister Ltd. P'ship v. County of San Benito* (1999) 72 CA4th 1, 19, 84 CR2d 715] .

29.31[1][b] Two Statutory Limits Comprise "Reasonable Time." The limitations period in two statutes of limitations apply by analogy to motions to set aside judgments or orders void in fact in the following manner:

- The time limitation specified in *CCP* § 473.5 (relief from default) applies by analogy when the invalidity of the judgment or order resulted from the improper service or nonservice of summons, or other required notice [*Rogers v. Silverman* (1989) 216 CA3d 1114, 1123-1124, 265 CR 286] . The period specified is a reasonable time not exceeding the earlier of two years after entry of the default judgment or 180 days after the defendant was served with a written notice that the default or default judgment has been entered [*CCP* § 473.5(a)]. The period starts running from the date the judgment, rather than the default, was entered [*Rogers v. Silverman* (1989) 216 CA3d 1114, 1126, 265 CR 286] . The "reasonable time" requirement is separate from the two-year limit set forth in *CCP* § 473.5. Thus, although the court has jurisdiction to set aside the judgment within the two year period, a party bringing the motion within that period must demonstrate a satisfactory excuse for the default and diligence in making the motion after discovery of the default [*Schenkel v. Resnik* (1994) 27 CA4th Supp 1, 3-4, 33 CR2d 60] . Neither the actual notice provision in *CCP* § 473.5(a) [*In re Marriage of Smith* (1982) 135 CA3d 543, 546, 554-555, 185 CR 411] nor the affidavit requirement set forth in *CCP* § 473.5(b) [*Rogers v. Silverman* (1989) 216 CA3d 1114, 1124, 265 CR 286] applies to a motion for relief from a void judgment.

➡ **Cross Reference:**

Discussion of time limitation in *CCP § 473.5*, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.68[3][c]; or California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

■ In all other cases than those mentioned in the preceding paragraph, the six-month limitation set forth in *CCP § 473(b)* applies by analogy to the definition of "reasonable time" [*Thompson v. Cook* (1942) 20 C2d 564, 569, 127 P2d 909 ; *Plaza Hollister Ltd. P'ship v. County of San Benito* (1999) 72 CA4th 1, 19, 84 CR2d 715] .

Cross References:

Discussion of time limitation in *CCP § 473(b)*, see 29.14[1].

Discussion of time limitation in *CCP § 473(b)* as applied to defaults and default judgements, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.68[3][c]; or California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

29.31[1][c] Motion Not Made Within Reasonable Time Subject to Collateral Attack Rules. A motion made after expiration of a reasonable time is governed by the rules applicable to collateral attack, which means that the motion must be determined on the judgment roll alone. In that case, extrinsic evidence cannot be produced to show the invalidity, and without extrinsic evidence, the invalidity cannot be shown [*Connelly v. Castillo* (1987) 190 CA3d 1583, 1588, 236 CR 112] .



Warning:

Some decisions refer to an untimely motion to set aside a judgment or order made in excess of jurisdiction as a collateral attack [see, e.g., *Swain v. Swain* (1967) 250 CA2d 1, 10, 58 CR 83] , when it was a direct attack made subject to collateral attack rules due to its untimeliness.

Exception:

The rule that relief must be sought within a reasonable time does not apply to an untimely motion when the party in whose favor the judgment or order runs admits facts showing the invalidity of the judgment or order, or, without objection on his or her part, evidence is admitted that clearly shows the existence of those facts. The situation is the same as when the judgment is void on its face, and it is the duty of the court to declare the judgment or order void [*Phelan v. Superior Court* (1950) 35 C2d 363, 372-373, 217 P2d 951] .

Any order vacating such a judgment on motion made after a reasonable time has expired is itself void on its face and is assailable wherever and whenever it may be produced, whether the attack on it is direct or collateral; and it may be set aside by the court that rendered it of its own motion at any time [*People v. Davis* (1904) 143 C 673, 675-676, 77 P 651] .

29.31[1][d] Judgment or Order Void in Fact Is Not Subject to Collateral Attack If Adverse Party Has Changed Position. When some parties have relied on, or changed their position in accordance with, a former judgment granting relief the court was without power to grant, a court may deny a collateral attack on the judgment [*Moffat v. Moffat* (1980) 27 C3d 645, 657-658, 165 CR 877, 612 P2d 967 (detrimental reliance found)].

Example:

A parent is entitled to rely on a final child support order when he or she has not engaged in misconduct [*Armstrong v. Armstrong* (1976) 15 C3d 942, 951, 126 CR 805, 544 P2d 941] (action by children of

divorced parents against father for past child support and misappropriation of income from testamentary trust established by paternal grandfather); *In re Marriage of Maxfield* (1983) 142 CA3d 755, 761, 191 CR 267 (contempt proceeding arising out of modification of spousal support proceeding)].

29.31[3] Showing of Meritorious Defense or Case Not Required. A meritorious case or defense is not required to be shown on a motion to set aside a judgment that is valid on its face but void in fact [see *County of Ventura v. Tillett* (1982) 133 CA3d 105, 112, 183 CR 741]. Accordingly, no affidavit or declaration of merits is required to support a motion for relief at law from a judgment on the ground that it is void in fact, although not void on its face [see *County of Ventura v. Tillett* (1982) 133 CA3d 105, 112, 183 CR 741].

29.31[3] Extrinsic Evidence May Be Presented. If a judgment or order is not void on its face but is void in fact, and the motion is timely, any facts showing the invalidity of the judgment or order may be presented, including facts outside the record as well as facts appearing on the face of the judgment roll or record [*Sousa v. Freitas* (1970) 10 CA3d 660, 667, 89 CR 485].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments



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29.32 Preparing Motion to Set Aside Void Judgment or Order.

29.32[1] Moving to Set Aside Under CCP § 473(d).

29.32[1][a] Noticed Motion Specifying Relief May Be Filed by Any Party. Under *CCP § 473(d)*, the court may set aside a judgment or order void on its face, on noticed motion of any party.



Timing:

A noticed motion to set aside a judgment or order void on its face may be made at any time [see 29.30[2]]. On the other hand, a noticed motion to set aside a judgment or order void in fact must be made within a reasonable time [see 29.31[2]].



Strategic Point:

The filing of a *CCP § 473(d)* motion extends the period in which appeal may be filed [see 29.09[2]]. However, to preserve the right to seek both forms of relief, the *CCP § 473(d)* motion should be filed expeditiously, because the filing of an appeal, even at the end of the extended period in which to do so, removes the trial court's jurisdiction to rule on the *CCP § 473(d)* motion [see 29.09[1]].

29.32[1][b] Documents Accompanying CCP § 473(d) Motion Differ for Setting Aside Judgment or Order Void on Its Face and Those Void in Fact. On a motion to set aside or vacate a judgment or order that is void on its face, no supporting affidavit or declaration is prepared. However, counsel should request that the court take judicial notice of the judgment or order and the judgment roll, or, if the invalidity is disclosed by some other paper or report filed in the action, that particular paper or report [see *Evid Code §§ 452(d), 453*].



Cross References:

Moving for judicial notice, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.17.

Case annotations and legislative comments to *Evid Code* §§ 452, 453, see Cotchett, *California Courtroom Evidence*, 12.03, 12.05 (Matthew Bender).

Extrinsic evidence for showing a judgment or order is void in fact is normally set out in one or more affidavits [see *CCP* §§ 2002(1), 2003, 2009] or declarations under penalty of perjury [see *CCP* § 2015.5] submitted with the notice of motion for relief [see, e.g., *People v. One 1941 Chrysler 6 Touring Sedan (1947)* 81 CA2d 18, 25-27, 183 P2d 368] .

If the motion is subject to the Civil Law and Motions Rules [*Cal Rules Ct, Rule 3.1100 et seq.*], or it is otherwise required by local rules, a supporting memorandum must be prepared and submitted whether the judgment or order is void on its face or void in fact but not on its face.

29.32[1][c] Application and Accompanying Papers Must Be Filed With Court and Served on Adverse Party.

The moving party must provide notice to other parties [*CCP* § 473(d)]. Unless the court or judge prescribes otherwise, the moving party must serve the notice of *CCP* § 473(d) motion in accordance with *CCP* § 1005(b), because *CCP* § 473(d) requires notice but does not prescribe another time or method [see *CCP* § 1005(a)(13)].

The party seeking relief must cause to be served on the adverse party's attorney, or on the adverse party if he or she has no attorney, and file with the court, a notice of motion stating the order sought, the grounds for its issuance, and the papers on which the motion is based [see *CCP* §§ 1005(b), 1010-1013, 1015; *Cal Rules Ct, Rules 3.1100, 3.1103(a)(2), 3.1110(a), 3.1300*].



Timing:

The § 473(d) motion and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing, but if service is by mail, the required 16-day period of notice is increased by five calendar days if the place of mailing and place of address are in California, 10 calendar days if either the place of mailing or place of address is outside California but in the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If notice is served by fax, Express Mail, or other overnight delivery method, the 16-day period is extended by two calendar days [*CCP* § 1005(a)(13), (b)].



Cross Reference:

Making noticed motions under *CCP* § 1005(b), see Matthew Bender[(R)] *Practice Guide: California Pretrial Civil Procedure*, 26.39 et seq.

29.32[2] Moving to Set Aside Under Court's Inherent Power to Set Aside Judgment or Order Void on Its Face.

29.32[2][a] Application, Motion, and Notice Not Necessarily Required, but Better Practice Is to File Motion.

The power of a court to set aside a judgment or order void on its face may be exercised whenever the matter is brought to the court's attention. While a motion to vacate is entirely appropriate, neither a motion nor notice to an adverse party is essential [*People v. Davis (1904)* 143 C 673, 675-676, 77 P 651 (affirming order, made apparently on ex parte application, vacating prior void-on-its-face order made on untimely motion that vacated and set aside judgment not void on their face); see also *People v. Glimps (1979)* 92 CA3d 315, 325, 155 CR 230 (no notice of motion to set aside order void on its face)].

29.32[2][b] Court May Set Aside Judgment or Order on Own Motion. The court has the power to set aside a judgment or order void on its face on its own motion and without any application having been made on the part of anyone [*People v. Glimps (1979)* 92 CA3d 315, 325, 155 CR 230 (order void on its face denying motion to vacate order sealing records)].

29.32[3] Other Forms of Direct Attack. In addition to a motion under *CCP* § 473(d), a party may make a direct attack in the same action on a judgment void on its face by filing an appeal or a motion to vacate the judgment.



Cross References:

Motion to vacate judgment, see Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

Direct attack by appeal of judgment or order, see California Forms of Pleading and Practice, Chs. 40- 54 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsAuthority to Adjudicate



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Chapter 29 Setting Aside Judgments and Orders

IV. SETTING ASIDE VOID JUDGMENTS OR ORDERS UNDER CCP § 473(d) AND RELATED EQUITABLE RELIEF

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.33

29.33 Separate Collateral Action to Set Aside Judgment or Order Void on Its Face.

29.33[1] Collateral Attack by Separate Action May Set Aside Judgment or Order Void on Its Face. A proceeding in the nature of a collateral attack [see 29.06] may only be directed at a judgment or order void on its face [see 29.29].

Examples:

- Collateral attack is permitted when the amount awarded in a default judgment exceeds the amount requested in the complaint as prohibited by CCP § 580 [*Becker v. S.P.V. Constr. Co. (1980) 27 C3d 489, 493, 165 CR 825, 612 P2d 915*] .
- A proceeding in mandate to compel a trial court to strike from its records a portion of an appealable order that reduced the judgment is a collateral attack on the order [*Phelan v. Superior Court (1950) 35 C2d 363, 372, 217 P2d 951*] .
- CCP § 473(d) motion to set aside dismissal entered during bankruptcy stay but after time for direct attack [see 29.15[2]] is proper collateral attack on judgment [*Sindler v. Brennan (2003) 105 CA4th 1350, 1353, 129 CR2d 888*] .
- Separate action past limitation period for actions sounding in fraud to set aside amended judgment of which the aggrieved party had no notice was proper collateral attack on the amendment [*Rochin v. Pat Johnson Mfg. Co. (1998) 67 CA4th 1228, 1239, 79 CR2d 719*] .
- Action for writ of mandate attacking prior decision of court modifying trust was a collateral attack on the modification [*Estate of Buck (1994) 29 CA4th 1846, 1854 n6, 35 CR2d 442* (relief denied because prior decision not jurisdictionally defective)].
- Judgment in excess of statute limiting amount to that sought in pleadings, as well as in excess of

stipulation, may be collaterally attacked in subsequent action for execution [*Jones v. World Life Research Inst.* (1976) 60 CA3d 836, 842-848, 131 CR 674] .

■ When orders are independently appealable and become final by lapse of time, a subsequent attack on them in an appeal from a later order or judgment is collateral [*Estate of Wemyss* (1975) 49 CA3d 53, 58, 122 CR 134] .

29.33[2] Nonjurisdictional Errors Not Subject to Attack in Separate Action. Nonjurisdictional errors are not subject to collateral attack [*Estate of Buck* (1994) 29 CA4th 1846, 1857, 35 CR2d 442 (lack of evidence)]. Thus, failure to state a cause of action, insufficiency of evidence, abuse of discretion, and mistake, or misapplication, of law are nonjurisdictional errors for which a collateral attack will not lie [see *Armstrong v. Armstrong* (1976) 15 C3d 942, 950-951, 126 CR 805, 544 P2d 941] .

29.33[3] Jurisdiction Is Presumed in Collateral Attack by Separate Action. The judgment or order of any California court, United States court, or court of general jurisdiction in any other state or nation, is presumed on collateral attack to have been made in the lawful exercise of the court's jurisdiction [*Evid Code* § 666; see also *Evid Code* § 664 (official duty is presumed to have been regularly performed); *Thomas v. Department of Motor Vehicles* (1970) 3 C3d 335, 337, 90 CR 586, 475 P2d 858] . Thus, on collateral attack every presumption is in favor of the validity of the judgment or order of a court of general jurisdiction, and any condition of facts consistent with its validity and not affirmatively contradicted by the judgment roll will be presumed to have existed, and, under this rule, it will be presumed when necessary that the parties consented to the court's action or waived objection to it [*Gagnon Co. v. Nevada Desert Inn Inc.* (1955) 45 C2d 448, 456, 289 P2d 466] .



Cross Reference:

Case annotations and legislative comments to *Evid Code* §§ 664, 666, see Cotchett, *California Courtroom Evidence*, 15.38, 15.40 (Matthew Bender).

Example:

If the record is silent, it will be presumed that process and pleadings were properly served and that due proof of service was presented to the court. Similarly, notice, or facts rendering it unnecessary, are presumed unless the record shows the contrary, and, when the court may shorten time or dispense with notice, it will be presumed that the court did so if the order is silent on the point [*Phelan v. Superior Court* (1950) 35 C2d 363, 373-374, 217 P2d 951] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsEvidenceInferences & PresumptionsPresumption of Regularity



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29.34 CHECKLIST: Setting Aside Judgments or Orders In Equity Due to Fraud, Duress, or Extrinsic Mistake.

- ☐ Determine if conduct of adverse or third party attorney constitutes extrinsic fraud, duress, or extrinsic mistake.

Discussion:

See 29.35[1], 29.40 -29.42

- ☐ If party has grounds for relief from extrinsic fraud, duress, or extrinsic mistake, determine whether the party can show:

- ☐ That the extrinsic fraud, duress, or extrinsic mistake deprived the party of his or her day in court in the underlying action.

Discussion:

See 29.36[1]

- ☐ A meritorious case or defense in the underlying action.

Discussion:

See 29.36[2]



Timing: Determine if relief may be sought by motion within a reasonable time from the entry of the judgment or order or of the discovery of the fraud, duress, or mistake, or by separate action within 3 years of discovery of the fraud, duress, or mistake.

Discussion:

See 29.38

- ☐ Determine whether the moving party has standing to seek relief on the extant grounds.

Discussion:

See 29.37

- ☐ If party is eligible for relief from an adverse or third party's extrinsic fraud, duress, or extrinsic mistake, file and prepare a noticed motion in the action in which the judgment or order from which relief is sought was issued or file a separate action attacking the judgment or order.

Discussion:

See 29.43, 29.44

Forms:

See 29.80 -29.83

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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29.35 Options and Strategies for Moving Party.

29.35[1] Defining Extrinsic Fraud, Duress, or Extrinsic Mistake for Equitable Relief.

29.35[1][a] General Equitable Power Permits Granting Relief From Extrinsic Fraud, Duress, or Extrinsic Mistake. Under their general equitable power, courts may grant equitable relief from a judgment or order on the grounds of extrinsic fraud or extrinsic mistake by the adverse party [*Estate of Beard* (1999) 71 CA4th 753, 774-775, 84 CR2d 276 (probate court has power to grant equitable relief for extrinsic fraud or mistake)]. Federal courts may entertain motions for equitable relief from state court judgments on the basis of extrinsic fraud or mistake [*Rand v. Lombardo* (In re Lombardo) (SD Cal 1998) 224 BR 774, 781] .

29.35[1][b] No Relief From Intrinsic Fraud or Mistake. Claims of intrinsic fraud must be discovered and exposed in the proceeding in which they were perpetrated so as to avoid multiplicity of suits [*Rios v. Allstate Ins. Co.* (1977) 68 CA3d 811, 818, 137 CR 441 (bad faith claim in attack on arbitration award was claim of intrinsic fraud)].

29.35[1][c] Distinguish Extrinsic Fraud and Duress From Extrinsic Mistake. Extrinsic fraud is a broad concept that encompasses almost any set of extrinsic circumstances that deprive a party of a fair adversary hearing. Generally, it arises when one party has in some way fraudulently been prevented from presenting his or her claim or defense [*Estate of Beard* (1999) 71 CA4th 753, 774, 84 CR2d 276 ; *Parage v. Couedel* (1997) 60 CA4th 1037, 1044, 70 CR2d 671] . There is no abstract formula for determining whether a particular case involves extrinsic, rather than intrinsic, fraud. It is necessary to examine the facts in the light of the policy that a party who failed to assemble all its evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which it was deprived of a fair opportunity fully to present his case.

Extrinsic fraud includes a false promise of compromise that induces a party to act or refrain from acting in such a way as to deprive that party of a fair opportunity to litigate his or her case. A finding of extrinsic fraud does not require that a party actually be physically prevented from appearing at a conference or hearing, as long as the fraudulent promise to settle or drop a litigated matter causes the party to forego an opportunity to prosecute or contest a case, or to be deprived of a fair hearing [*Estate of Beard* (1999) 71 CA4th 753, 774, 84 CR2d 276] .

Several decisions have held that relief from a judgment or order may be granted on the ground of duress [e.g., *In re Marriage of Baltins* (1989) 212 CA3d 66, 83-84, 260 CR 403 ; *In re Marriage of Brockman* (1987) 194 CA3d 1035, 1047, 240 CR 96] . However, one court, in acknowledging that it had found no case stating that it was granting relief solely on the ground of duress, stated that "but this is probably because duress is often characterized as fraud" [*In re Marriage of Baltins* (1989) 212 CA3d 66, 83, 260 CR 403] .

Extrinsic fraud is not the only basis for granting equitable relief from a judgment otherwise final and conclusive [*Estate of Beard* (1999) 71 CA4th 753, 775, 84 CR2d 276] . Like extrinsic fraud, extrinsic mistake must result in the entry of an unjust judgment without a fair adversary hearing [*Estate of Beard* (1999) 71 CA4th 753, 775, 84 CR2d 276] . Extrinsic mistake is a term broadly applied to circumstances extrinsic to the litigation that unfairly cost a party a hearing on the merits [*Cruz v. Fagor America, Inc.* (2007) 146 CA4th 488, 496, 52 CR3d 862] . Equitable relief from an order or judgment otherwise final may be granted on this theory when the aggrieved party has been unable to make a case of extrinsic fraud, but has shown excusable neglect, hardship or other grounds for the failure to press a claim or defense [*Estate of Beard* (1999) 71 CA4th 753, 775, 84 CR2d 276] .

29.35[1][d] Extrinsic Fraud Applies Only to Act of Adverse or Third Party, While Extrinsic Mistake Can Apply to Aggrieved Party's Mistake. Extrinsic fraud is not established based on the act of the aggrieved party [see *In re Marriage of Dorris* (1984) 160 CA3d 1208, 1213, 207 CR 160 (extrinsic fraud is not established by the inclusion of patently ambiguous language for division of property in a dissolution judgment that is based on a marital termination agreement drafted by the attorney for the party claiming equitable relief)]. However, extrinsic mistake may be based on the act of the aggrieved party or his or her counsel, such as the relief sought under CCP § 473(b).

Cross References:

Discussion of procedures under CCP § 473(b), see 29.10 et seq.

29.35[2] Strategy for Moving Party. A judgment or order resulting from an adverse or third party's extrinsic fraud or mistake may be vacated on motion, as well as by an action in equity [see *Edison v. Edison* (1960) 178 CA2d 632, 633, 3 CR 201] .

Timing:

Equitable relief is allowed long after the time for appeal, new trial, or other statutory means of review have expired if the judgment was obtained under circumstances of fraud or mistake that prevented a fair adversary hearing, and the aggrieved party did not have a reasonable opportunity to litigate his or her claim or defense [*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 CA3d 725, 737, 216 CR 300 (equitable motion to vacate order setting aside previous order of dismissal for failure to answer interrogatories when motion was filed almost three years after order was entered)].



Strategic Point--Both Extrinsic and Intrinsic Fraud:

Particular circumstances may constitute both extrinsic fraud by adverse party and extrinsic mistake by moving party [see *Estate of Beard* (1999) 71 CA4th 753, 775, 84 CR2d 276 (the probate court was within its own broad equitable jurisdiction because appellant's actions in entering into the compromise agreement, promising to dismiss her then pending appeal and litigation against the estate, and then subsequently breaching this promise and repeatedly violating the court's orders that she comply, both constituted an extrinsic fraud on the other parties or directly resulted in their excusable extrinsic mistake in relying on her promises. Either of these conclusions justified the probate court in setting aside the terms of the original settlement and amended order)].

Cross Reference:

Discussion of setting aside judgments and orders based on extrinsic mistake of moving party, see 29.11[1][e].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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29.36 Requisites for Equitable Relief on Grounds of Extrinsic Fraud or Mistake.

29.36[1] Equitable Relief Is Discretionary on Proper Showing. The granting of a motion for equitable relief from the same court's judgment or order due to extrinsic fraud or mistake is within the sound discretion of the court [see *McCreadie v. Arques* (1967) 248 CA2d 39, 45, 56 CR 188] .

29.36[2] Equitable Relief Requires Showing of Denial of Day in Court. In order for equitable relief to be granted, the extrinsic fraud or mistake must deprive the party of an opportunity to present his or her case to the court [*Rand v. Lombardo* (*In re Lombardo*) (SD Cal 1998) 224 BR 774, 781 (fraud); *Jorgensen v. Jorgensen* (1948) 32 C2d 13, 18-20, 193 P2d 728 (mistake); *In re David H.* (1995) 33 CA4th 368, 381, 39 CR2d 313 (fraud)].

29.36[3] Equitable Relief Requires Showing of Meritorious Case. A party seeking equitable relief from a judgment or order due to extrinsic fraud or mistake must plead and prove that he or she has a meritorious case or defense [*Estate of McGuigan* (2000) 83 CA4th 639, 652, 99 CR2d 887 (meritorious claim shown); *In re David H.* (1995) 33 CA4th 368, 381, 39 CR2d 313 (no attempt to present meritorious case claiming extrinsic fraud precluded relief)]. Meeting this standard requires a showing that the claim or defense, if asserted in a new trial, would likely to result in a judgment favorable to the moving party [*Estate of McGuigan* (2000) 83 CA4th 639, 652, 99 CR2d 887] .

Example:

The moving party's own pleadings and exhibits showed his paternity of the child whose support the moving party claimed in the action was not his obligation [*Rand v. Lombardo* (*In re Lombardo*) (SD Cal 1998) 224 BR 774, 781] .

➡ Cross Reference:

Discussion of requirement of showing meritorious case or defense as applied to defaults and default judgments, 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:

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudgmentsRelief From JudgmentFraudCivil
ProcedureJudgmentsRelief From JudgmentIndependent Actions



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29.37 Who May Seek Equitable Relief.

29.37[1] Party or Person in Privity With Party May Make Motion or Bring Action for Equitable Relief. A party or one in privity with a party who has been prevented from obtaining a fair adversary hearing through extrinsic fraud or mistake may bring an equitable action to vacate the judgment [*Morton Regent Enters., Inc. v. Leadtec California, Inc.* (1977) 74 CA3d 842, 847, 141 CR 706] . Relief is available either by a motion in the action in which the judgment was rendered or in an independent action in equity [see *Morton Regent Enters., Inc. v. Leadtec California, Inc.* (1977) 74 CA3d 842, 847, 141 CR 706] .

29.37[2] Third Party May Make Motion or Bring Action for Equitable Relief. A stranger to the proceedings may maintain such an action if his or her interests have been adversely affected by the judgment [*Morton Regent Enters., Inc. v. Leadtec California, Inc.* (1977) 74 CA3d 842, 847, 141 CR 706] . The right of a third party to set aside a judgment may depend on extrinsic mistake as well as extrinsic fraud [*Villarruel v. Arreola* (1977) 66 CA3d 309, 318, 136 CR 19] .

Relief by a stranger to the proceedings may also be sought by intervention [*Villarruel v. Arreola* (1977) 66 CA3d 309, 318, 136 CR 19 ; see CCP § 387]. The interest necessary for intervention must involve such an immediate and direct claim on the very subject matter of the litigation that the intervener will either gain or lose by the direct operation of the judgment that may be rendered [*People ex rel. Public Utils. Comm'n v. Ryerson* (1966) 241 CA2d 115, 119, 50 CR 246] . While the interest of the intervener is normally pecuniary, that is not an indispensable element [*People ex rel. Public Utils. Comm'n v. Ryerson* (1966) 241 CA2d 115, 119, 50 CR 246] .



Cross References:

Discussion and forms for use in seeking to intervene, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 31, Intervention.

California Forms of Pleading and Practice, Ch. 395, Parties (Matthew Bender).

29.37[3] Court May Make Motion for Equitable Relief. The court may grant equitable relief from a party's

extrinsic fraud or mistake on its own motion, as long as the motion is noticed and a hearing is held on it [*see, e.g., Badella v. Miller* (1955) 44 C2d 81, 86-87, 279 P2d 729 (relief denied because motion not noticed and hearing not held)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityStandingThird Party StandingCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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29.38 Time for Filing Motion for Equitable Relief Differs From Time for Filing Action.

29.38[1] Time for Filing Motion for Equitable Relief Is Reasonable Time From Entry of Judgment or Order or Discovery of Extrinsic Fraud or Mistake. A party moving in equity for relief from a judgment or order must act diligently in discovering the grounds for relief [*Manson, Iver & York v. Black* (2009) 176 CA4th 36, 49, 97 CR3d 522] . Likewise, a motion for relief in equity must be sought with reasonable diligence after the date that the judgment or the extrinsic fraud or mistake was discovered, irrespective of when the judgment was entered [*In re Marriage of Stevenot* (1984) 154 CA3d 1051, 1066-1067, 202 CR 116 ; *In re Marriage of Coffin* (1976) 63 CA3d 139, 149, 133 CR 583 (equitable motion granted when it was filed approximately two months after entry of final judgment of dissolution and about eight and one-half months after interlocutory judgment was entered)].

In determining whether the moving party exercised diligence in seeking relief, the court must look to the extent of prejudice to the opposing party and to the reasonableness of the moving party in not filing the motion to vacate earlier [*In re Marriage of Modnick* (1983) 33 C3d 897, 908, 191 CR 629, 663 P2d 187] .

Prerequisite--Reasonable Diligence:

The balancing between due diligence and prejudice reflects a balancing of two separate policy concerns, the policy favoring a trial on the merits and that favoring the finality of judgments [*In re Marriage of Baltins* (1989) 212 CA3d 66, 93, 260 CR 403 (in marital property cases, unless circumstances are egregious, finality of judgment should prevail)]. The policy favoring finality is man primarily by the need for confidence in the judicial system, as well as the need for judicial economy for overburdened courts [*In re Marriage of Baltins* (1989) 212 CA3d 66, 93, 260 CR 403] . Counsel should weigh these competing factors in arguing diligence and prejudice or lack thereof.

Accordingly, the greater the prejudice, the more timely must be the relief sought [*In re Marriage of Modnick* (1983) 33 C3d 897, 908, 191 CR 629, 663 P2d 187] . When little judicial time and effort have been expended, the factor of judicial economy that otherwise weighs in favor of finality is less strong, and the equitable considerations of fair hearing and of penalizing fraud weigh more compellingly [*In re Marriage of Baltins* (1989) 212 CA3d 66, 93, 260 CR 403] .

Examples:

- The duty of diligence is reduced when there is a fiduciary [*In re Marriage of Coffin* (1976) 63 CA3d 139, 155, 133 CR 583 (discovery occurred on party retaining counsel)] or confidential relationship between the parties [*Estate of Sanders* (1985) 40 C3d 607, 615, 221 CR 432, 710 P2d 232 (extrinsic fraud)].
- Prejudice to a plaintiff is less if judgment has not been entered when a defendant seeks equitable relief [see *Rappleyea v. Campbell* (1994) 8 C4th 975, 984, 35 CR2d 669, 884 P2d 126] .

In determining reasonable diligence, the court may be guided by the three-year statute of limitations applicable to independent equitable actions for relief [*In re Marriage of Modnick* (1983) 33 C3d 897, 908, 191 CR 629, 663 P2d 187 (motion filed two years after judgment was discovered, during which time moving party was not dilatory)].

➡ **Cross Reference:**

Three-year statute of limitations applicable to independent equitable actions for relief from judgment or order, see 29.22[2].

The failure to show due diligence after discovery of the mistake is, by itself, fatal and constitutes a bar to the granting of equitable relief [see *Washko v. Stewart* (1941) 44 CA2d 311, 318, 112 P2d 306 (party seeking equitable relief from extrinsic fraud by motion as not permitted to wait until more than a year after he admittedly had actual notice of judgment before attacking it)]. The inexcusable neglect of the moving party in seeking relief is lack of due diligence [*In re Marriage of Stevenot* (1984) 154 CA3d 1051, 1075, 202 CR 116 (relief denied)].

Example:

Party seeking relief from judgment of paternity did not show diligence in waiting five years after judgment to oppose imposition of child support obligation in bankruptcy proceeding [*Rand v. Lombardo* (*In re Lombardo*) (SD Cal 1998) 224 BR 774, 781] .

Distinguish--Laches:

The requirement that a party act diligently in moving for relief from a judgment or order is sometimes explained in terms of laches [see, e.g., *In re Marriage of Modnick* (1983) 33 C3d 897, 908, 191 CR 629, 663 P2d 187] . In other decisions, this is not the appropriate doctrine: laches requires a finding of prejudice to the adverse party caused by the delay, whereas the failure to act diligently in seeking relief is an independent consideration that may defeat the motion for equitable relief, whether or not the other party was prejudiced by any delay [*In re Marriage of Baltins* (1989) 212 CA3d 66, 92, 260 CR 403] .

29.38[2] Time for Filing Action for Equitable Relief Generally Is Three Years From Entry of Judgment or Order or Discovery of Extrinsic Mistake.

29.38[2][a] Three-Year Statute of Limitation Generally Applies to Action for Equitable Relief From Extrinsic Mistake. When extrinsic fraud or mistake is the gravamen of a suit in equity to vacate, or to secure relief from, a judgment that is not void on its face, the action is governed by the three-year period of limitation set forth in CCP § 338(d), governing actions for fraud or mistake [*Bennett v. Hibernia Bank* (1956) 47 C2d 540, 560, 305 P2d 20 (action timely); *Parsons v. Tickner* (1995) 31 CA4th 1513, 1525, 37 CR2d 810 (timely action for extrinsic fraud)].

29.38[2][b] Three-Year Statute of Limitation Runs From Date of Discovery of Extrinsic Mistake. A cause of action for setting aside a judgment due to extrinsic fraud or mistake accrues when the aggrieved party discovers the facts constituting the fraud or mistake [CCP § 338(d); *Parsons v. Tickner* (1995) 31 CA4th 1513, 1525, 37 CR2d 810] . However, the courts have construed this provision to mean that the cause of action accrues when the aggrieved party

discovers, or in the exercise of reasonable diligence should have discovered, the facts constituting the fraud or mistake [*Bennett v. Hibernia Bank* (1956) 47 C2d 540, 559, 305 P2d 20] .

Prerequisite--Reasonable Diligence:

While the aggrieved party must exercise reasonable diligence in discovering the facts constituting the fraud or mistake, a party's right to proceed on the theory of fraud is not destroyed merely because opportunities for examination or means of knowledge were open to him or her when no legal duty devolved on the party to employ those means of knowledge. When there is an improper concealment of facts at the time of the transaction and thereafter that causes a party to forego an investigation, the statute of limitations does not commence to run until the party discovers the fraud thereby worked on him or her. In addition, when by reason of representations made to a defrauded party, the party is dissuaded from making inquiry, he or she is not charged with constructive notice of the contents of public records [*Harkins v. Fielder* (1957) 150 CA2d 528, 538, 310 P2d 423 (involving attack on prior probate decree distributing estate)].

Moreover, the existence of a fiduciary relationship between the parties may lessen the plaintiff's duty to make an earlier discovery of the facts [*Bennett v. Hibernia Bank* (1956) 47 C2d 540, 559-563, 305 P2d 20 ; see *Parsons v. Tickner* (1995) 31 CA4th 1513, 1525, 37 CR2d 810 (delayed discovery rule generally applicable to fiduciary and confidential relationships)].

But even absent a fiduciary or confidential relationship, one who speaks is not only obligated to tell the truth but is equally bound not to suppress or conceal any facts within his or her knowledge that materially qualify those stated [*Harkins v. Fielder* (1957) 150 CA2d 528, 537, 310 P2d 423] .

It is a question for the trier of fact to determine whether the delay in the investigation and discovery of the true facts was reasonable and excusable, as the acts of a person of ordinary care and prudence, under the same circumstances [*Harkins v. Fielder* (1957) 150 CA2d 528, 539, 310 P2d 423] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsGovernmentsLegislationStatutes of LimitationsTime Limitations



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Chapter 29 Setting Aside Judgments and Orders
V. SETTING ASIDE JUDGMENTS OR ORDERS IN EQUITY DUE TO FRAUD, DURESS, OR EXTRINSIC
MISTAKE

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.39

29.39 Burden of Proof for Setting Aside Judgment or Order Under Equitable Principles Is on Moving Party.

The party moving for equitable relief from a judgment or order has the burden of establishing extrinsic fraud or mistake
[*Parage v. Couedel* (1997) 60 CA4th 1037, 1041, 70 CR2d 671] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent
ActionsEvidenceProcedural ConsiderationsBurden of ProofGeneral Overview



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29.40 Setting Aside Judgment or Order on Grounds of Extrinsic Fraud of Adverse or Third Party.

29.40[1] In General, Adverse or Third Party Commits Extrinsic Fraud by Keeping Aggrieved Party in Ignorance or Preventing Full Participation. A judgment or order may be set aside on equitable grounds if it was procured by extrinsic fraud [*Home Ins. Co. v. Zurich Ins. Co. (2002) 96 CA4th 17, 26, 116 CR2d 583*] . Generally, extrinsic fraud encompasses almost any set of extrinsic circumstances that deprive a party of a fair adversary hearing [*In re Marriage of Modnick (1983) 33 C3d 897, 905, 191 CR 629, 663 P2d 187*] , but specifically, extrinsic fraud occurs when an adverse or third party keeps the aggrieved party in ignorance of the action or fraudulently prevents that party from fully participating in the proceeding in some manner [*Home Ins. Co. v. Zurich Ins. Co. (2002) 96 CA4th 17, 26-27, 116 CR2d 583 ; see also 29.19[1][b]*].

The definition of actual fraud under CC § 1572 is applicable to ascertaining the commission of extrinsic fraud [see *Harkins v. Fielder (1957) 150 CA2d 528, 536, 310 P2d 423*] .

Distinguish:

When actual fraud is not shown, it is generally within the ground of extrinsic mistake [*Sousa v. Freitas (1970) 10 CA3d 660, 667, 89 CR 485*] .

➤ Cross References:

Distinguishing extrinsic fraud from extrinsic mistake, see 29.19[1][b].

Setting aside judgments and orders based on extrinsic mistake by adverse or third party, see 29.26.

Examples:

- Order of distribution in probate obtained by administrator knowingly not notifying potential heirs in accordance with *Prob Code* § 8110 was obtained through extrinsic fraud [*Estate of Carter (2003) 111 CA4th 1139, 1154, 4 CR3d 490* (relief granted to potential heirs)].

- A confession of judgment obtained through fraud consisting of the attorney for the adverse party executing the declaration of counsel for moving party under CCP § 1132(b) may be set aside as procured through extrinsic fraud [*Rivercourt Co. Ltd. v. Dyna-Tel, Inc.* (1996) 41 CA4th 1477, 1481-1482, 49 CR2d 279] .

29.40[2] Fraudulent Failure to Give Notice May Be Extrinsic Fraud. An equitable attack on a judgment or order may be made on the ground of extrinsic fraud when it appears that there was a willful failure to give the required notice [*Estate of Carter* (2003) 111 CA4th 1139, 1148-1149, 4 CR3d 490] .

Examples:

- Order of distribution in probate obtained by administrator knowingly not notifying potential heirs in accordance with *Prob Code* § 8110 was obtained through extrinsic fraud [*Estate of Carter* (2003) 111 CA4th 1139, 1154, 4 CR3d 490 (relief granted to potential heirs)].

- Claim or representative's accounting that falsely states that the state does not need to be notified because it is not entitled to a distribution is extrinsic fraud when a possible right to distribution is known to adverse party [*Estate of Starkweather* (1998) 64 CA4th 580, 593-594, 75 CR2d 766 (relief granted to state agency on claim for reimbursement of benefits hidden from court); *State v. Broderon* (1967) 247 CA2d 797, 803-805, 56 CR 58 (relief granted to state on escheat claim)]

 Cross Reference:

Equitable relief from extrinsic fraud from defaults and default judgments due to adverse party's willful failure to provide notice, see *Matthew Bender*[(R)] *Practice Guide: California Pretrial Civil Procedure*, 36.73.

California Forms of Pleading and Practice, Ch. 489, Relief From Judgments and Orders (Matthew Bender).

29.40[3] Fraudulent Representations by Adverse Party May Be Extrinsic Fraud. When one party has willfully misled the other with respect to the other party's need to appear and protect his or her rights and the other party has reasonably relied on that representation, equitable relief from the subsequent judgment will be granted if the other conditions for equitable relief exist [*Parsons v. Tickner* (1995) 31 CA4th 1513, 1526, 37 CR2d 810] .

Consider--Reasonable Reliance:

When no duty is imposed by law on a person to make inquiry, and when under the circumstances prudent person would not be put on inquiry, the mere fact that means of knowledge are open to the person, and the person has not taken advantage of them, does not preclude the person from relief when thereafter the person makes actual discovery [*Parsons v. Tickner* (1995) 31 CA4th 1513, 1528-1529, 37 CR2d 810] .

Example:

Hired managers who misrepresented themselves as owners of the managed intellectual property to heirs of the rightful owner engaged in extrinsic fraud, and heirs acceptance of misrepresentations was reasonable, when they had no legal duty to verify ownership, until they were able to discover true ownership of the property [*Parsons v. Tickner* (1995) 31 CA4th 1513, 1529, 37 CR2d 810 (heir not estopped by acceptance of royalty payments under alleged agreement)].

29.40[4] Concealment of Facts From Party by Fiduciary or Person Confidential Relationship. A fiduciary who conceals facts from the beneficiary engages in extrinsic fraud entitling the beneficiary to equitable relief from a

resulting judgment or order [*Estate of Sanders* (1985) 40 C3d 607, 616, 221 CR 432, 710 P2d 232 ; *In re Marriage of Coffin* (1976) 63 CA3d 139, 150-151, 133 CR 583] .

Examples:

- If a personal representative leads a beneficiary to believe that a particular distribution will be made in his or her behalf and later changes the proposed distribution, failure to inform the beneficiary of that change in a manner that will allow the beneficiary to appear and contest it constitutes extrinsic fraud that would allow the court to vacate the subsequent distribution decree [*Estate of Sanders* (1985) 40 C3d 607, 616, 221 CR 432, 710 P2d 232] .

- Spouse in custody of community property is fiduciary with respect to other spouse and, therefore, has duty to disclose its existence to the other spouse before the negotiation of a property settlement agreement, so that the failure to disclose it is grounds for attacking the judgment based on the agreement [*In re Marriage of Modnick* (1983) 33 C3d 897, 905, 191 CR 629, 663 P2d 187] .

- Concealment of facts by real estate agent from client constitutes extrinsic fraud [*Kachig v. Boothe* (1971) 22 CA3d 626, 634-636, 99 CR 393 (no extrinsic fraud found)].

When a relationship of trust and confidence exists, the person in whom confidence is reposed is under a duty to make full disclosure of all material facts within his or her knowledge relating to the transaction in question. The disclosure must be full and complete. Any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured by it to an action [*Estate of Sanders* (1985) 40 C3d 607, 616, 221 CR 432, 710 P2d 232] .

Distinguish:

A confidential relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary relationship, and is particularly likely to exist when there is a family relationship or one of friendship. A confidential relationship exists when trust and confidence are reposed by one person in the integrity and fidelity of another. It is not necessary that there be an extended period of business or accommodation transactions or dealings between persons for a confidential relationship to be established between them [*Estate of Sanders* (1985) 40 C3d 607, 615, 221 CR 432, 710 P2d 232] .

Example:

The fact that the decedent's widow, told the elderly mother of the decedent that she need not retain an attorney because widow would keep the mother informed of the probate proceedings and would do everything possible to protect her interests in the estate, and thereby prevented the mother's appearance in the probate proceedings was sufficient to show extrinsic fraud even though defendant was not executor and did not owe plaintiff a fiduciary duty in that capacity. The court implicitly relied solely on the breach of a confidential relationship [*Craney v. Low* (1956) 46 C2d 757, 759, 298 P2d 860] .

However, when in a probate proceeding there is no allegation or showing that the complaining party did not receive notice of the proceeding or that some attempt was made to prevent his or her full participation in it, the concealment of the complaining party's interest in the estate to be distributed will not serve as a basis for equitable relief. In that case, the complaining party has every opportunity to present his or her case, and it follows that there is no extrinsic fraud or mistake sufficient to constitute the basis for an attack on the decree in equity [*Westphal v. Westphal* (1942) 20 C2d 393, 397, 126 P2d 105 ; *Kachig v. Boothe* (1971) 22 CA3d 626, 634-636, 99 CR 393 (intrinsic fraud)].

29.40[5] Concealment From Court of Party's Disability by Adverse Party Is Extrinsic Fraud. An adverse party's concealment of a party's legal disability from the court is extrinsic fraud [see *In re Marriage of Park* (1980) 27

C3d 337, 342-343, 165 CR 792, 612 P2d 882] . The party seeking relief must show [*Edison v. Edison* (1960) 178 CA2d 632, 634, 3 CR 201] :

- Moving party was legally disabled at the determinative time involved;
- Adverse party either knew this or knew facts concerning it which, if revealed to the court, would have resulted in a continuance until defendant could be heard in person or by guardian; and
- Adverse party concealed such information from the court.

Examples:

The adverse party's concealment of the following legal disabilities from the court has constituted extrinsic fraud:

- Incompetence [*Edison v. Edison* (1960) 178 CA2d 632, 634, 3 CR 201] .
- Stranding in another country [*Landon v. Landon* (1946) 74 CA2d 954, 957, 169 P2d 980 (positive misstatements of fact in affidavit)].
- Deportation [*In re Marriage of Park* (1980) 27 C3d 337, 343, 165 CR 792, 612 P2d 882] .

► Cross Reference:

Party's legal disability as constituting grounds for discretionary statutory relief or equitable relief from judgment or order, see 29.19[3].

29.40[6] Concealment of Party's Rights From Court or Party. In some instances, equitable relief from a judgment has been granted when the evidence establishes that the rights and interests of certain parties have been concealed from the court and from the interested party [*Estate of McGuigan* (2000) 83 CA4th 639, 651, 99 CR2d 887 (adverse party need not have misled aggrieved party)]. Thus, when the parties to a lawsuit fraudulently conceal the existence of an indispensable party in an attempt to obtain a judgment that cuts off the legal rights of that party, the judgment may be vacated [*Estate of McGuigan* (2000) 83 CA4th 639, 651, 99 CR2d 887 ; *In re Olivia A.* (1986) 181 CA3d 237, 241-243, 226 CR 382 (extrinsic fraud)].

Examples:

- The invocation of equity on the ground of extrinsic fraud is warranted when an heir or legatee fails to notify the court of the existence of other heirs of whom he or she has knowledge and files false petitions with the court representing that there are no such heirs [*Harkins v. Fielder* (1957) 150 CA2d 528, 535, 310 P2d 423] .
- Failure to notify other heir or the court hearing action for recovery of escheated property subject to distribution by potential heir that he or she knows of other closer heirs entitled to the property in accordance with CCP § 1355 is extrinsic fraud [*Estate of McGuigan* (2000) 83 CA4th 639, 651, 99 CR2d 887 (court must also determine that other heir was entitled to notice and would have filed timely claim)].
- Parent's failure to notify county of petition to have child declared outside the custody and control of other parent because other parent could not afford to support child is extrinsic fraud on the court [*In re*

Olivia A. (1986) 181 CA3d 237, 241-243, 226 CR 382] .

When the loss of rights results from the party's failure to investigate and pursue them rather than from the adverse party's active concealment, the courts will deny relief [*Jorgensen v. Jorgensen (1948) 32 C2d 13, 22-23, 193 P2d 728]* .

Example:

Although a spouse may secure relief from a property settlement agreement obtained through the other spouse's concealment of assets in violation of his or her duty to disclose them, when the ground for relief is merely the mistaken reliance on the other spouse's classification of the fully disclosed assets as either community or separate property, the complaining spouse is barred from obtaining equitable relief by an admission that he or she and his or her attorney did not investigate the facts having had full opportunity to do so [*Jorgensen v. Jorgensen (1948) 32 C2d 13, 22-23, 193 P2d 728]* .

29.40[7] Fraudulent Change in Property Settlement Agreement May Be Extrinsic Fraud. In some cases, a court will grant equitable relief from a property settlement incorporated in a dissolution of marriage judgment when it is shown that one party fraudulently changed the terms of the oral agreement in reducing it to a written document under circumstances that would excuse the other party from recognizing and contesting the change. For example, when after having agreed orally to pay a particular sum for alimony and child support for an indeterminate period of time, the husband changed the written settlement to provide for the termination of those payments on his remarriage, the court set aside the property settlement on grounds of extrinsic fraud when the evidence revealed that the wife, relying on her attorney and not fully understanding the terms of the agreement, did not have notice of the change in the written document before its incorporation in the divorce judgment [*Lopez v. Lopez (1965) 63 C2d 735, 736-737, 48 CR 136, 408 P2d 744]* .

29.40[8] No Relief for Intrinsic Fraud by Adverse or Third Party.

29.40[8][a] Mistake or Fraud Is Intrinsic If Aggrieved Party Received Notice and Was Not Prevented From Presenting Claims. Equitable relief from extrinsic fraud or mistake is denied if the aggrieved party has been given notice of the action and has not been prevented from participating in it [*Heyman v. Franchise Mortgage Acceptance Corp. (2003) 107 CA4th 921, 926, 132 CR2d 465* (litigation privilege under CCP § 47(b) does not bar relief for extrinsic fraud); *Home Ins. Co. v. Zurich Ins. Co. (2002) 96 CA4th 17, 27, 116 CR2d 583* (litigation privilege does not apply to equitable action to set aside settlement agreement procured by fraud)], but unreasonably neglected to do so [*Home Ins. Co. v. Zurich Ins. Co. (2002) 96 CA4th 17, 27, 116 CR2d 583]* .

Example:

A party who has not requested special notice and who receives constructive notice under *Prob Code* §§ 8110, 8120 of the probate of an estate but not actual notice is not entitled to relief from extrinsic fraud or mistake [*Parage v. Couedel (1997) 60 CA4th 1037, 1044, 70 CR2d 671]* .

Consider--Unreasonable Neglect:

When a claim of fraud goes to an issue involving the merits of the prior proceeding which the moving party should have guarded against at that time, or if the moving party was guilty of negligence in failing to prevent the fraud or mistake or in contributing thereto, or failed to take advantage of liberal discovery policies to fully investigate his or her claim, any fraud is intrinsic fraud [*Heyman v. Franchise Mortgage Acceptance Corp. (2003) 107 CA4th 921, 926, 132 CR2d 465]* .

Examples:

- An adverse party's representation of the value of an asset favorable to that party constitutes intrinsic

fraud, because only through the moving party's inexcusable neglect would that party accept the valuation given by the adverse party without making his or her own investigation [*Heyman v. Franchise Mortgage Acceptance Corp.* (2003) 107 CA4th 921, 926, 132 CR2d 465] .

- Absent egregious conduct such as concealment of the existence of community assets or concealment of the existence of the proceedings, when a party requesting equitable relief is represented by counsel in divorce proceedings, any fraud is found to be inexcusable neglect and intrinsic, rather than extrinsic fraud, and therefore insufficient to set aside a judgment and marital settlement agreement [*In re Marriage of Stevenot* (1984) 154 CA3d 1051, 1063, 1074-1075, 202 CR 116] .

Thus, obtaining a judgment or order by use of perjured testimony or forged documents or by concealing or suppressing evidence constitutes intrinsic fraud from which relief is not available after a trial on the merits [*Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 CA4th 17, 27, 116 CR2d 583 (misrepresentation of insurance policy limits)].

Examples:

- Misrepresentations in the report of a social worker in a proceeding adjudicating parental rights are intrinsic to the proceeding and not the basis for relief [*In re David H.* (1995) 33 CA4th 368, 383, 39 CR2d 313] .

- Real estate agent who participated in conspiracy to forge documents and offer perjured testimony in case involving breach of contract for sale of real property engaged in intrinsic fraud not subject to relief [*Kachig v. Boothe* (1971) 22 CA3d 626, 634-636, 99 CR 393] .

29.40[8][b] Contribution by Aggrieved Party May Render Fraud of Adverse or Third Party Intrinsic. Relief is also denied when the complaining party has contributed to the alleged fraud giving rise to the judgment thus obtained [*Sunseri v. Camperos Del Valle Stables, Inc.* (1986) 185 CA3d 559, 561, 230 CR 23] .

Example:

An insurer with sufficient notice of the claim and no other excuse for refusing to defend the insured contributed to fraud it alleged the insured and the plaintiff perpetrated by entering a stipulated judgment and assignment of right to sue the insurer [*Sunseri v. Camperos Del Valle Stables, Inc.* (1986) 185 CA3d 559, 561, 230 CR 23] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsContracts LawContract InterpretationFiduciary Responsibilities



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29.41 Setting Aside Judgment or Order on Grounds of Duress of Adverse Party.

Duress may be the basis for setting aside a judgment or order [*In re Marriage of Baltins* (1989) 212 CA3d 66, 83-84, 260 CR 403] . Duress includes whatever destroys one's free agency and constrains a person to do what is against the person's will. Duress may be exercised by threat, importunity, or any species of mental coercion. It is shown when a party intentionally used threats or pressure to induce action or inaction to the other party's detriment. The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing. The courts look not so much to the nature of the threats, but to their effect on the threatened person's state of mind [*In re Marriage of Baltins* (1989) 212 CA3d 66, 84, 260 CR 403] .



Strategic Point:

One court has noted that there does not appear to be a decision in which duress was the sole basis for equitable relief from a judgment or order [see *In re Marriage of Baltins* (1989) 212 CA3d 66, 83, 260 CR 403 (affirming trial court's setting aside property and support provisions of the interlocutory and final judgments of dissolution of marriage on the grounds of duress and extrinsic fraud or mistake)]. If possible, counsel for the moving party should also characterize coercive behavior as extrinsic fraud and include a claim for relief on the basis.

Example:

Relief granted to wife who, through extrinsic factor of duress, had been denied fair adversary hearing in dissolution of marriage proceeding by husband's causing her to sign papers providing cause could be tried as uncontested matter without notice [*In re Marriage of Baltins* (1989) 212 CA3d 66, 84, 260 CR 403] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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29.42 Setting Aside Judgment or Order on Grounds of Extrinsic Mistake Caused by Adverse or Third Party.

29.42[1] Relief for Extrinsic Mistake of Adverse or Third Party. Equitable relief is available to set aside a judgment or order resulting from the extrinsic mistake of an adverse party [*Jorgensen v. Jorgensen* (1948) 32 C2d 13, 18, 193 P2d 728 (nondisclosure of community property found to be extrinsic fraud, rather than mistake); *Estate of Beard* (1999) 71 CA4th 753, 775, 84 CR2d 276] or a third party [see *Hallett v. Slaughter* (1943) 22 C2d 552, 555-558, 140 P2d 3 (relief granted from default for "extrinsic accident" when mailed answer lost by post office)].

29.42[2] Moving Party Must Have Been Deprived of Opportunity to Present Case in Court. Extrinsic mistake from which relief may be granted must deprive the unsuccessful party of an opportunity to present his or her case to the court [*Jorgensen v. Jorgensen* (1948) 32 C2d 13, 18-20, 193 P2d 728] .

29.42[3] No Relief From Intrinsic Mistake of Adverse or Third Party.

29.42[3][a] Mistake of Adverse or Third Party Within Proceeding Is Not Grounds for Equitable Relief. The mistake of an adverse party that is intrinsic to the action is not grounds for equitable relief [*Kulchar v. Kulchar* (1969) 1 C3d 467, 472-473, 82 CR 489, 462 P2d 17] .

29.42[3][b] Contribution by Aggrieved Party May Render Mistake of Adverse or Third Party Intrinsic. Relief from an adverse party's extrinsic mistake will be denied when the complaining party has contributed to the mistake giving rise to the judgment thus obtained. Thus, a mutual inexcusable mistake that might be sufficient to set aside a contract is intrinsic and not sufficient to set aside a final judgment [*Kulchar v. Kulchar* (1969) 1 C3d 467, 472-473, 82 CR 489, 462 P2d 17] .

Example:

In an equitable motion by the husband to modify a divorce decree on the ground of extrinsic fraud or mistake to relieve him of any liability for certain taxes on the assertion that both spouses were unaware of the repercussions of tax liability with respect to certain properties, the trial court committed reversible error in granting relief when it was established by the evidence that both parties were aware of the assets, full disclosure of the assets had been made during the proceedings, but the complaining party

inexcusably chose not to investigate the taxability of the assets [*Kulchar v. Kulchar* (1969) 1 C3d 467, 472-473, 82 CR 489, 462 P2d 17] .

29.42[3][c] Relief Is Not Available if Party Failed to Appear Without Having Been Prevented From Doing So. Relief on the ground of extrinsic mistake is not available to a party if the party has been given notice of an action, yet fails to appear without having been prevented from participating in the action. To set aside a judgment based on extrinsic mistake requires satisfying three elements [*Cruz v. Fagor America, Inc.* (2007) 146 CA4th 488, 503, 52 CR3d 862] :

- The defaulting party must demonstrate that it has a meritorious case.
- The party seeking to set aside the default must articulate a satisfactory excuse for not presenting a defense to the original action.
- The moving party must demonstrate diligence in seeking to set aside the default once discovered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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29.43 Preparing, Filing, and Serving Motion for Equitable Relief.

The jurisdiction of equity may be invoked to set aside a court's judgment or order by means of a motion addressed to that court [*see McCreadie v. Arques* (1967) 248 CA2d 39, 45, 56 CR 188] .

A party seeking equitable relief from a judgment by a motion must present a meritorious case or defense [*see Bailey v. Roberts* (1969) 271 CA2d 282, 286, 76 CR 572] by filing a proposed pleading that shows the case or defense [*see Stiles v. Wallis* (1983) 147 CA3d 1143, 1148, 195 CR 377] or submitting declarations setting forth facts of the case or defense [*see People v. One Parcel of Land* (1991) 235 CA3d 579, 582, 286 CR 739] .

A motion for equitable relief should set forth the requested relief, along with any motions and supporting documents necessary for effecting it [*see, e.g., In re Marriage of Stevenot* (1984) 154 CA3d 1051, 1072, 202 CR 116] .



Timing:

The motion and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing, but if service is by mail, the required 16-day period of notice is increased by five calendar days if the place of mailing and place of address are in California, 10 calendar days if either the place of mailing or place of address is outside California but in the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If notice is served by fax, express mail, or other overnight delivery method, the 16-day period is extended by two calendar days [CCP § 1005(a)(13), (b)].



Cross References:

Form of notice of motion in equity to set aside judgment or order procured by extrinsic fraud or mistake, see 29.80.

Form of order setting aside judgment or order procured by extrinsic fraud or mistake, see 29.81.

Making noticed motions, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.39 *et seq.*; or California Forms of Pleading and Practice, Ch. 372, Motions and Orders (Matthew

Bender).

Service of summons, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 8, Service of Summons.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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29.44 Preparing, Filing, and Serving Separate Action for Equitable Relief.

A party may file an action in equity for setting aside a judgment or order by filing a complaint with a California court and obtaining service of summons on parties affected by the judgment or order to be set aside. The complaint must plead facts from which it appears, at least prima facie, that if the judgment were set aside and the proceedings reopened, a different result would probably follow [*Bennett v. Hibernia Bank* (1956) 47 C2d 540, 554, 305 P2d 20 ; *New York Higher Educ. Assistance Corp. v. Siegel* (1979) 91 CA3d 684, 688-689, 154 CR 200] .

► Cross References:

Form of complaint in equity to set aside judgment or order procured by extrinsic fraud or mistake, see 29.75.

Form of judgment setting aside judgment or order procured by extrinsic fraud or mistake, see 29.76.

Complaints, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7; or California Forms of Pleading and Practice, Ch. 123, Complaints and Cross Complaints (Matthew Bender).

Service of summons, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 8; or California Forms of Pleading and Practice, Ch. 123, Complaints and Cross Complaints (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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VI. SETTING ASIDE JUDGMENT ON BASIS OF MILITARY SERVICE

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.45

29.45 CHECKLIST: Setting Aside Judgment on Basis of Military Service.

☐ Verify grounds for relief:

☐ Military service prejudiced defendant in making defense.

Authority:

M&V Code § 402(d)

Discussion:

See 29.47

☐ Prejudicial military service is full-time and at least seven days in a 14-day period.

Authority:

M&V Code §§ 400(b), 402(d)

Discussion:

See 29.50

☐ Prejudicial judgment rendered during military service or within 30 days thereafter.

Authority:

M&V Code § 402(d)

Discussion:

See 29.48

☐ Moving party is a service member:

☐ National Guard member or officer called into active state or federal service.

Authority:

M&V Code §§ 143, 146, 400(a)(1), 402(d); 50 USC app § 501 et seq.

Discussion:

See 29.49[2]

☐ United States Military Reserve reservist called into active duty.

Authority:

M&V Code §§ 400(a)(2), 402(d)

Discussion:

See 29.49[3]

☐ Moving party has a meritorious or legal defense to the claim on which judgment was granted.

Authority:

CCP §§ 128.5, 128.7; M&V Code § 402(d)

Discussion:

See 29.51

 File within 90 days of end of military service.

Authority:

M&V Code §§ 402(d), 409.8

Discussion:

See 29.52

☐ File motion for relief.

☐ If possible, obtain certificate of military service.

☐ Draft motion, stating meritorious or legal defense to part or all of action in which judgment was rendered.

☐ Have the prejudiced party or his or her legal representative file and serve motion.

Authority:

M&V Code §§ 402(d), 409.8

Discussion:

See 29.52

Forms:

See 29.84, 29.85

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act



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29.46 Options and Strategies for Moving Party.

On a motion to set aside a judgment prejudicing defendant due to defendant's military service, the court may open the judgment and let in the defendant and his or her legal representative to defend against the claim [*M&V Code § 402(d)*].

Exception:

The setting aside of a judgment prejudicing defendant due to defendant's military service does not impair the right or title that a bona fide purchaser for value acquires under the judgment set aside [*M&V Code § 402(d)*].

Consider--Scope of Protections:

M&V Code § 402(d) states: "If any judgment shall be rendered in any action or proceeding governed by this chapter. " Chapter 7.5 of the Military and Veterans Code includes a wide range of protections for servicemembers, and often parallels the federal Servicemembers Civil Relief Act [*50 USC app § 501 et seq.*]. Actions or proceedings governed by Chapter 7.5 include:

- Default judgments [*M&V Code § 402(a)*].
- Attachment or garnishment [*M&V Code § 403(c)*].
- Obligations bearing interest [*M&V Code § 405*].
- Evictions [*M&V Code § 406*].
- Installment contracts of personal and real property [*M&V Code § 407*].
- Mortgages and deeds of trust [*M&V Code § 408*].
- Leases [*M&V Code § 409*].
- Life insurance [*M&V Code § 410*].

- Taxes or assessments [*M&V Code §§ 411, 412*].
- Health insurance [*M&V Code § 413*].
- Dependent benefits [*M&V Code § 414*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act



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29.47 Military Service Must Prejudice Defendant in Making Defense.

A judgment rendered in an action against a defendant who is prejudiced by reason of his or her military service may be set aside. Specifically, the military service must prejudice the defendant in the making of his or her defense to the action [*M&V Code § 402(d)*].

Cross References:

Discussion on motion for relief, see 29.52.

Relief from defaults and default judgments based on military service, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.70.

Relief based on military service, 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:

Civil Procedure Judgments Relief From Judgment General Overview Military & Veterans Law Servicemembers Soldiers & Sailors Civil Relief Act



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29.48 Only Judgments Rendered During Military Service or Within 30 Days Thereafter May Be Set Aside.

The judgment prejudicing the service member must be rendered during the service member's military service or within 30 days thereafter [*M&V Code* § 402(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act



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29.49 Only Service Members May Obtain Relief.

29.49[1] Only Service Members Are Entitled to Relief. Only service members are entitled to relief from a judgment prejudicing a defendant due to the defendant's military service [*M&V Code § 402(d)*].

29.49[2] Officers and Enlisted Members in State or Federal Service May Be Service Members. Officers and enlisted members of the National Guard called or ordered into active state service by the Governor pursuant to the provisions of *M&V Code § 143* or *146*, or into active federal service by the President of the United States pursuant to 10 USC or 32 USC are service members who may obtain relief from a judgment prejudicing a defendant due to the defendant's military service [*M&V Code § 400(a)(1)*].

29.49[3] Reservists of United States Military Reserve May Be Service Members. Reservists of the United States Military Reserve who have been called to full-time active duty are service members who may seek relief from a judgment prejudicing a defendant due to the defendant's military service [*M&V Code § 400(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act



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29.50 Military Service Must Be Full-Time Active Service.

The military service prejudicing a service member must be military service that is full-time and either active state or federal service, as defined in 29.47[2], or full-time active reserve duty, as defined in 29.49[3], in order to obtain relief from a judgment prejudicing the service member due to the member's military service [*M&V Code § 400(b)*].

Distinguish:

The military service prejudicing a service member must be for a period in excess of seven days in a 14-day period [*M&V Code § 400(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act



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29.51 Moving Party Must Have Meritorious or Legal Defense.

Considering that the motion to set aside judgment prejudicing defendant due to defendant's military service must state a meritorious or legal defense to the action or some part thereof [*M&V Code § 402(d)*], and given sanctions applicable to frivolous actions and delaying tactics under *CCP §§ 128.5, 128.7*, the moving party must have a meritorious or legal defense with evidentiary support and no improper purpose [*see CCP §§ 128.5, 128.7*].



Cross Reference:

Sanctions for frivolous actions or delaying tactics, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 35.04 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Judgments Relief From Judgment General Overview Military & Veterans Law Servicemembers Soldiers & Sailors Civil Relief Act



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.52

29.52 Applying to Set Aside Judgment Prejudicing Defendant Due to Defendant's Military Service.

29.52[1] Service Member or Legal Representative May File Motion. A service member or his or her representative may file a motion to set aside a judgment prejudicing defendant due to defendant's military service [*M&V Code § 402(d)*].



Timing:

A motion to set aside judgment prejudicing defendant due to defendant's military service must be filed within 90 days after the termination of the service [*M&V Code § 402(d)*].



Strategic Point--Moving Party:

A certificate signed by an appropriately authorized officer of the military department, branch, or unit in which a service member is serving is prima facie evidence of specified facts concerning a party's military service [*M&V Code § 409.8(a)*]. The moving party should obtain [*see M&V Code § 409.8(b)*] and attach to the motion a certificate concerning his or her military service relevant to the motion.



Cross References:

Form of motion for relief based on prejudice due to military service, see 29.84.

Form of order granting relief based on prejudice due to military service, see 29.83.

Applying for relief from defaults and default judgments based on military service, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.70[2], 36.71.

29.52[2] Motion Must State Meritorious or Legal Defense. A motion to set aside judgment prejudicing defendant due to defendant's military service must state a meritorious or legal defense to the action or some part thereof [*M&V Code § 402(d)*].

**Warning:**

Stating a defense without merit, evidentiary support, or for an improper purpose may subject the moving party to sanctions under *CCP* §§ 128.5, 128.7.

**Cross Reference:**

Sanctions for frivolous actions or delaying tactics, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 36.70[2], 36.71.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act



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29.53 CHECKLIST: Setting Aside Judgment or Order When Court Assumed Jurisdiction Over Attorney's Practice



Timing:

☐ Must generally apply for relief within a reasonable time not to exceed six months after the court assumes jurisdiction over the attorney's practice.

☐ If party and, when applicable, attorney appointed under *B&P Code § 6180.5* have received notice to that effect, the right to apply for relief expires 90 days after the later service of notice on the two recipients.

Authority:

CCP § 473.1

Discussion:

See 29.57[2]

☐ If court assumed jurisdiction over attorney's practice under *B&P Code § 6180* or *B&P Code § 6190*, and you are not the attorney appointed under *B&P Code § 6180.5* in the order assuming jurisdiction, ascertain who that attorney is and determine whether he or she has information or notices concerning the action, judgment, or order.

☐ Verify grounds for relief:

☐ A California court has assumed jurisdiction over the party's attorney's practice on one of the following grounds:

☐ The attorney has ceased practice.

☐ The attorney is unable to practice.

Authority:

B&P Code §§ 6180, 6180.5, 6190, 6190.4; CCP § 473.1

Discussion:

See 29.55

☐ Judgment or order from which relief is sought was taken after application for court's assumption of jurisdiction over attorney's practice is filed.

Authority:

CCP § 473.1

Discussion:

See 29.56

☐ File and serve motion for relief from judgment or order.

☐ Motion should seek relief that is just.

Authority:

CCP § 473.1

Discussion:

29.54

☐ Motion does not have to be accompanied by affidavit or declaration of merits of defense or case.

Authority:

CCP § 473.1

Discussion:

See 29.57[1]

Forms:

See 29.86, 29.87

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Judgments Relief From Judgment General Overview Civil Procedure Remedies Receiverships General Overview Legal Ethics General Overview



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29.54 Options and Strategies for Moving Party.

On an application for relief from judgments and orders on the basis that a court has assumed jurisdiction over the law practice of the party's attorney, relief may be on any terms that are just [CCP § 473.1]. This ground for relief is uncommon, but it does happen from time to time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview



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29.55 Court Must Have Assumed Jurisdiction on Statutory Grounds.

When a California court has assumed jurisdiction over an attorney's practice under *B&P Code § 6180.5* because the attorney has ceased practice [*see B&P Code § 6180*] or is unable to practice [*see B&P Code §§ 6190, 6190.4*], a court may relieve the party from a judgment, order, or other proceeding, including dismissal of an action pursuant to *CCP §§ 581, 583.110 et seq. [CCP § 473.1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewLegal EthicsGeneral Overview



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.56

29.56 Judgment Must Have Been Taken After Motion for Assumption of Jurisdiction.

The judgment from which relief is sought on the basis that a court has assumed jurisdiction over the law practice of the party's attorney has to have been taken after the application or motion for the court to assume jurisdiction was filed [CCP § 473.1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral
OverviewLegal EthicsGeneral Overview



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29.57 Moving for Relief.

29.57[1] Motion Does Not Require Affidavit of Merits. The application or motion for relief from judgment when a court has assumed jurisdiction of the party's attorney's law practice does not have to be accompanied by an affidavit or declaration of the merits of the party's claims in the underlying case [CCP § 473.1].



Cross Reference:

Form of motion and order for relief, see 29.86, 29.87.

29.57[2] Time in Which to File Motion for Relief.

29.57[2][a] Motion for Relief Generally Must Be Filed Within Reasonable Time, Not to Exceed Six Months.

An application or motion for relief from judgments and orders on the basis that a court has assumed jurisdiction over the law practice of the party's attorney generally must be filed within a reasonable time after the court takes jurisdiction over the practice, in no case exceeding six months [CCP § 473.1].

29.57[2][b] Motion for Relief From Judgment or Order Determining Ownership or Possession of Property Subject to 90-Day Notice. If the party against whom a judgment or order was taken as well as counsel appointed under *B&P Code § 6180.5* are served with notice within California that the party's right to such relief will expire 90 days after service of the notice, the party must file for relief from the judgment or order within 90 days of the later service of notice on the two recipients [CCP § 473.1].

Distinguish:

The notice only applies to the period for applying for relief from a judgment or order determining ownership or possession of property [CCP § 473.1].



Strategic Point:

The party opposing relief from judgment or order determining ownership or possession of property when

a California court has assumed jurisdiction over another party's attorney's practice should determine whether the curtailment of the period in which the party seeking relief may apply for relief that will result from serving the 90-day expiration notice on the party whose attorney's practice was taken over is advantageous.

Consider:

The 90-day expiration notice probably should never be served less than 90 days before the end of the general six-month limitation period for the adverse party's filing for an application for relief, because it has no effect, given that the 90-day period does not extend the six-month limitation period [*see CCP* § 473.1].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewLegal EthicsGeneral Overview



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29.58 CHECKLIST: Opposing the Setting Aside of Judgments and Orders.

29.58[1] Opposing Setting Aside Void Judgments or Orders.

- ☐ Determine whether there are grounds for opposing relief.

Discussion:

See 29.61[1], 29.62[1]

- ☐ File and serve response to motion or action to set aside void judgment or order and include appropriate declaration.

Discussion:

See 29.61[2], [3]

- ☐ If relief is sought in direct attack, present extrinsic evidence showing lack of jurisdictional defect.

Discussion:

See 29.62[3]

29.58[2] Opposing Motion for Relief Under CCP § 473(b).

- ☐ Determine grounds for opposing discretionary relief under *CCP § 473(b)* by showing any of the following:

- ☐ The application was not properly noticed or served.
- ☐ The application for relief was not timely filed.

- ☐ The party applying for relief does not have standing to do so.
- ☐ The application is not accompanied by the necessary declarations or affidavits.
- ☐ The party's or party's attorney's conduct does not constitute a mistake, inadvertence, surprise, or neglect necessary for relief to be granted or, as the case may be, was not excusable.

Authority:*CCP § 473(b)***Discussion:***See 29.60[1][a]*

☐ Determine grounds for opposing mandatory relief under *CCP § 473(b)* by showing any of the following:

- ☐ The application was not properly noticed or served.
- ☐ The application for relief was not timely filed.
- ☐ The party applying for relief does not have standing to do so.
- ☐ The application is not accompanied by the necessary attorney's affidavit of fault.
- ☐ The attorney's mistake, inadvertence, surprise, or neglect was not the cause of the judgment or order.
- ☐ The attorney's mistake, inadvertence, surprise, or neglect did not cause the party to lose his or her day in court.
- ☐ The dismissal from which relief is sought is not against the moving party.
- ☐ The judgment is not a "dismissal" from which relief may be granted on the basis of the attorney's affidavit of fault.
- ☐ The attorney's conduct does not constitute a mistake, inadvertence, surprise, or neglect necessary for relief to be granted.

Authority:*CCP § 473(b)***Discussion:***See 29.60[2][a]*

☐ Prepare, file, and serve response to notice of motion for relief based on attorney's affidavit of fault, including appropriate declaration.

Authority:

CCP §§ 1005(a)(13), (b), 1015

Discussion:

See 29.60[1][b], [2][b]

Form:

See 29.74

☐ If the court grants relief from a dismissal (or default or default judgment) under *CCP* § 473, request that the court order any of the following that are desired:

- ☐ Offending party or attorney pay a \$1,000 penalty.
- ☐ Offending attorney pay up to \$1,000 into the State Bar Client Security Fund.
- ☐ Other appropriate relief be granted.

Authority:

CCP § 473(c)(1)

Discussion:

See 29.60[3][a]

Form:

See 29.75

☐ If the court grants relief from a judgment or order based on the affidavit of fault of the opposing attorney, request that the court order that attorney to pay the reasonable attorney's fees for the opposing party's participation in the judgment or order.

Authority:

CCP § 473(b)

Discussion:

See 29.60[3][b]

Form:

See 29.75

29.58[3] Opposing Motions or Actions for Equitable Relief From Judgment or Order.

☐ Determine whether there are grounds for opposing relief.

Discussion:

See 29.63[1]

- ☐ File response to motion or action to set aside void judgment or order.

Discussion:

See 29.63[2], [3]

29.58[4] Opposing Relief From Judgment Due to Military Service.

- ☐ Oppose relief based on prejudice due to military service by:
- ☐ Showing the application was not filed in a timely manner.
 - ☐ Showing the application does not state meritorious or legal defense to the claim on which judgment was granted.
 - ☐ Disproving one of elements necessary for moving party to show for relief.
 - ☐ Showing an interest, property, or contract was transferred or acquired with the intent to delay the just enforcement of that right by taking advantage of the benefits provided in the statutes concerning relief from prejudice due to military service.
 - ☐ Showing opposing party is bona fide purchaser for value.

Authority:

M&V Code §§ 402(d), 409.7

Discussion:

See 29.64

29.58[5] Opposing Setting Aside Judgment or Order When Court Has Taken Jurisdiction Over Attorney's Practice.

- ☐ On learning of the court's assumption of jurisdiction over attorney's practice, by notice of interim order under *B&P Code § 6180.8* or otherwise, serve notice, if desired and when applicable, on adverse party and any attorney appointed under *B&P Code § 6180.5* notifying them that the adverse party's right to apply for relief from a judgment or order determining ownership or possession of property expires 90 days from the later service of the notice on the two recipients.

Authority:

CCP § 473.1

Discussion:

See 29.57[2][b]

- ☐ After receiving notice of the application for relief from opposing party seeking relief from court's

assumption of opposing party's attorney's practice, oppose relief by showing any of the following:

- ☐ Court has not assumed or has not properly assumed jurisdiction over attorney's practice under either *B&P Code § 6180* or *B&P Code § 6190*.
- ☐ Judgment or order from which relief is sought was not taken after the filing of the application for assumption of jurisdiction over the attorney's practice.



Cross Reference:

Determining when judgment or order is taken, see 29.03[4].

- ☐ Application for relief was not timely filed.

Authority:

CCP § 473.1

Discussion:

See 29.57[2]

- ☐ Relief sought by the moving party is not just.

Authority:

CCP § 473.1

Discussion:

See 29.54

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act



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29.59 Options and Strategy for Opposing Party.

A party opposing another party's request for relief from a judgment or order should always make sure that the moving party is not simply trying to get another chance to argue its case before the court.



Strategic Point:

A motion for mandatory relief from dismissal under *CCP § 473(b)* may not be used to merely amplify or supplement the evidence and arguments that were presented in opposition to the original motion to dismiss [*Peltier v. McCloud River R.R. Co. (1995) 34 CA4th 1809, 1825, 41 CR2d 182*] .

The distinctions between judgments that are void on their face or void in fact, the difference between ability to attack judgments resulting from extrinsic v. intrinsic fraud, and other issues discussed in this chapter that affect the burden imposed on the party attacking or defending a judgment, make it imperative in any motion to focus on the distinction that helps the party preparing the brief. The party seeking to attack a judgment should make clear whether he or she is relying on, for example, an argument that the judgment is void on its face, or extrinsic fraud, as against the party seeking to uphold the judgment who should argue that opposing counsel is simply rearguing facts or attempting impermissibly to demonstrate intrinsic fraud.

In addition to the points of opposition discussed in the sections that follow the peculiar to the particular types of relief sought, the opposing party should make sure to oppose requests for relief on more general grounds applicable to the form of the request.

Example:

Failure to object to an improper notice of motion under *CCP § 473(b)* based on a party's mistake, inadvertence, surprise, or neglect waives objection to the hearing of and decision on the motion [*Billings v. Health Plan of Am. (1990) 225 CA3d 250, 256, 275 CR 80*] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From

JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentIndependent
ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsMilitary & Veterans
LawServicemembersSoldiers & Sailors Civil Relief Act



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29.60 Opposing Motion for Relief Under CCP § 473(b).

29.60[1] Opposing Discretionary Relief Under CCP § 473(b).

29.60[1][a] Grounds for Opposing Motion for Relief. A party opposing another party's application for discretionary relief under *CCP* § 473(b) from judgment or order due to party's or party's counsel's excusable mistake, inadvertence, surprise, or neglect may seek to defeat the motion by showing any of the following:

- The application was not properly noticed [*see* 29.15[1]] or served [*see* 29.15[5]].
- The application for relief was not timely filed [*see* 29.14[1], 29.22[2]].
- The party applying for relief does not have standing to do so [*see* 29.13[1]].
- The application is not accompanied by the necessary declarations or affidavits [*see* 29.15[3]].
- The party's or party's attorney's conduct does not constitute a mistake, inadvertence, surprise, or neglect necessary for relief to be granted or, as the case may be, was not excusable [*see* 29.17 -29.22].

29.60[1][b] File Response to Notice of Motion for Relief. Opposing papers must be filed and served at least nine court days, and all reply papers at least five court days, before the hearing [*CCP* § 1005(a)(13), (b)], with service on the party's attorney in the action, if any, or, if none, on the party [*CCP* § 1015].



Cross Reference:

Fees and costs that the opposing party may request in his or her response, *see* 29.60[3].

29.60[2] Opposing Mandatory Relief Under CCP § 473(b).

29.60[2][a] Grounds for Opposing Motion for Relief. A party opposing another party's application for mandatory relief under *CCP* § 473(b) from dismissal based on the attorney's affidavit of fault may seek to defeat the motion by showing any of the following:

- The application was not properly noticed [see 29.15[1]] or served [see 29.15[5]].
- The application for relief was not timely filed [see 29.14[7]].
- The party applying for relief does not have standing to do so [see 29.14[6]].
- The application is not accompanied by the necessary attorney's affidavit of fault [see 29.14[4]].
- The attorney's mistake, inadvertence, surprise, or neglect was not the cause of the judgment or order [see 29.23[2]].
- The attorney's mistake, inadvertence, surprise, or neglect did not cause the party to lose his or her day in court [see 29.23[4]].
- The dismissal from which relief is sought is not against the moving party [see 29.23[3]].
- The judgment is not a "dismissal" from which relief may be granted on the basis of the attorney's affidavit of fault [see 29.23[5]].
- The attorney's conduct does not constitute a mistake, inadvertence, surprise, or neglect necessary for relief to be granted [see 29.18 -29.21].

29.60[2][b] File Response to Notice of Motion for Relief. Opposing papers must be filed and served at least nine court days, and all reply papers at least five court days, before the hearing [CCP § 1005(a)(13), (b)], with service on the party's attorney in the action, if any, or, if none, on the party [CCP § 1015].

 Cross Reference:

Fees and costs that the opposing party may request in his or her response, see 29.60[3].

29.60[3] Seeking Attorney's Fees, Costs, and Penalties With Relief Under CCP § 473.

29.60[3][a] With Relief From Dismissal. When the court grants relief from a dismissal (or default or default judgment) under CCP § 473, the court may order that [CCP § 473(c)(1)]:

- Offending party or attorney pay a \$1,000 penalty.
- Offending attorney pay up to \$1,000 into the State Bar Client Security Fund.
- Other appropriate relief be granted.

 Cross Reference:

Discussion of attorney's fees, costs, and penalties in relation to relief from defaults and default judgments based on attorney's fault under CCP § 473, see California Forms of Pleading and Practice, Ch. 489, Relief from Judgments and Orders (Matthew Bender).

29.60[3][b] With Relief Based on Attorney Affidavit of Fault. Whenever relief is granted on an attorney's affidavit (or declaration) of fault, the court must direct the attorney to pay reasonable compensatory legal fees and costs to the opposing counsel or parties [CCP § 473(b)].

However, when the attorney was only minimally late in filing the papers on the underlying motion, and the court accepted the late filed papers, the lack of prejudice warranted no award of attorney's fees [*Ruiz v. Sysco Food Servs.* (2004) 122 CA4th 520, 539-541, 18 CR3d 700 (no fee award for filing one day late the opposition to motion to compel arbitration)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise



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29.61 Opposing Setting Aside Judgment or Order Void on Its Face.

29.61[1] Grounds for Opposing Relief From Judgment or Order Void on Its Face. A party opposing another party's application for relief from a judgment or order void on its face may seek to defeat the request for relief by showing any of the following:

- The defect in the judgment or order is judicial, not jurisdictional [see 29.28];
- The jurisdictional defect of the judgment or order was the subject of controversy, the decision on which has become res judicata [see 29.30[2]]; or
- The moving party does not have standing to seek relief from the judgment or order [see 29.30[1], 29.31[1]].

In addition, if the moving party is making a collateral attack [see 29.33] on the judgment or order, the opposing party may defeat the request for relief by showing that the judgment roll does not on its face reveal the jurisdictional defect [see 29.29].

29.61[2] File Response to Notice of Motion for Relief. Unless the court or judge prescribes otherwise, the opposing party must serve his or her response to the notice of motion under *CCP* § 473(d) in accordance with *CCP* § 1005(c), because *CCP* § 473(d) requires notice but does not prescribe another time or method [see *CCP* § 1005(a)(13)].

➤ Cross Reference:

Responding to noticed motions under *CCP* § 1005(c), see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.46 et seq.

29.61[3] File Response to Action for Relief. A complaint seeking to nullify a void judgment or order must be answered with 30 days of service of the summons [*CCP* § 412.20(a)(3)].

➤ Cross Reference:

Responding to complaint, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 14.03 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime
LimitationsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments



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29.62 Opposing Direct Attacks on Judgment or Order Void in Fact.

29.62[1] Grounds for Opposing Relief From Judgment or Order Void in Fact. A party opposing another party's application for relief from a judgment or order void in fact may seek to defeat the request for relief by showing any of the following:

- The defect in the judgment or order is judicial, not jurisdictional [*see* 29.28];
- The jurisdictional defect of the judgment or order was the subject of controversy, the decision on which has become res judicata [*see* 29.30[2]]; or
- The moving party does not have standing to seek relief from the judgment or order [*see* 29.30[1], 29.31[1]]; or
- Relief was not sought in a reasonable time after entry of the judgment or order [*see* 29.31[2]].

29.62[2] File Response to Notice of Motion for Relief. Unless the court or judge prescribes otherwise, the opposing party must serve his or her response to the notice of motion under *CCP* § 473(d) in accordance with *CCP* § 1005(c), because *CCP* § 473(d) requires notice but does not prescribe another time or method [*see CCP* § 1005(a)(13)].

29.62[3] Present Extrinsic Evidence Contesting Alleged Defect. The opposing party may present extrinsic evidence showing the lack of a jurisdictional defect necessary to the moving party's request for relief [*Cruz v. Fagor America, Inc.* (2007) 146 CA4th 488, 496, 52 CR3d 862] .



Cross Reference:

Discussion of extrinsic evidence, see 29.31[3].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.63

29.63 Opposing Equitable Relief From Judgment or Order Due to Fraud, Duress, or Extrinsic Mistake.

29.63[1] Grounds for Opposing Request for Relief. A party opposing another party's application for equitable relief due to extrinsic fraud, duress, or extrinsic mistake may seek to defeat the motion by showing any of the following:

- The application or action was not properly noticed or served, or timely filed [*see* 29.43, 29.44].
- The application or complaint for relief was not timely filed [*see* 29.14[3], 29.38].
- The party seeking relief does not have standing to do so [*see* 29.13[2], 29.37].
- The alleged conduct does not constitute a mistake, inadvertence, surprise, or neglect necessary for relief to be granted or, as the case may be, was not excusable [*see* 29.17 -29.22, 29.40- 29.42].

29.63[2] File Response to Request for Equitable Relief.

29.63[2][a] File Response to Notice of Motion for Equitable Relief. Opposing papers must be filed and served at least nine court days, and all reply papers at least five court days, before the hearing [CCP § 1005(a)(13), (b)], with service on the party's attorney in the action, if any, or, if none, on the party [CCP § 1015].

➡ Cross Reference:

Responding to noticed motions under CCP § 1005(c), see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.46 *et seq.*

29.63[2][b] File Response to Complaint for Equitable Relief. A complaint for equitable relief must be answered with 30 days of service of the summons [CCP § 412.20(a)(3)].

➡ Cross Reference:

Responding to complaint, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 14.03 *et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion
PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil
ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions



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29.64 Opposing Application for Relief From Judgment Prejudicing Defendant Due to Defendant's Military Service.

A party opposing another party's application for relief from judgment prejudicing the party due to his or her military service may seek to defeat the motion by showing any of the following:

- The moving party is not a service member entitled to relief [*see* 29.48].
- The moving party was not in fact prejudiced by the judgment [*see* 29.47].
- The prejudice does not arise from the period of military service or 30 after termination of service [*see* 29.48].
- The moving party's military service was not full-time active service [*see* 29.50].
- The moving party does not have a prima facie meritorious or legal defense to the claim on which judgment was granted [*see* 29.51].
- The application was not filed in a timely manner [*see* 29.52[1]].
- The application does not state meritorious or legal defense to the claim on which judgment was granted [*see* 29.52[2]].

Furthermore, on a showing that an interest, property, or contract was transferred or acquired with the intent to delay the just enforcement of that right by taking advantage of the benefits provided in the statutes concerning relief from prejudice due to military service, the court may make an appropriate order [*M&V Code* § 409.7]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure Judgments Relief From Judgment General Overview Military & Veterans Law Servicemembers Soldiers & Sailors Civil Relief Act



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29.65 Opposing Setting Aside Judgment or Order When Court Has Taken Jurisdiction Over Attorney's Practice.

A party opposing another party's application for relief from judgment or order when a California court has assumed jurisdiction over the other party's attorney's practice by showing any of the following:

- The judgment or order was not taken after the filing of the application for assumption of jurisdiction [see 29.56].
- The court has not in fact assumed jurisdiction over the moving party's attorney's practice [see 29.55].
- The application for relief was not filed in a timely manner [see 29.57[2]].
- The relief granted by the trial court was not just [see 29.54].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewLegal EthicsGeneral Overview



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29.66 CHECKLIST: Seeking Review of Proceedings to Set Aside Judgments and Orders.

- ☐ Determine and calendar time for appeal and any extension thereof for decision on request for relief and for judgment or order sought to be set aside.

Authority:

Cal Rules Ct, Rules 8.104, 8.108

Discussion:

See 29.09[2], 29.69[3][f]

- ☐ Determine which orders or judgments of which to seek review.

☐ Order granting or denying statutory or equitable relief.

☐ Judgment or order from which relief was sought.

Discussion:

See 29.68 -29.70

- ☐ Determine appropriate method of review to seek.

☐ If relief from void judgment or order was denied, consider seeking relief from void judgment or order.

Authority:

CCP § 473(d)

Discussion:

See 29.10 *et seq.*, 29.68[1]

- ☐ If review of order or judgment under CCP § 473 not yet final is sought, consider motion for reconsideration or renewed motion.

Authority:

CCP § 1008

Discussion:

See 29.69[1], [2]

- ☐ If relief sought under CCP § 473, determine whether decision on motion is appealable.

Authority:

Zirbes v. Stratton (1986) 187 CA3d 1407, 1411, 232 CR 653 (grant under CCP § 473(d)); *John Siebel Assocs. v. Keele* (1986) 188 CA3d 560, 564 n3, 233 CR 231 (denial under CCP § 473(d)); *Garcia v. Hejmadi* (1997) 58 CA4th 674, 680, 68 CR2d 228 (grant under CCP § 473(b)); *Scognamillo v. Herrick* (2003) 106 CA4th 1139, 1146, 131 CR2d 393 (denial under CCP § 473(b))

Discussion:

See 29.68[1], 29.69[3][a], [b]

- ☐ If decision is appealable, determine whether to also appeal underlying judgment or order.

Discussion:

See 29.67

- ☐ If decision is not appealable, appeal decision along with judgment or order at the appropriate time.

Discussion:

See 29.69[3][b]

- ☐ If review of judgment in action for relief is sought, consider all methods of direct and collateral attack that may be appropriate.

Discussion:

See 29.70[1]

- ☐ Determine if lack of other plain, speedy, and adequate remedy in the ordinary course of law allows for review by writ of mandate.

Authority:

CCP § 1086; *Rodrigues v. Superior Court* (2005) 127 CA4th 1027, 1032, 26 CR3d 194 (grant under

CCP § 473(b)); *In re Marriage of Fuller* (1985) 163 CA3d 1070, 1072 n1, 1076, 210 CR 73 (denial under *CCP § 473(b)*); *Settlemyre v. Superior Court* (2003) 105 CA4th 666, 675, 129 CR2d 560 (request for equitable relief)

Discussion:

See 29.68[1], 29.69[3][a], [b]

☐ Apply for review desired.

☐ For reconsideration or renewed motion, file noticed motion.



Timing:

Motion for reconsideration of would have to be made within the six-month limitation specified in *CCP § 473(b)* as well as within the 10-day limitation of *CCP § 1008(a)* [*Kollander Constr. v. Superior Court* (2002) 98 CA4th 304, 314-315, 119 CR2d 614] .

Authority:

CCP § 1008

Discussion:

See 29.69[1], [2]

☐ To appeal, file notice of appeal.

Authority:

CCP § 1086

Discussion:

See 29.69[3][f]

☐ To obtain review by writ of mandate, file a verified petition.

Authority:

CCP § 1086

Discussion:

See 29.69[3][f]

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsReviewabilityNotice of Appeal



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29.67 Options and Strategy.

Decisions on motions and actions to set aside judgments and orders are subject to the usual methods of attack, including motions to set aside as discussed in this chapter.



Strategic Point:

Post-decision motions attacking a decision on a motion or action to set aside a judgment or order extends the time in which to appeal [see 29.09[1]], while the filing of appeal removes the jurisdiction of the court to hear such motions [see 29.09[2]].

Although review by appeal is the general path to take, in that the right to appeal is not conditioned on the lack of other remedy, as is review by writ of mandate [see *CCP* § 1086], appeal may not be available at all in certain instances when review by writ is available under the statutory conditions, such as in review of denial of motions under *CCP* § 473(b) [see 29.69[3][b]].



Strategic Point:

The rules as to the timeliness of appeals do not apply to petitions for writ of mandate [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71] .

Furthermore, appealing a decision on a request for setting aside a judgment or order may give standing to attack the judgment or order itself by a party who missed the appeal period for appealing the judgment or order itself.



Strategic Point:

Unlike *CCP* § 473(b), which limits relief to parties or their legal representatives, an appeal from a judgment may under *CCP* § 902 be taken by any party aggrieved. A person not a party to the action as originally commenced or tried may become a party to the record, subsequent to the judgment, by moving to vacate and thereby gain a right of appeal from the order denying the motion [*O'Dell v. Freightliner*

Corp. (1992) 10 CA4th 645, 662, 12 CR2d 774] . Timing may be crucial in these instances.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesWritsCommon Law
WritsMandamusCivil ProcedureAppealsAppellate JurisdictionLower Court JurisdictionCivil
ProcedureAppealsAppellate JurisdictionState Court Review



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29.68 Review of Decision Under CCP § 473(d) or Court's Inherent Power to Set Aside Void Judgment or Order.

29.68[1] Grant or Denial of CCP § 473(d) Motion Is Appealable. An order granting relief from a void judgment is appealable [*Zirbes v. Stratton* (1986) 187 CA3d 1407, 1411, 232 CR 653] . Likewise, an order denying a motion to vacate a judgment or order on voidness is appealable [*John Siebel Assocs. v. Keele* (1986) 188 CA3d 560, 564 n3, 233 CR 231] under CCP § 904.1(b) [*Romadka v. Hoge* (1991) 232 CA3d 1231, 1237, 283 CR 878] . The failure to appeal such an order, allowing it to become final, does not prevent its being set aside in a subsequent proceeding for that purpose [*Rochin v. Pat Johnson Mfg. Co.* (1998) 67 CA4th 1228, 1240, 79 CR2d 719] .

Example:

An order denying a judgment or order that is actually void on its face is appealable [*Renoir v. Redstar Corp.* (2004) 123 CA4th 1145, 1154, 20 CR3d 603 ; *Carlson v. Eassa* (1997) 54 CA4th 684, 691, 62 CR2d 884] .



Cross Reference:

Seeking appellate review, see 29.69[3][f].

29.68[2] Standard of Review. The trial court's decision on CCP § 473(d) motions are addressed to the sound discretion of the trial court and are not disturbed unless there is a showing of an abuse of discretion [*Romadka v. Hoge* (1991) 232 CA3d 1231, 1235, 283 CR 878] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion



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29.69 Review of Decision Under CCP § 473(b).

29.69[1] Reconsideration. Under *CCP § 1008(a)*, when an application for an order has been refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after knowledge of the order and based on an alleged new or different state of facts, circumstances, or law, apply to the same judge who made the order to reconsider the matter and modify, amend, or revoke the prior order. The motion must be supported by an affidavit (or declaration under *CCP § 2015.5*) showing what application was made before, when and to what judge, what order or decision was made on it, and what new or different facts, circumstances or law are claimed to be shown [*CCP § 1008(a)*]. It would appear that if the conditions of the statute are met a party could move to reconsider an order granting or denying relief under *CCP § 473(b)* [see, e.g., *Kollander Constr. v. Superior Court* (2002) 98 CA4th 304, 314-315, 119 CR2d 614] .



Timing:

It appears that the motion would have to be made within the six-month limitation specified in *CCP § 473(b)* as well as within the 10-day limitation of *CCP § 1008(a)* [see *Kollander Constr. v. Superior Court* (2002) 98 CA4th 304, 314-315, 119 CR2d 614] .



Cross Reference:

Further discussion and a form of motion to reconsider, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 29, Motions to Reconsider and Renewed Motions; California Forms of Pleading and Practice, Ch. 374, Motions to Reconsider and Renewed Motions (Matthew Bender); or California Points and Authorities, Ch. 158, Motions to Reconsider and Renewed Motions (Matthew Bender).

29.69[2] Renewal. When a motion for relief under *CCP § 473(b)* is denied and a different state of facts, circumstances, or law exists that would support the granting of the motion, a party may renew his or her motion for relief under *CCP § 1008(b)* [see *Monsan Homes, Inc. v. Pogrebneak* (1989) 210 CA3d 826, 831-832, 258 CR 676] . When the party who originally applied for an order that was refused in whole or in part, or granted conditionally or on terms, makes a subsequent application for the same order on an alleged different state of facts, circumstances, or law, it must be shown by affidavit (or declaration under *CCP § 2015.5*) what application was made before, when and to what

judge, what order or decision was made on it, and what new facts, circumstances, or law are claimed to be shown [CCP § 1008(b)].



Timing:

A renewed motion is subject to the six-month limitation provided in CCP § 473(b) [*Northridge Fin. Corp. v. Hamblin* (1975) 48 CA3d 819, 825, 122 CR 109 (treating motion to reconsider as renewed motion)].

Distinguish:

The renewal of an earlier motion is not subject to the 10-day limitation governing motions to reconsider under CCP § 1008(a) [*Monsan Homes, Inc. v. Pogrebneak* (1989) 210 CA3d 826, 831, 258 CR 676, see 29.61[1]].



Cross Reference:

Further discussion and forms relating to renewed motions under CCP § 1008(b), see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 29, Motions to Reconsider and Renewed Motions; California Forms of Pleading and Practice, Ch. 374, Motions to Reconsider and Renewed Motions (Matthew Bender); or California Points and Authorities, Ch. 158, Motions to Reconsider and Renewed Motions (Matthew Bender).

29.69[3] Appellate Review.

29.69[3][a] Order Granting Relief Reviewable As Final Judgment or by Writ. An order setting aside a judgment under CCP § 473(b) is appealable, and thus reviewable only on direct appeal, when the vacated judgment is an appealable final judgment [CCP § 904.1(a)(2); *Garcia v. Hejmadi* (1997) 58 CA4th 674, 680, 68 CR2d 228]. The order vacating an order that is not a final judgment is generally only appealable with the appeal of a post-trial judgment [*Garcia v. Hejmadi* (1997) 58 CA4th 674, 680, 68 CR2d 228].

Examples:

- An order granting a motion to vacate a voluntary dismissal is not an appealable order [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1365-1366, 118 CR2d 71 ; but see *Basinger v. Rogers & Wells* (1990) 220 CA3d 16, 21, 269 CR 332 (appealable)].
- The setting aside of an order for summary judgment is not appealable when the case has not been dismissed as a result of the summary judgment [*Garcia v. Hejmadi* (1997) 58 CA4th 674, 680, 68 CR2d 228 (order setting aside summary judgment)].

However, writ review of an appealable order is appropriate when it is necessary to resolve an issue of first impression promptly and to set guidelines for bench and bar [see *Rodriguez v. Superior Court* (2005) 127 CA4th 1027, 1032, 26 CR3d 194].

Examples:

- A petition for writ of mandate is the appropriate vehicle to review an order granting a motion to vacate a voluntary dismissal [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1365-1366, 118 CR2d 71].

- Mandamus lay to vacate an order setting aside a prior order to dismiss plaintiff's civil action for his failure to prosecute, when his notice of motion for reconsideration of the order setting aside the dismissal had not been accompanied by any points and authorities, and when the order granting his motion was based on a declaration that failed to state why the contents therein had not been presented, earlier, in opposition to the motion to dismiss, and that did not purport to establish that such failure had been due to mistake, inadvertence, surprise or excusable neglect by himself or his counsel [*San Francisco Lathing, Inc. v. Superior Court* (1969) 271 CA2d 78, 84, 76 CR 304] .

29.69[3][b] Order Denying Relief Generally Not Reviewable Except on Appeal From Final Judgment in Underlying Action. As a general rule, orders denying a motion to vacate under *CCP* § 473(b) are not appealable, because any assertions of error can be reviewed on appeal from the judgment itself [*Scognamillo v. Herrick* (2003) 106 CA4th 1139, 1146, 131 CR2d 393] .



Strategic Point:

Given that *CCP* § 473(b) is construed liberally, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71] .

Example:

Order vacating voluntary dismissal [*Gray v. Superior Court* (1997) 52 CA4th 165, 170-171, 60 CR2d 428] .

Exceptions:

Although, as a general rule, an order denying a *CCP* § 473(b) motion to set aside a discretionary dismissal, such as for delay in prosecution, is not appealable, newly revealed facts or the hitherto unrevealed impact of known facts may demonstrate that the moving party was effectually deprived of a meaningful opportunity to defend against the original motion, thus warranting an appeal from the denial of the motion rather than from the dismissal itself. Further, the rule established by the Supreme Court that an order denying a *CCP* § 473 motion to vacate a default is not appealable is not applicable, because that rule applies only to such motions that seek relief from the ministerial act of entry of default, not from default judgments or orders of dismissal [*Peltier v. McCloud River R.R. Co.* (1995) 34 CA4th 1809, 1814-1815, 41 CR2d 182] .

Examples:

- A party may appeal from the order denying a motion to vacate a *CCP* § 998 judgment after acceptance of offer of compromise, because the motion provides the court with its first opportunity to consider any evidence and legal argument, and the record after the motion to vacate the judgment will include new evidence [*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 CA4th 658, 668-669, 73 CR2d 242] .

- Trial court's order denying plaintiff's motion to vacate the involuntary dismissal of his action for failure to bring the case to trial within three years, on the ground of the mistake or neglect of counsel under mandatory provisions of *CCP* § 473(b) was appealable, when plaintiff introduced new evidence on the motion to vacate, namely his counsel's declaration for the first time taking full responsibility for the delay in prosecution of the case. Moreover, for the first time, plaintiff tendered the argument that *CCP* § 473 itself operated so as to compel the setting aside of the dismissal, and this argument tendered a hitherto unrevealed impact of known facts [*Peltier v. McCloud River R.R. Co.* (1995) 34 CA4th 1809,

1814-1815, 41 CR2d 182] .

An order denying a motion under CCP § 473(b) to set aside a type of order not included in Prob Code § 1303, enumerating appealable orders in probate proceedings, is not appealable [see *Estate of Doescher* (1963) 217 CA2d 104, 105, 31 CR 346 (decree of distribution not included in former Prob Code § 1240)].

Review of a denial may also be available by writ of mandate under unusual circumstances [*In re Marriage of Fuller* (1985) 163 CA3d 1070, 1072 n1, 1076, 210 CR 73 (consideration of lack of notice of sanctions raised for first time on appeal)].

29.69[3][c] Court Has Discretion to Consider Appeal As Petition for Writ of Mandate. An appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate, but that power should be exercised only in unusual circumstances compelling enough to indicate the propriety of a petition for writ in the first instance [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1366-1367, 118 CR2d 71] .

Distinguish:

The court may consider an appeal of a nonappealable order as a petition for writ of mandate if dismissing the appeal rather than exercising power to reach the merits would be "unnecessarily dilatory and circuitous. The court may consider such factors as whether the briefs and record included in substance the necessary elements for a proceeding for a writ of mandate, whether there is indication the trial court would appear as a party in a writ proceeding, the appealability of the order, and the desire of the parties to have the court decide the issue rather than dismiss the appeal [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1367, 118 CR2d 71 (appeal considered as petition for writ of mandate)].

29.69[3][d] Standard of Appellate Review. A trial court's finding on the causation issue will be affirmed so long as it is supported by substantial evidence [*Milton v. Perceptual Dev. Corp.* (1997) 53 CA4th 861, 867, 62 CR2d 98] .

It is clearly established that a motion for relief under CCP § 473 is addressed to the sound discretion of the trial court [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71] and that an appellate court will not interfere unless there is a clear showing of abuse [*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 C4th 249, 257, 121 CR2d 187, 47 P3d 1056] . The appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered [*H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71] .

However, if the review consists only of application of the law to undisputed facts, the standard of review is de novo [*Rodrigues v. Superior Court* (2005) 127 CA4th 1027, 1032, 26 CR3d 194] .

29.69[3][e] Burden of Establishing Error, and Presumption of Correctness of Order. The burden of affirmatively demonstrating error is on the appellant. This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error. The order of the lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness [*State Farm Fire & Cas. Co. v. Pietak* (2001) 90 CA4th 600, 610, 109 CR2d 256] .

The appellate court extends all legitimate and reasonable inferences to uphold the judgment [*Estate of Carter* (2003) 111 CA4th 1139, 1154, 4 CR3d 490 ; *H.D. Arnaiz Ltd. v. County of San Joaquin* (2002) 96 CA4th 1357, 1368, 118 CR2d 71] . When two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court [*State Farm Fire & Cas. Co. v. Pietak* (2001) 90 CA4th 600, 610, 109 CR2d 256 ; *Milton v. Perceptual Dev. Corp.* (1997) 53 CA4th 861, 867, 62 CR2d 98] .

When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and when

there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed [*see Rappleyea v. Campbell (1994) 8 C4th 975, 987, 35 CR2d 669, 884 P2d 126*].

29.69[3][f] Seeking Appellate Review. Appeals in unlimited cases are authorized by *CCP* § 904.1; and in limited civil cases, by *CCP* § 904.2.



Timing:

The time in which an appeal must be filed is governed by *Cal Rules Ct, Rule 8.104*, with extensions triggered by post-trial motions governed by *Cal Rules Ct, Rule 8.108* [*see 29.09[2]*].



Cross Reference:

Preparing and filing notices of appeal, see California Forms of Pleading and Practice, Ch. 42, Appeal: Notice of Appeal (Matthew Bender).

Under *CCP* § 1084 *et seq.*, a writ of mandate is sought by verified petition of a beneficially interested party [*CCP* § 1086], and a writ must issue if all cases when there is no other plain, speedy, and adequate remedy [*CCP* § 1086; *H.D. Arnaiz Ltd. v. County of San Joaquin (2002) 96 CA4th 1357, 1366, 118 CR2d 71* (petition denied)].



Warning:

Appeals from orders to vacate a judgment or order, which appeals are frivolous or taken only for purposes of delay, may result in sanctions against the appealing party [*see CCP* § 907; *Cal Rules Ct, Rule 8.276*; *DeRose v. Heurlin (2002) 100 CA4th 158, 179, 122 CR2d 630* (sanctions imposed for appeal of order under *CCP* § 473(b))].



Cross Reference:

Sanctions for frivolous appeals, see California Forms of Pleading and Practice, Ch. 49, Appeal: Sanctions (Matthew Bender).



Timing:

The rules as to the timeliness of appeals do not apply to petitions for writ of mandate. However, under the doctrine of laches a writ may be denied when a party unreasonably delays in filing the petition and there is prejudice to the real party in interest [*H.D. Arnaiz Ltd. v. County of San Joaquin (2002) 96 CA4th 1357, 1368, 118 CR2d 71* (no prejudice)].



Cross Reference:

Sanctions for frivolous appeals, 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 & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court Review



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Chapter 29 Setting Aside Judgments and Orders

IX. SEEKING REVIEW OF PROCEEDINGS TO SET ASIDE JUDGMENTS AND ORDERS

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.70

29.70 Review of Decisions on Motions and Actions for Equitable Relief Due to Fraud, Duress, or Extrinsic Mistake.

29.70[1] Grant or Denial, Except Denial of Motion, of Equitable Relief Is Appealable and May Be Subject to Writ Review. An order granting relief from a judgment obtained by extrinsic fraud or mistake is appealable [*In re Marriage of Baltins* (1989) 212 CA3d 66, 73, 260 CR 403 (order granting motion to set aside property and support provisions of dissolution of marriage judgment on grounds of duress and extrinsic fraud or mistake)].

On the other hand, orders denying a motion to vacate are not appealable, because any assertions of error can be reviewed on appeal from the judgment itself [see *Rappleyea v. Campbell* (1994) 8 C4th 975, 983, 35 CR2d 669, 884 P2d 126 (same standard of review)].

Review of a decision on a request for equitable relief may also be available by writ of mandate in appropriate circumstances [see, e.g., *Settlemyre v. Superior Court* (2003) 105 CA4th 666, 675, 129 CR2d 560 (authorization in reference order exceeded scope of power delegable under CCP § 259(f))].



Cross Reference:

Seeking appellate review, see 29.69[3][f].

29.70[2] Standard of Review Differs for Grant or Denial of Relief. The standard of review is that a determination of extrinsic fraud is accepted on appeal if supported by substantial evidence [*In re Marriage of Bonds* (2000) 24 C4th 1, 31, 99 CR2d 252, 5 P3d 815], in which case all reasonable inferences from substantial evidence are also drawn in favor of the judgment [*Estate of Carter* (2003) 111 CA4th 1139, 1154, 4 CR3d 490].

An appellate court reviews a challenge to a trial court's order denying a motion to vacate a default on equitable grounds as it would a decision under CCP § 473 [see *Rappleyea v. Campbell* (1994) 8 C4th 975, 983, 35 CR2d 669, 884 P2d 126 (same standard of review)]. Orders granting relief on equitable grounds are also reviewed for abuse of discretion [*Parage v. Couedel* (1997) 60 CA4th 1037, 1041, 70 CR2d 671].

In considering an appeal from an order which is based on affidavits and which involves the determination of a question

of fact, an appellate court is bound by the same rule that controls when oral testimony is presented for review, namely: If there is any conflict in the affidavits those favoring the prevailing party are accepted as true; and since all intendments are in favor of the action taken by the lower court the affidavits in behalf of the successful party are deemed not only to establish the facts directly stated therein but all facts reasonably to be inferred from those stated [*In re Marriage of Coffin* (1976) 63 CA3d 139, 149-150, 133 CR 583] .

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent
ActionsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate
JurisdictionState Court ReviewCivil ProcedureAppealsStandards of ReviewGeneral Overview



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Chapter 29 Setting Aside Judgments and Orders
X. FORMS

2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.71

29.71 Notice of Motion and Motion for Order Vacating and Setting Aside Judgment, Order, Default, or Other Proceeding; Supporting Declarations; and Memorandum (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Moving Party's Attorney's Fault).

Notice of Motion and Motion for Order Vacating and Setting Aside Judgment, Order, Default, or Other Proceeding; Supporting Declarations; and Memorandum (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Moving Party's Attorney's Fault).

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION
	)	AND MOTION FOR
	)	_____ [specify,
_____ [name],	)	e.g., ORDER VACATING
Plaintiff,	)	AND SETTING ASIDE
vs.	)	DEFAULT (AND
_____ [name],	)	DEFAULT JUDGMENT)],
Defendant.	)	DECLARATION(S) OF _____
	)	[name(s)],
	)	AND MEMORANDUM)
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

To _____ [identify party, e.g., plaintiff] _____ [name] and to his/her attorney of

record:

[EITHER, if motion is for relief from default, default judgment, or dismissal and based on attorney's affidavit or declaration attesting to his/her fault]

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], _____ [moving party, e.g., defendant] will, and hereby does, move _____ [specify, e.g., to vacate and set aside] the _____ [specify judgment, dismissal, order, or proceeding from which relief is sought, e.g., default (and default judgment) entered against defendant] on _____ [date]. The motion will be made on the ground(s) that the _____ [default (and resulting default judgment) or dismissal was/were] taken against _____ [specify party, e.g., defendant] as the result of the _____ [mistake or inadvertence or surprise or neglect or all or any combination of these] of his/her attorney, _____ [name], who has _____ [given an affidavit or executed a declaration under penalty of perjury] attesting to this fault.

[OR, if motion is for relief from default, default judgment, or dismissal without attorney's affidavit or declaration attesting to fault, or is for relief from any other judgment, dismissal, order, or proceeding]

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], _____ [moving party, e.g., defendant] will move _____ [specify, e.g., to vacate and set aside] the _____ [specify judgment, dismissal, order, or proceeding from which relief is sought, e.g., default (and default judgment) entered against defendant] on _____ [date]. The motion will be made on the ground(s) that the _____ [judgment or dismissal or order or proceeding] was taken _____ [by or against] _____ [specify moving party, e.g., defendant] through his/her _____ [mistake or inadvertence or surprise or excusable neglect or all or any combination of these].

[CONTINUE]

The motion will be based on this notice of motion, the accompanying _____ [affidavit(s) and/or declaration(s)] of _____ [name(s)] [the _____ (specify pleading proposed to be filed, e.g., proposed answer to the complaint herein), 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]

DECLARATION OF _____ [name] IN SUPPORT OF MOTION FOR RELIEF FROM
 _____ [specify, e.g., THE DEFAULT AND DEFAULT JUDGMENT ENTERED HEREIN]

I, _____ [name], declare:

1. I am the _____ [specify, e.g., defendant] in this action and make this declaration in support of my motion for an order _____ [specify relief sought, e.g., vacating and setting aside] the _____ [specify judgment, order, or proceedings from which relief is sought, e.g., default (and default judgment) taken against me] in this action.

2. As shown by the records herein, of which the court is requested to take judicial notice, the _____ [specify judgment, order, or proceeding from which relief is sought, e.g., default (and default judgment) was/were] _____ [entered or taken] through my _____ [mistake or inadvertence or surprise or excusable neglect or all or any combination of these] in that _____ [set forth all facts establishing the ground(s) of the motion].

3. I have at all times acted diligently in seeking this relief as shown by the following facts: _____ [state how and when party discovered the entry or taking of the judgment, order, or proceeding from which relief is sought, set forth the steps taken to secure relief, and explain with good reason each and every delay between the date of discovery and the date this notice of motion will be 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]

MEMORANDUM

[set out memorandum here]

NOTES:

Authority:

CCP § 473(b)



Timing:

See 29.14[1]

Grounds:

See 29.18 -29.22

Related Form of Declaration in Support (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect):

See 29.72

Related Form of Attorney's Affidavit of Fault:

See 29.73

Related Form of Declaration in Opposition:

See 29.74

Related Form of Order:

See 29.75

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.10 -70.12, 70.30, 70.40, 70.41, 70.90 -70.100 (Matthew Bender)



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Chapter 29 Setting Aside Judgments and Orders
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**29.72 Declaration in Support of Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding
(Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect).**

Declaration in Support of Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF
	)	_____ [name]
	)	IN SUPPORT OF
_____ [name],	)	MOTION _____
Plaintiff,	)	[specify, e.g., FOR
vs	)	ORDER VACATING AND
_____ [name],	)	SETTING ASIDE
Defendant.	)	DEFAULT (AND
	)	DEFAULT JUDGMENT)]
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: None
	)	

I, _____ [name], declare:

1. I am the _____ [specify, e.g., defendant] in this action and make this declaration in support of my

motion for an order _____ [*specify relief sought, e.g., vacating and setting aside*] the _____ [*specify judgment, order, or proceedings from which relief is sought, e.g., default (and default judgment) taken against me*] in this action.

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to defendant's excusable neglect in reasonably relying on a codefendant's or employer's promise to defend, e.g.:*]

2. As shown by the records herein, of which the court is requested to take judicial notice, the judgment dismissing plaintiff's action was entered through my _____ [*mistake or inadvertence or surprise or excusable neglect or all or any combination of these*] arising from erroneous information I received from _____ [*specify court officer, e.g., the courtroom clerk*].

3. On _____ [*date*], _____ [*specify what was done, e.g., the date scheduled for trial of this action, as attorney for the plaintiff, I arrived early with my client in the courtroom of Judge _____, who was scheduled to try the case*]. At that time I was advised by the _____ [*specify court officer, e.g., courtroom clerk*] _____ [*set forth statement(s), e.g., that the trial had been postponed, that it would be reset, and that I would be notified at a later time of the new trial date*].

4. _____ [*Specify action taken in reliance on statement, e.g., So notified, the plaintiff and I left the courtroom*].

5. The _____ [*e.g., clerk's*] statement was erroneous in that _____ [*specify true facts, e.g., the trial had not been postponed, and it was called for trial as scheduled*]. As a result of the clerk's erroneous advice, _____ [*specify, e.g., no one appeared for the plaintiff when the case was called, and the action was dismissed on defendant's motion*].

NOTES:

Authority:

CCP § 473(b)

Related Form of Notice of Motion:

See 29.71

Related Form of Attorney's Affidavit of Fault:

See 29.73

Related Form of Declaration in Opposition:

See 29.74

Related Form of Order:

29.75

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.10 -70.12, 70.30, 70.40, 70.41, 70.90 -70.100 (Matthew Bender)



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.73

**29.73 Declaration in Support of Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding
(Based on Moving Party's Attorney's Fault).**

Declaration in Support of Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Attorney's Fault).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. _____
) DECLARATION OF
) _____ [name of
) attorney] ATTESTING TO
) FAULT IN SUPPORT OF
) _____ [PLAINTIFF'S
) or DEFENDANT'S] MOTION
) FOR ORDER VACATING AND
) SETTING ASIDE _____
) [DEFAULT (AND DEFAULT
) JUDGMENT) or DISMISSAL]
) Date: _____
) Time: _____
) Dept: _____
) Trial Date: _____
)

I, _____ [name], declare:

1. I am an attorney at law duly admitted to practice in the State of California and _____ [attorney or attorney of record or former attorney of record] for the _____ [specify moving party] herein and make this declaration in support of _____ [specify moving party]'s motion for an order setting aside and vacating the _____ [default (and default judgment) or dismissal] taken against _____ [specify moving party].

2. The _____ [default (and default judgment) or dismissal] was/were entered through my _____ [mistake or inadvertence or surprise or neglect or all or any combination of these] in that _____ [set forth all facts establishing the attorney's fault and showing that the default (and resulting default judgment) or dismissal were caused by the attorney's mistake, inadvertence, surprise, or neglect].

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 § 473(b)

Related Form of Notice of Motion:

See 29.71

Related Form of Declaration in Support:

See 29.72

Related Form of Declaration in Opposition:

See 29.74

Related Form of Order:

29.75

Related Form of Memorandum:

See *California Points and Authorities*, § 70.12 (Matthew Bender)



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.74

29.74 Declaration in Opposition to Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect).

Declaration in Opposition to Motion for Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF
	)	_____ [name]
_____ [name],	)	IN OPPOSITION TO
Plaintiff,	)	MOTION _____
vs.	)	[specify, e.g., FOR ORDER
_____ [name],	)	VACATING AND SETTING
Defendant.	)	ASIDE DEFAULT (AND
	)	DEFAULT JUDGMENT)]
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: None
	)	

I, _____ [name], declare:

1. I am _____ [specify, e.g., the plaintiff in the above-entitled action or an attorney at law duly admitted to practice in all California state courts and the attorney of record for the _____ (specify

party, e.g., plaintiff)] and make this declaration in opposition to _____ [party, e.g., defendant's] motion _____ [specify relief sought, e.g., to set aside and vacate] _____ [specify judgment, dismissal, order, or proceeding, e.g., the default and default judgment] entered in this action against _____ [party, e.g., the defendant].

2. As shown by the records of this court, the _____ [specify when judgment, dismissal, order, or proceeding was taken, e.g., default was entered on _____ (date) and the default judgment was entered on _____ (date)].

[EITHER]

3. As further shown by the records herein, of which this court is requested to take judicial notice, _____ [specify moving party, e.g., defendant's] motion was filed on _____ [date], and is therefore untimely in that it was not filed within six months from the date _____ [specify judgment, dismissal, order, or proceeding moving party seeks to set aside, e.g., the default was entered or, if relief is sought only from a default judgment or other judgment, the (default) judgment was entered].

[OR]

3. As further shown by the proof of service filed in this action, _____ [specify moving party, e.g., defendant] was served with notice of _____ [specify judgment, dismissal, order, or proceeding moving party seeks to set aside, e.g., entry of the default and default judgment] on _____ [date], yet failed to take any steps to seek relief from _____ [specify, e.g., default] until _____ [date], when _____ [specify moving party, e.g., defendant's] motion was filed. The declaration of _____ [name] submitted in support of the motion shows not only that _____ [specify moving party, e.g., defendant] failed to act diligently in seeking relief from _____ [specify, e.g., default], but that he/she failed to take any action at all for a period of _____ [e.g., four months] after receiving notice that the _____ [specify, e.g., default and default judgment were entered].

[AND/OR]

4. There is no showing that the _____ [mistake or inadvertence or surprise or neglect or any combination of these] relied on by _____ [specify moving party, e.g., defendant] is excusable.

5. [Specify any defects, omissions, or statements in moving party's supporting declaration that admit or imply inexcusability, or are disputed, e.g., Defendant makes no claim that at the time he/she was served with the summons and complaint in this action that he/she did not have full possession of his/her faculties, that he/she was ill or incapacitated, or that he/she could not read or write the English language or did not understand the summons, but states in sum only that on receipt of the papers he/she "didn't really understand what the fuss was all about," mislaid the papers, and forgot about them until he/she received a copy of plaintiff's request to enter default. Plaintiff knew, or was bound to know, the meaning of the contents of the summons and complaint served, and knew, or was bound to know, from a simple reading of the summons, that action on his/her part was required within 30 days of service, and knew, or was bound to know, that a judgment would be taken against him/her in the amount stated in the complaint in the event that he/she failed to file a responsive pleading].

6. _____ [Set forth facts within declarant's personal knowledge negating any claims in moving party's supporting declaration, e.g., Defendant is _____ (specify business or occupation). Over a period

beginning almost two months before the complaint was filed, I attempted unsuccessfully to negotiate a settlement of the dispute with the defendant. These negotiations terminated on _____ (*date*), at which time, I told the defendant that I was going to hire an attorney and file an action against him/her to recover the money he/she owed me. His/Her reply to me was that I could do what I wanted, but that, if I did sue, he/she would keep the case tied up in the trial and appellate courts for years and I'd never receive a cent. Consequently, defendant knew in advance that I was going to sue him/her, had my statement confirmed when he/she received the summons and complaint, and his/her statement about tying up the case in the courts implies familiarity with court proceedings].

[*CONTINUE*]

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 § 473(b)



Timing:

See 29.60[1][b]

Grounds:

See 29.60[1][a]

Related Form of Notice of Motion:

See 29.71

Related Form of Declaration in Support:

See 29.72

Related Form of Attorney's Affidavit of Fault:

See 29.73

Related Form of Order:

29.75

Related Forms of Memoranda:

See California Points and Authorities, §§ 70.120 -70.131, 70.190, 70.211 (Matthew Bender)



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.75

29.75 Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Moving Party's Attorney's Fault).

Order Setting Aside Judgment, Order, Default, or Other Proceeding (Based on Moving Party's Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Moving Party's Attorney's Fault).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER
_____ [name],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
	)	

The motion of _____ [identify party, e.g., defendant] for an order _____ [specify, e.g., setting aside and vacating the default (and default judgment) heretofore entered] 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 granted,

[OR]

The court, having considered [the evidence presented at the hearing, and] the _____ [affidavit(s) or declaration(s) or affidavit(s) and declaration(s) or _____ (affidavit or declaration) of fault of defendant's attorney], submitted in support of and in opposition to the motion, and being fully advised in the premises, finds that the _____ [specify, judgment, dismissal, order, or proceeding, e.g., default and default judgment] was/were taken _____ [against or by] _____ [specify party, e.g., defendant] through _____ [his/her or his/her attorney's] _____ [mistake or inadvertence or surprise or excusable neglect or all or any combination of these].

[CONTINUE]

IT IS HEREBY ORDERED that the _____ [specify, e.g., default (and default judgment)] heretofore entered in this action _____ [e.g., against defendant][, this judgment having been _____ (specify, e.g., entered on _____ [date] in Volume _____, Page _____, of the Judgment Book),] be hereby set aside and vacated.

[IT IS FURTHER ORDERED that _____ (name of party or party's attorney) pay to _____ (specify, e.g., plaintiff) legal fees and costs in the sum of \$_____.]

[IT IS FURTHER ORDERED that _____ (name), the attorney for _____ (specify party, e.g., defendant) pay to _____ (specify, e.g., plaintiff) legal fees and costs in the sum of \$_____.]

[IT IS FURTHER ORDERED that _____ (specify any monetary penalties imposed, e.g., defendant's attorney, _____ [name], pay the amount of \$_____ [not exceeding \$1,000] to the State Bar Client Security Fund)].

[IT IS FURTHER ORDERED that _____ (specify party, e.g., defendant) be permitted to _____ (specify, e.g., file) the _____ (answer or other pleading or paper) _____ (proposed to be filed or accompanying the notice of motion)].

[Add, if sanctions are imposed]

STATEMENT OF REASONS

The above _____ [identify sanctions] are imposed for the following reasons:

1. _____ [Set forth in this and subsequent paragraphs each fact that support the sanctions, including the award of attorney's fees and costs].

Dated: _____

Judge of the Superior Court

NOTES:

Authority:
CCP § 473(b)

Related Form of Notice of Motion:

See 29.71

Related Form of Declaration in Support:

See 29.72

Related Form of Declaration in Opposition:

See 29.74

Related Form of Attorney's Affidavit of Fault:

See 29.73

Related Form of Memorandum:

See *California Points and Authorities*, § 70.12 (Matthew Bender)



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29.76 Notice of Motion and Motion to Set Aside Judgment or Order Void on Its Face.

Notice of Motion and Motion to Set Aside Judgment or Order Void on Its Face.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION TO
	)	AND MOTION TO SET ASIDE
_____ [name],	)	[specify judgment or order, e.g.,
Plaintiff,	)	QUIET TITLE JUDGMENT]
vs.	)	VOID ON ITS FACE, REQUEST
_____ [name],	)	FOR JUDICIAL NOTICE, AND
Defendant.	)	MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
	)	

To _____ [identify 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] will, and hereby does, move for an order setting aside the

_____ [specify judgment or order, e.g., quiet title judgment] entered against _____
 [party, e.g., defendant] on _____ [date]. The motion will be made on the ground that the
 _____ [specify judgment or order, e.g., quiet title judgment] is/are void on its face
 _____ [specify defect, e.g., because the judgment was entered after a stay of proceedings due to
 bankruptcy was issued by the federal court].

The motion will be based on this notice of motion, on the request for judicial notice, the supporting memorandum served and filed herewith, and on the records and file herein.

Dated: _____

_____ [signature]

Attorney for _____ [moving party]

REQUEST FOR JUDICIAL NOTICE

TO THE [HONORABLE _____ (name), JUDGE OF THE] ABOVE ENTITLED COURT:

_____ [Party, e.g., Defendant Mary Jones], under the provision of *Evidence Code* section 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, e.g., the Quiet Title Judgment issued by this court on January 20, 2005, in the above entitle action, and the Notice of Stay of Proceedings filed in the above entitled action by Defendant Mary Jones on January 18, 2005, that has attached to it a copy of the order of the federal bankruptcy court staying all proceedings against Defendant Mary Jones effective January 18, 2005].

MEMORANDUM

[set out memorandum here]

NOTES:

Authority:

CCP § 473(d)



Timing:

See 29.30[2]

Grounds:

See 29.27, 29.29[3]

Related Form of Order:

See 29.77

Related Form of Notice of Motion and Motion to Set Aside Judgment or Order Void In Fact:

See 29.78

Requirements for Judicial Notice:

See Matthew Bender Practice Guide: *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure*, 26.17

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.310 -70.315, 70.330 -70.336, 70.350 -70.352, 70.360 -70.364 (Matthew Bender)



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29.77 Order Setting Aside Judgment or Order Void on Its Face.

Order Setting Aside Judgment or Order Void on Its Face.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [name],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____ [Specify party, e.g., Defendant's] motion for an order _____ [specify, e.g.,
setting a judgment quieting title heretofore entered] came on regularly for hearing before this court on
_____ [date]. _____ [Name] appeared as attorney for plaintiff, and
_____ [name] appeared as attorney for defendant.

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the _____ [specify judgment, order, or proceeding, e.g., judgment quieting title]
be, and hereby is/are, vacated and set aside.

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES:

Authority:

CCP § 473(d)

Related Form of Motion:

See 29.76

Related Form of Order Setting Aside Judgment or Order Void in Fact:

See 29.79

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.310 -70.315, 70.330 -70.336, 70.350 -70.352, 70.360 -70.364 (Matthew Bender)



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.78

29.78 Notice of Motion and Motion to Set Aside Judgment or Order Void in Fact.

Notice of Motion and Motion to Set Aside Judgment or Order Void in Fact.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION
	)	AND MOTION TO SET ASIDE
	)	[specify judgment or order, e.g.,
_____ [name],	)	DISMISSAL FOR FAILURE)
Plaintiff,	)	TO RESPOND TO
vs.	)	INTERROGATORIES] VOID
_____ [name],	)	IN FACT, DECLARATION(S)
Defendant.	)	OF [name(s)], AND
	)	MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
	)	

To _____ [identify 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] will, and hereby does, move for an order setting aside the
 _____ [specify judgment or order, e.g., dismissal for failing to respond to interrogatories] entered
 against _____ [party, e.g., defendant] on _____ [date]. The motion will be made on
 the ground that the _____ [specify judgment or order, e.g., dismissal] is/are void in fact
 _____ [specify defect, e.g., for lack of jurisdiction over the person of the 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 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 OF _____ [name] IN SUPPORT OF MOTION FOR ORDER TO SET ASIDE
 VOID _____ [specify judgment or order, e.g., DISMISSAL FOR FAILURE TO RESPOND TO
 INTERROGATORIES]

I, _____ [name], declare:

1. I am _____ the _____ [specify party, e.g., defendant] herein, and I make this
 declaration in support of my motion _____ [specify relief sought, e.g., to set aside and vacate the
 dismissal for failure to respond to interrogatories heretofore entered against me].

[SET FORTH facts showing that the judgment or order is void in fact, e.g.:]

[EITHER]

2. As shown by the record herein, of which the court is requested to take judicial notice, the complaint was filed on
 _____ [date] by my then attorney of record, _____ [name] and dismissed on
 _____ [date] as a sanction for my having "repeatedly" failed to respond to discovery motions or to
 answer written interrogatories.

3. At no time was I ever informed by anyone that I had been ordered to appear at depositions or to answer
 interrogatories. When I employed my attorney, he/she told me it could take a year or two before the matter would get to
 trial and there would be periods of noticeable inaction.

4. On _____ [date], I signed and verified the complaint. Thereafter, on or about
 _____ [date] my attorney mailed me a conformed copy of the filed complaint, and on
 _____ [date] I received in the mail a file stamped copy of the summons and proof of service.

5. Several times over the next few weeks, I phoned my attorney and each time was assured that everything was
 proceeding normally. I phoned again on _____ [date] and was told by the man/woman who answered
 the phone that my attorney had "closed his/her office the day before and moved away." I immediately phoned the court
 clerk's office to learn the status of my case and was told that my complaint had been dismissed on

_____ [date] for the reasons stated above. This was the first and only notice I had that my case had been dismissed or that I was supposed to have appeared at depositions and answer interrogatories. Had I been informed that I was supposed to attend depositions or to answer interrogatories I would have done so.

6. The same day I consulted another attorney, _____ [name] who, in my presence, phoned the State Bar of California and was told that my attorney, _____ [name], had been disbarred on _____ [date], which was the day I received the file-stamped copy of the summons and proof of service. This was the very first I had heard of his/her disbarment. At no time did he/she tell me he/she had been disbarred or was being investigated by the State Bar, and I have never received any letter or notice from him/her informing me of this fact. Nor have I at any time received any notice, written or oral, from the defendant herein or his/her counsel advising me of the disbarment of my attorney.

[CONTINUE]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____

_____ [signature]

MEMORANDUM

[set out memorandum here]

NOTES:

Authority:

CCP § 473(d)



Timing:

See 29.31[2]

Grounds:

See 29.28, 29.29[3]

Related Form of Order:

See 29.79

Related Form of Notice of Motion to Set Aside Judgment or Order Void On Its Face:

See 29.76

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.460 -70.463 (Matthew Bender)



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29.79 Order Setting Aside Judgment or Order Void in Fact.

Order Setting Aside Judgment or Order Void in Fact.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [name],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____ [Specify party, e.g., Defendant's] motion for an order _____ [specify, e.g., setting aside dismissal for failure to respond to interrogatories heretofore entered] came on regularly for hearing before this court on _____ [date]. _____ [Name] appeared as attorney for plaintiff, and _____ [name] appeared as attorney for defendant.

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the _____ [specify judgment, order, or proceeding, e.g., dismissal for failure to respond to interrogatories] be, and hereby is/are, vacated and set aside.

Dated: _____

Judge of the Superior Court [signature]

NOTES:

Authority:

CCP § 473(d)

Related Form of Motion:

See 29.78

Related Form of Order Setting Aside Judgment or Order Void On Its Face:

See 29.77

Related Forms of Memoranda:

See California Points and Authorities, §§ 70.460 -70.463 (Matthew Bender)



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29.80 Notice of Motion and Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

Notice of Motion and Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. ____
) NOTICE OF MOTION AND
) MOTION FOR _____
) specify, *e.g.*, ORDER
) [SETTING ASIDE AND
) VACATING DEFAULT (AND
) DEFAULT JUDGMENT)],
) DECLARATION(S) OF
) _____ [name(s)],
) AND MEMORANDUM
)
)
) Date: _____
) Time: ____
) Dept: _____
) Trial Date: _____
)

To _____ [identify 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], _____ [moving party, e.g., defendant] will, and hereby does, move for _____ [specify relief sought, e.g., an order setting aside and vacating the default (and default judgment)] entered _____ [specify, e.g., against defendant] on _____ [date]. The motion will be made on the ground(s) that the _____ [judgment or order] [is void and] was taken against _____ [specify party, e.g., defendant] through the _____ [extrinsic _____ (fraud and/or mistake [and/or accident and/or duress])] of _____ [party, e.g., plaintiff], which prevented _____ [party, e.g., defendant] from presenting his/her case to the court, thereby denying him/her of a fair adversary hearing[, and that defendant has a meritorious defense to the action].

The motion will be based on this notice of motion, the accompanying _____ [affidavit(s) and/or declaration(s)] of _____ [name(s)] [, the _____ (specify pleading or other paper proposed to be filed, e.g., proposed verified answer to the complaint herein,) and supporting memorandum, [and] on the records and file herein[, and on such oral and documentary evidence as may be presented at the hearing on this motion].

Date: _____

_____ [signature]

Attorney for _____ [moving party]

DECLARATION OF _____ [name] IN SUPPORT OF _____ [specify party, e.g., DEFENDANT'S] MOTION _____ [specify, e.g., FOR ORDER SETTING ASIDE AND VACATING DEFAULT (AND DEFAULT JUDGMENT)]

I, _____ [name], declare:

1. I am the _____ [party, e.g., defendant in this action or other person having personal knowledge of the facts] and make this declaration in support of _____ [my or _____ (party, e.g., defendant's)] motion for an order _____ [specify relief sought, e.g., setting aside and vacating the default (and default judgment)] taken against _____ [me or the _____ (specify party, e.g., defendant)] herein.

2. _____ [Set forth facts within declarant's personal knowledge showing that the judgment, order, or proceeding was rendered, made, or taken as a result of extrinsic fraud or mistake, e.g.: The _____ (specify, e.g., default [and default judgment] was/were entered as a result of _____ [my extrinsic mistake or extrinsic fraud or mistake on the part of _____ (specify, e.g., plaintiff)] in that _____ [set forth the facts establishing the ground(s) of the motion, e.g., at no time did I ever receive any notice of the action, by the service of a summons and complaint or otherwise, and had absolutely no knowledge of the fact that I was being sued until _____ (date) when my home, located at _____ (street address and city), and in which I have lived all my life, was levied on in satisfaction of the judgment and, at which time, I was given a copy of the writ of execution]]).

3. _____ [Set forth facts showing moving party has acted diligently in seeking relief, e.g.: Immediately on being given a copy of the writ of execution, I phoned my attorney, _____ (name), explained the situation, and, together, later that same day, we went to the courthouse and checked the file of the case. In the file was a

proof of service that stated the summons and complaint had been served on me at _____ (street address and city) by leaving a copy of the complaint and summons with "a man" apparently in charge of the place and thereafter mailing a copy of the summons and complaint addressed to me at the same address. Before my reading the proof of service, I had never heard of the address mentioned and have never resided at, worked or done business in, or visited that address and know no one at that address, and, as already stated, I never, at any time, received the copy of the summons and complaint, or either of them, left with "the man" or mailed to that address, or any other copy of them].

4. _____ [State facts showing that the moving party has either a good claim or defense, as the case may be, e.g.: When my attorney and I went through the court file of the case as stated in Paragraph 2, we also read the complaint on file and made photocopies of it. As shown by _____ (the proposed verified _____ [answer or other pleading]) to the _____ (complaint or other pleading) attached to the notice of motion and/or the following facts, the _____ (specify, e.g., judgment) would not have been _____ (e.g., rendered) had there been a _____ (hearing or trial) on the merits (:_____ [set forth facts within declarant's personal knowledge supporting the moving party's claim or defense, as the case may be])].

5. _____ [State facts showing that moving party acted diligently in seeking relief, e.g.: As shown by the court's records herein, the _____ (specify, e.g., default was entered on _____ [date] and the default judgment was entered on _____ [date]). Immediately after learning of the judgment, and phoning and then going with my attorney to the courthouse to examine the court file of the case, as stated in Paragraph 2, I directed my attorney to do whatever was necessary to get the matter straightened out and the judgment set aside. He said he would prepare the necessary papers that same day and that I should come to his office the following morning, namely, on _____ (date), to sign the declaration, which I did].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [signature]

NOTES:

Authority:

McCreadie v. Arques (1967) 248 CA2d 39, 45, 56 CR 188



Timing:

See 29.38[1], 29.14[3][a]

Grounds:

See 29.40 -29.42, 29.18 -29.22

Related Form of Order:

See 29.81

Related Form of Complaint to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake:

See 29.82

Related Forms of Memoranda:

See California Points and Authorities, §§ 70.480 -70.484, 70.490, 70.491 (Matthew Bender)



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29.81 Order Setting Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

Order Setting Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [name],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

The motion of _____ [identify party, e.g., defendant] for an order _____ [specify, e.g., setting aside and vacating the default (and default judgment) heretofore entered] 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 granted,

[OR]

The court being fully advised in the premises, and it satisfactorily appearing from the evidence and the _____ [*specify, e.g., proposed verified answer*] that the _____ [*specify, e.g., default (and default judgment)*] was/were entered against _____ [*specify party, e.g., defendant*] by reason of the extrinsic _____ [*fraud and/or mistake*] of _____ [*specify, e.g., plaintiff*], that _____ [*specify party, e.g., defendant*] was diligent in filing the motion, and that _____ [*specify party, e.g., defendant*] has a meritorious _____ [*specify, e.g., defense to the action*],

[*CONTINUE*]

IT IS ORDERED that the _____ [*specify, e.g., default (and default judgment)*] [entered on _____ (*date*) in Volume _____, Page _____ of the Judgment Book] be, and hereby is/are, vacated and set aside [and that defendant's proposed verified answer be filed].

Dated: _____

Judge of the Superior Court

NOTES:

Authority:

McCreadie v. Arques (1967) 248 CA2d 39, 45, 56 CR 188

Related Form of Motion:

See 29.80

Related Form of Judgment Setting Aside Judgment or Order Procured by Extrinsic Fraud or Mistake:

See 29.83

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.480 -70.484, 70.490, 70.491 (Matthew Bender)



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.82

29.82 Complaint in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

Complaint in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO SET ASIDE
_____ [name],	)	JUDGMENT
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. _____ [Allege capacity, residence, and/or agency of plaintiff, e.g.: Plaintiff is, and at all times herein mentioned was a corporation, organized and existing under the laws of California].
2. _____ [Allege capacity if other than an individual and principal place of business or residence, and/or agency of defendant, e.g.: Defendant _____ (name) is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ (city), California].
3. _____ [Identify action or proceeding in which judgment or order under attack was entered, e.g.: On _____ (date) the defendant, as plaintiff, filed in _____ (this court or the _____ [Superior or Municipal] Court [of the _____ Judicial District], County of _____), against plaintiff, as defendant, a complaint entitled _____ (specify, e.g., _____ [name], Plaintiff, vs. _____ [name], Defendant), Case No. _____, in which

defendant herein sought _____ (*specify, e.g., damages for an alleged breach of contract*) against plaintiff herein. The court is hereby requested to take judicial notice of _____ (*specify, e.g., the complaint and answer therein filed*), a copy of each of which is attached hereto as Exhibits A and B, respectively, and made a part hereof)].

4. _____ [*Identify judgment or order under attack, e.g.: As shown by the records of _____ (this court or the _____ [Superior or Municipal] Court [of the _____ Judicial District], County of _____) in the case referred to in Paragraph 3, a judgment against plaintiff herein was entered on _____ (date) in _____ (specify, e.g., Vol. _____ of the Judgment Book, page _____)*]. The court is hereby requested to take judicial notice of the judgment, a copy of which is attached hereto as Exhibit C and made a part hereof.

5. _____ [*Allege grounds on which judgment or order is sought to be set aside, e.g., Defendant herein obtained the entry of the judgment through extrinsic _____ (fraud and/or mistake) in that _____ (specify facts showing the fraud or mistake and how it occurred)*].

6. _____ [*Allege how and when plaintiff learned of the judgment or order and any facts showing good cause for any failure to have discovered the facts sooner, and plaintiff's freedom from any contributory fault in the entry of the judgment*].

[7. _____ (*Allege any facts showing that plaintiff was diligent in seeking relief after discovering the facts if any delay between the time plaintiff discovered the facts and the commencement of this action would be prejudicial to the defendant*).]

8. _____ [*Allege meritorious case, e.g., At all times herein mentioned plaintiff herein had, and continues to have, a meritorious defense to the prior action in that _____ (specify facts showing the existence of a valid claim or defense to the action in whole or in part)*].

[EITHER]

9. Plaintiff has no adequate remedy at law in that, through no fault of his/her own, he/she did not discover the _____ [fraud and/or mistake] herein alleged until after the time had expired for appeal, seeking a new trial, or seeking relief under *Code of Civil Procedure Section 473(b)* or *(d)*, for the reasons hereinabove alleged.

[OR]

9. Plaintiff's motion for relief under *Code of Civil Procedure Section 473* _____ [(b) or (d)] paragraph, was denied by the court on _____ [date] _____ [*specify reason for denial, e.g., as untimely or without a full hearing of the merits of plaintiff's claim, in that _____ (set forth facts showing that issues raised in this action were not considered or adjudicated by the court in the statutory motion and any reasons for the failure to raise or consider them)*].

[CONTINUE]

WHEREFORE, plaintiff prays judgment as follows:

1. That _____ [the default and default judgment entered in the prior action be vacated and set aside

(and leave granted to plaintiff herein to file an answer to the complaint therein) *or* the judgment entered against plaintiff herein in the prior action be declared null and void *or* defendant be declared a constructive trustee for the benefit of the plaintiff of all funds it received as a result of the prior _____ (judgment *or* order) *or specify other relief sought*].

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [firm name, if any]

By: _____ [signature]

Attorney for Plaintiff [typed name]

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.

Dated: _____

_____ [signature]

NOTES:

Authority:

McCreadie v. Arques (1967) 248 CA2d 39, 45, 56 CR 188



Timing:

See 29.38[2], 29.14[3][b]

Grounds:

See 29.40 -29.42, 29.18 -29.22

Related Form of Judgment:

See 29.83

Related Form of Motion to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake:

See 29.80

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.480 -70.484, 70.490, 70.491 (Matthew Bender)



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29.83 Judgment Setting Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

Judgment Setting Aside Judgment or Order Procured by Extrinsic Fraud or Mistake.

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	JUDGMENT SETTING ASIDE
_____ [name],	)	JUDGMENT
Defendant.	)	
	)	
	)	

This cause came on regularly for trial before the Honorable _____ [name], sitting without a jury on _____ [date] in [Department _____ of] the above-entitled court, _____ [name], appearing as attorney for the plaintiff, and _____ [name], appearing as attorney for the defendant. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and _____ [the court(, on _____ [plaintiff's or defendant's] request), having caused to be made and filed herein its written statement of decision or a statement of decision not having been requested],

IT IS ORDERED AND ADJUDGED that the [default and default] judgment entered against the plaintiff herein as defendant in Action No. _____ in _____ [this court or the _____ (Superior or Municipal) Court (of the _____ Judicial District), State of California], entitled _____ [specify, e.g., _____ (name), plaintiff vs. _____ (name), defendant], and entered on or about _____ [date], is null and void and is set aside and vacated, and _____ [specify any additional relief requested and granted, e.g., that defendant therein is granted until _____ days after this

judgment becomes final to file his/her answer to the complaint in that action].

IT IS FURTHER ORDERED that plaintiff recover from the defendant his/her costs of suit in the sum of \$_____.

Dated: _____

Judge of the Superior Court [signature]

NOTES:

Authority:

McCreadie v. Arques (1967) 248 CA2d 39, 45, 56 CR 188

Related Form of Complaint:

See 29.82

Related Form of Order Setting Aside Judgment or Order Procured by Extrinsic Fraud or Mistake:

See 29.81

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.480 -70.484, 70.490, 70.491 (Matthew Bender)



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2-29 MB Practice Guide: Trial & Post-Trial Civil Proc 29.84

29.84 Notice of Motion and Motion for Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum (Based on Prejudice Due to Military Service).

Notice of Motion and Motion for Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum
(Based on Prejudice Due to Military Service).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND
_____ [name],	)	MOTION FOR RELIEF FROM
Defendant.	)	JUDGMENT TAKEN AGAINST
	)	DEFENDANT DURING
	)	PERIOD OF MILITARY
	)	SERVICE [Mil. & Vet. Code § 402(d)]
	)	
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
	)	

To _____ [identify party, e.g., plaintiff] _____ [name] 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],
 _____ [party, e.g., defendant] will, and hereby does, move for an order vacating and setting aside the
 judgment entered against _____ [party, e.g., defendant] on _____ [date] and
 granting _____ [party, e.g., defendant] leave to defend the action. The motion will be made pursuant
 to *Section 402(d) of the Military and Veterans Code* on the ground that the judgment entered against
 _____ [party, e.g., defendant] by this court on _____ [date] was entered against a
 service member as defined by *Section 400(a) of the Military and Veterans Code* _____ [specify either
 during a period of military service as defined by *Section 400(b) of the Military and Veterans Code* or within 30 days
 after a period of military service as defined by *Section 400(b) of the Military and Veterans Code*], and that
 _____ [party, e.g., defendant] was prejudiced by reason of military service in making a defense to the
 action and has a _____ [specify meritorious or legal] defense to _____ [specify all or
 part] of the action. 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 evidence
 as may be presented at the hearing on this motion.

Dated: _____

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for _____ [party, e.g., Defendant]

DECLARATION OF _____ [name] IN SUPPORT OF MOTION FOR ORDER VACATING AND SETTING ASIDE JUDGMENT

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., the defendant named in this action].

2. As shown by the records of this court, of which the court is requested to take judicial notice, this action was filed on
 _____ [date], and _____ [specify proceeding leading to judgment from which relief
 is sought, e.g., the summons was served on _____ (date), and defendant's default was entered on
 _____ (date), and a default judgment against the defendant was entered on _____
 (date)].

[EITHER]

3. On _____ [date], I was called to active _____ [specify state or federal] military
 service as _____ [specify, e.g., an enlisted member of the National Guard] by the
 _____ [specify Governor of the State of California pursuant to the provisions of Section
 _____ (specify 143 or 146) of the Military and Veterans Code or the President of the United States of
 America pursuant to Title _____ (specify 10 or 12) of the United States Code].

[OR]

3. On _____ [date], I was called to full-time active duty as a reservists of the United States Military Reserve.

[CONTINUE]

4. As shown by the attached certificate, of which the court is requested to take judicial notice, from _____ [date] to _____ [date], I was in full-time active _____ [specify state or federal] service as defined in *Section 400(b) of the Military and Veterans Code*.

5. As shown by Paragraphs 2 through 4, above, the judgment from which relief is sought was entered during a period of military service governed by *Section 402(d) of the Military and Veterans Code*.

6. I was prejudiced by reason by military service in making my defense to this action because _____ [specify facts showing prejudice].

7. I have a _____ [specify meritorious or legal] defense to _____ [specify all or part] of the action, which is _____ [specify].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [signature]

NOTES:

Authority:

M&V § 402(d)



Timing:

See 29.52[1]

Grounds:

See 29.47 -29.51

Related Form of Order:

See 29.85

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.260 -70.262 (Matthew Bender)



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29.85 Order Setting Aside Judgment or Order (Based on Prejudice Due to Military Service).

Order Setting Aside Judgment or Order (Based on Prejudice Due to Military Service).

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER
_____ [name],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
	)	

The motion of _____ [identify party, e.g., defendant] for an order _____ [specify, e.g., setting aside and vacating the judgment heretofore entered] 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 should be granted,

IT IS ORDERED that the judgment heretofore entered in this action be, and hereby is, vacated and set aside.

Dated: _____

_____ [signature]

Judge of the Superior Court

NOTES:

Authority:

M&V § 402(d)

Related Form of Motion:

See 29.84

Related Forms of Memoranda:

See *California Points and Authorities*, §§ 70.260 -70.262 (Matthew Bender)



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29.86 Notice of Motion and Motion for Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum (When Court Has Assumed Jurisdiction Over Attorney's Practice).

Notice of Motion and Motion for Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum
(When Court Has Assumed Jurisdiction Over Attorney's Practice).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],
Plaintiff,
vs.
_____, [name],
Defendant.

)
) NO. ____
) NOTICE OF MOTION AND
) MOTION FOR ORDER
) VACATING AND SETTING
) ASIDE _____ [e.g.,
) DEFAULT (AND
) DEFAULT JUDGMENT)],
) DECLARATION(S) OF
) _____ [name(s)],
) AND MEMORANDUM
) Date: _____
) Time: ____
) Dept: _____
) Trial Date: _____
)

To _____ [identify 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] will, and hereby does, move for an order vacating and setting aside the _____ [specify, e.g., default (and default judgment)] entered against _____ [party, e.g., defendant] on _____ [date] and granting _____ [party, e.g., defendant] leave to _____ [specify, e.g., defend] the action. The motion will be made on the ground that the Superior Court of California, County of _____, pursuant to the provisions of Business and Professions Code Section _____ [6180 or 6190], has assumed jurisdiction over the law practice of the _____ [specify party, e.g., defendant's] attorney and that the _____ [specify, e.g., default (and default judgment)] was/were entered after the application for the court to assume jurisdiction over the attorney's practice was filed.

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 evidence as may be presented at the hearing on this motion.

Dated: _____

_____ [signature]

Attorney for _____ [party, e.g., Defendant]

DECLARATION OF _____ [name] IN SUPPORT OF MOTION FOR ORDER VACATING AND SETTING ASIDE _____ [e.g., DEFAULT (AND DEFAULT JUDGMENT)]

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 the _____ (moving party, e.g., defendant)].
2. As shown by the records of this court, of which the court is requested to take judicial notice, this action was filed on _____ [date], and _____ [specify proceeding leading to judgment, order, or proceeding from which relief is sought, e.g., the summons was served on _____ (date), and defendant's default was entered on _____ (date), and a default judgment against the defendant was entered on _____ (date)].
3. As shown by the declaration of _____ [moving party, e.g., defendant] submitted herewith, on _____ [date], _____ [moving party, e.g., defendant] employed _____ [name] (hereinafter, the attorney) as his/her attorney [of record] to file a responsive pleading and otherwise represent him/her in this action.
4. Thereafter, on the application of _____ [name], filed in the Superior Court of California, County of _____, in a proceeding entitled _____, File Number _____, _____ [that or this] court, by order _____, assumed jurisdiction over the attorney's law practice on the ground the attorney _____ [specify reason for cessation of practice or incapacity, e.g., had been disbarred], and the court continues to exercise jurisdiction. This court is requested to take judicial notice of the court records and file in the foregoing described proceeding.

5. As further shown by the _____ [*moving party, e.g., defendant's*] declaration submitted herewith, _____ [*moving party, e.g., defendant*] did not receive notice of his/her attorney's _____ [*specify, e.g., disbarment*] until _____ [*date*].

6. As shown by Paragraphs 2 and 4, above, the _____ [*specify judgment, order, or proceeding from which relief is sought, e.g., defendant's default was entered*] after the application to assume jurisdiction had been filed.

[7. On _____ (*date*), I was appointed by the Superior Court of California, County of _____, in the above-described matter, to file, with the consent of the client, notices, motions, and pleadings on behalf of the attorney's clients when jurisdictional time limits are involved and other legal counsel has not yet been obtained. Pursuant to this authority, I am appearing, with the consent of the _____ (*moving party, e.g., defendant*) in this action on his/her behalf.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [*signature*]

NOTES:

Authority:

CCP § 473.1



Timing:

See 29.557[2]

Grounds:

See 29.55 -29.56

Related Form of Order:

See 29.87

Related Form of Memorandum:

See *California Points and Authorities*, § 143.42 (Matthew Bender)



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29.87 Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum (When Court Has Assumed Jurisdiction Over Attorney's Practice).

Order Setting Aside Judgment or Order, Supporting Declarations, and Memorandum (When Court Has Assumed Jurisdiction Over Attorney's Practice).

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER
_____ [name],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
	)	

The motion of _____ [identify party, e.g., defendant] for an order _____ [specify, e.g., setting aside and vacating the default (and default judgment) heretofore entered] 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 that the _____ [default (and default judgment)] heretofore entered in this action be, and hereby is/are, vacated and set aside.

[IT IS FURTHER ORDERED that _____ (set forth any terms or conditions on the grant of relief).]

Dated: _____

Judge of the Superior Court [signature]

NOTES:

Authority:

CCP § 473.1

Related Form of Motion:

See 29.86